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The 105th Constitutional Amendment Act - An Analysis

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This article revolves around the 105th Constitutional Amendment Act,¹ with explaining the events from the very beginning that contributed to this Constitutional amendment. The 105th Constitutional Amendment Act brought changes to the 102nd Constitutional Amendment Act,² and nullifies the Supreme Court judgement in Jaishri Laxmanrao Patil v The Chief Minister And Ors.³ popularly known as the 'Maratha Reservation' case. The Supreme Court declared the 16% Reservation granted by the Maharashtra government to the Maratha community unconstitutional and held that the states cannot create their list of Socially and Economically Backward classes and have the power to categorise them is exclusive to the centre.⁴ This amendment,⁵ retains the power of the state government and, now, the states have their jurisdiction of preparing and maintaining their list of Socially and Economically Backward Class which can be different from the list created by the Union and notified by the President of India. This article explains the 102nd Constitutional Amendment Act in detail which was the base of the 105th Constitutional Amendment Act. Along with explaining these acts an insight into the Maratha reservation case and the Indira Sawhney case has also been provided which is important to be considered under recent developments. The possible outcomes and future implications after this amendment are also briefly given at the end of the article.

¹ Constitution (One Hundred and Fifth Amendment) Act 2021

² Constitution (One Hundred and Second Amendment) Act 2018

³ Jaishri Laxmanrao Patil v The Chief Minister & Ors Civil Appeal No 3123/2020

⁴ Ibid

⁵ Amendment Act 2021 (n 1)

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INTRODUCTION

The monsoon session of parliament which started on 19 July was full of mayhem. There was hardly any discussion but only protests and hullabaloo mostly regarding the probe on Pegasus. The Constitution (One hundred and the twenty-seventh amendment) Bill,⁶ passed by Parliament has finally become The Constitution (One hundred and fifth amendment) Act after formal approval from the President of India, Shri Ram Nath Kovind on 18th August 2021. This bill came into force after getting published in the Gazette of India. This act, now, restore the power of state government to identify and categorise socially and economically backward classes.⁷ The act passed in the Monsoon session brings in itself something unexpected, but satisfying. The opposition supported the act with the government, setting aside its differences and the act passed with a special majority (majority of 2/3rd member present and supported by 50% of the total membership of Parliament) involving 396 votes in favour and opposed by none.⁸ Such a coherence between the government and the opposition was seen only after the 103rd constitutional amendment,⁹ which brought 10 percent reservation to the economically weaker sections. The word reservation was common in both these bills which were passed silently and had some productive discussion. The need for this amendment was seen by the central government after, the Supreme Court judgement came in *Jaishri Laxmanrao Patil vs Chief minister*,¹⁰ in which the Supreme Court said that under article 342A,¹¹ the President alone is empowered to identify socially and economically backward classes. This judgment was followed by a demand to remove a 50% cap on reservations by the opposition. In his blog,

⁶ Constitution (One hundred and the twenty-seventh amendment) Bill 2018

⁷ K Venkatramanan, 'How was the backward classes policy restored?' (*The Hindu*, 29 August 2021) <<https://www.thehindu.com/news/national/how-was-the-backward-classes-policy-restored/article36159057.ece>> accessed 12 September 2021

⁸ *Ibid*

⁹ Constitution (One Hundred and Third Amendment) Act 2019

¹⁰ *Jaishri* (n 3)

¹¹ Constitution of India, art 342A

we would try to understand the events chronologically along with discussing all the events that led to the introduction of the 127th constitutional amendment bill,¹² in the parliament.

HIGHLIGHTS

The objective of the freshly passed bill was to, undo the judgment given by the Honourable Supreme in Maratha reservations judgment that 'Central list' notified by the President and is the only list for the 'purpose of the Constitution' and should be followed by the states and UTs. The SEBC's list notified by the President will only remain for the purpose of the central government, and the 'Central List' is only for the maintenance of the record of Socially and Economically Backward Classes by the central government. Every state or UT, by law, is authorised to maintain its own Socially and Economically Backward Classes list and can be different from the Central list.

The 105th Constitutional Amendment Act also changed the definition of SEBC from originally described " such backward classes as are so deemed under Article 342A for this Constitution" in the 102nd Constitutional Amendment Act to "Socially and Economically Backward Classes are those deemed under an equivalent article for the needs of the Central government, or the state or the Union Territory". It adds a provision to the effect that the requirement that the National Backward Classes Commission, which has got constitution status under 102nd CAA, should be consulted on policy matters will not apply to the State lists of Socially and Economically Backward Classes.¹³

WHY 105TH AMENDMENT AND WHAT IS 102ND AMENDMENT?

The root of this amendment act goes back to the 102nd constitutional amendment. It gave constitutional status to National Commission for Backward Classes which was established through the National Commission for Backward classes act, 1993.¹⁴ The constitutional amendment act first removed some wordings of the clause 10 of article 338¹⁵ and then added

¹² Amendment Bill 2018 (n 6)

¹³ Venkatramanan (n 7)

¹⁴ National Commission for Backward Classes Act 1993

¹⁵ Constitution of India, art 338

article 338B,¹⁶ after article 338A¹⁷. The first article i.e., 338B (1) introduces National Commission for backward classes. Then in Article 338B (2), the structure of NCBC is discussed. The President, by warrant under his hand and seal will appoint the members along with the Chairperson and vice-chairperson of NCBC as stated in Article 338B (3). Powers and duties of the Commission is stated in Article 338B (5). Clause 6 says that the report given by NCBC should be laid before each House of the parliament along with giving specifications about the actions taken and reason if action is not taken . Copy of the report submitted by NCBC concerning a particular state should be given to that state which will again present it in their particular state assembly giving all the details of action taken or explanation if action is not taken. This is the content of clause 7. Clause 8 of article 338B gives power of a Civil Court to NCBC and mentions the way of its functioning. The union and the state governments shall make policy on SEBC after consulting in NCBC only.¹⁸

All these clauses and sub clauses mentioned in article 338 B were mainly regarding NCBC its structure, function, working and powers but it is article 342A that led the Supreme Court giving this 3:2 dissenting judgement- “By introduction of Articles 366(26C),¹⁹ and 342A through the 102nd Constitution, the President alone, to the exclusion of all other authorities, is empowered to identify SEBCs and include them in a list to be published under Article 342A(1),²⁰ which shall be deemed to include SEBCs in relation to each state and union territory for the purposes of the Constitution”²¹. Article 342A gives power only to the president to specify SEBC of union territory or any state, and in the case of a state, consultation of the governor shall be taken. Article 366(26C) defines SEBCs as those backward classes that are mentioned in that area. Hence, taking all the powers and authority from every state to specify and maintain their list of SEBCs. We will look at the implication of article 348A on the SC

¹⁶ Constitution of India, art 338B

¹⁷ Constitution of India, art 338A

¹⁸ Constitution of India 1950, art 338, art 366, inserted vide the Constitution (One Hundred and Second Amendment) Act 2018

¹⁹ Constitution of India, art 366(26C)

²⁰ Constitution of India, art 342A(1)

²¹ *Dr Lakshman Rao Patil v The Chief Minister & Ors* 2021 SCC OnLine SC 362

judgement in the case of *Jai Shri Laxmanrao Patil v chief minister*,²² popularly known as the Maratha reservation case.

ARTICLES AMENDED UNDER 105TH CONSTITUTIONAL AMENDMENT ACT

To nullify this judgement, the 127th constitutional amendment Bill Was introduced in the parliament by social justice and empowerment minister Virendra Kumar, which passed with a special majority and with no member opposing it to become 105th Constitutional Amendment Act.

The amendment act amended article 338B, article 342A and article 366 of the Constitution. In clause 9 Of article 338B a provision has been added which says that the content of this clause shall not be applicable for the purposes of clause 3 of article 342A. In article 342A the act first changes the clause 1. In this clause there is clear specification that the list of SEBCs shall now be used by the central government. It clearly empowers central government to maintain its list. After clause 2 a proper explanation of Separation of the central SEBC list and state SEBC list has been is inserted²³. It defines central list as the list prepared and maintained by the central government for its purposes and distinguishes the central list from the state list by specifying that every state and union territory can have their own list of SEBCs which would be prepared by that particular state for its purposes.²⁴ It would totally depend on the concerning state to include or exclude any community in SEBC category and would be totally independent of the intervention of the central government. The amendment act clearly mentions that the state and the centre may differ in their respective lists which means that from now on There may be some classes that may find themselves aa SEBCs in a state but may not be considered as a SEBC at the central level and vice-versa In article 366, after clause (26B) earlier there was no mention of central list and state list but the amended version now adds that the SEBCs deemed in article 342A are for the purposes of the central government and the state government or

²² *Jaishri* (n 3)

²³ Livelaw News Network, 'President Gives Assent To 105th Constitutional Amendment to Restore States Power To Identify SEBCs' (*Live Law.in*, 19 August 2021) <<https://www.livelaw.in/top-stories/105th-constitutional-amendment-notified-sebc-state-power-179931>> accessed 12 September 2021

²⁴ *Ibid*

union Territory which was missing earlier. With the sign of the president, states are now empowered with their own jurisdiction of maintaining their own SEBCs list and thus the amendment act nullifies the judgement of Maratha reservation case that came in May this year and interpreted that the states cannot have their list of SEBCs.

RESERVATION AND ITS NEED

Reservation is affirmative action or positive discrimination by the government of India to provide historically vulnerable and disadvantaged communities of the society some relief in government jobs, educational institutions and even legislatures by reserving some seats for certain sections of the society. The reservation policy of India is backed by the Constitution of India by means of various articles and amendments. Originally, only SC and ST [under Article 15(4)²⁵ and 16(4)²⁶ respectively] were granted reservations but got extended to Socially and Backward communities in 1991 [Article 15(5)²⁷] and to EWS in 2019 [Article 15(6)²⁸ and Article 16(6)²⁹] through 103rd Constitutional Amendment Act.³⁰

Reservation policy in India is not like a new born baby in its goal to bring social and gender equality, bringing the unprivileged at par with the privileged, providing everyone with equal opportunities and right to life what our constitution suggests. It has its roots in ancient society which divides society into Varnas, jatis and class and they were as follows in the descending order of their social hierarchy- the Brahmans, the Kshatriyas, the Vaisyas and the Shudras.³¹ There were another class of people known as 'Avarna' are untouchables. Untouchables were considered to be impure and were excluded from the system of society. They were having no social rights and resides outside the villages. The division of society on the norms of purity and impurity was a very cruel system, and it had adverse effects on the development and growth of these lower-class people where the skill and labour of an individual were laboured

²⁵ Constitution of India, art 15(4)

²⁶ Constitution of India, art 16(4)

²⁷ Constitution of India, art 15(5)

²⁸ Constitution of India, art 15(6)

²⁹ Constitution of India, art 16(6)

³⁰ A A George, 'Reservation in India- Explained in Layman's Terms' (*ClearIAS*, 3 February 2020) <<https://www.clearias.com/reservation-in-india/>> accessed 12 September 2021

³¹ *Ibid*

merely on the ground of him being a member of a lower caste. The idea of reservation originated because of prevalent atrocities against certain classes by the 'upper castes. The reservation was introduced to provide socially and economically deprived communities with equal opportunities and status in the society, increase their representation, uplift them in society and bring development in the lower strata of the society.

MARATHA RESERVATION

Marathas were a warrior group from the Western Deccan region and originally formed from an amalgamation of families from peasant (Kunbi), shepherd (Dhangar), pastoral (Gawli), blacksmith (Lohar), carpenter (Sutar), Bhandari, Thakar and Koli castes in Maharashtra. Mathadi Labour Union leader Annasaheb Patil, in 1981, was the first to bring out an agitation in Mumbai, in demand of reservations for Marathas but after his death, the demand was left in limbo, but the demand again revived in the late 1980s during the implementation of Mandal commission recommendations. A major agitation was again organised in demand of Marathas reservations in 1997 by the Maratha Mahasangh and the Maratha Seva Sangh. After more than three decades, in 2014, Marathas saw the sunrise and the Congress-NCP led government led by Prithviraj Chavan accorded 16% to Marathas and an additional 5% to the Muslims in Government jobs and educational institutions. The Bombay High Court stayed the decision and the Supreme Court supported the order of the Bombay High Court and refused to vacate that order in response to a petition filed by Devendra Fadanvis led BJP-Shivsena coalition challenging the decision of the Bombay High Court. A massive agitation again was witnessed in Aurangabad under the banner of Maratha Kranti Morcha in 2016 after the Kopardi rape case that rocked Maharashtra with rallies and agitations demanding reservations for the Maratha community.

Maharashtra state government formed an 11-member State Backward Class Commission under Justice M.J. Gaikwad in June 2017 to study the social, financial and educational status of the Maratha community. The committee submitted its report in November 2018 and based on the committee's report Maharashtra state government passed a bill unanimously proposing

16% reservations for the Maratha community in government jobs and educational institutions in the same month. A bunch of petitions were filed against the decision in the Bombay High court, teaming it as violative of the Supreme Court decision of the case *Indira Sawhney vs. Union of India*,³² which puts a cap on the reservations to 50%. The Bombay High Court on June 27, 2019, upholds the Constitutional validity of the bill but asked the government to reduce it to 12% and 13% for educational institutions and government jobs respectively. Appeals were filed in the Supreme Court challenging the decision of the Bombay High Court within a month and a five-judge bench of the Supreme court declared the law unconstitutional and struck it down citing Article 338B and Article 342A of the Indian Constitution along with the 102nd constitutional amendment act, 2018.³³

MANDAL COMMISSION

Mandal Commission was set up under the tenure of Prime Minister Morarji Desai on January 1, 1979, under the chairmanship of B.P. Mandal, who was once the Chief Minister of Bihar, with a mandate to identify "socially and educationally backward classes" in India. The commission submitted the first half of its report on December 31, 1980, and the second recommendation regarding reservation for OBCs in Central educational institutions was submitted in 2006. On August 7, 1990, a historic announcement was made by, the then Prime Minister, V.P. Singh, to grant 27% reservation to the Other Backward Castes (referred to as Socially and Economically Backward Classes in the Constitution of India) jobs in central government services and Public sector units, fulfilling the first half of the recommendation of the Mandal commission by granting reservation in public employment. The announcement by the then PM, V.P. Singh, led to a widespread protest among students. Many student organisations organised Dharnas, streets and roads blockade and students took to the streets. These anti- Mandal protests, got a face when Rajeev Goswami, a Delhi University student from Deshbandhu College immolated himself. This widespread protest led to the filing of a case challenging the decision of the Parliament by *Indira Sawhney*. This case acted like a sheet

³² *Indira Sawhney v Union of India* AIR 1993 SC 477

³³ K D Sutar, 'Maratha reservation: What has happened so far' (*India Today*, 8 June 2021)

<<https://www.indiatoday.in/india/story/-maratha-reservation-what-has-happened-so-far-1812483-2021-06-08>>
accessed 12 September 2021

anchor to limit the protests. *Indira Sawhney vs. Union of India* came with the criteria of a creamy layer to ensure that the benefits of the Mandal Commission percolate down to only the most backward community. It was delivered by the 9- judge bench on the Mandal Commission report on 16 November, 2021. All those households with an annual income of 8 lakhs or above would be classified under the creamy layer and will not fall under the scope of reservation. Recently, NCBC demanded to increase that income ceiling to 16 lakh.³⁴

CONCLUSION

The act when seen in its entirety looks very wholesome. There's no doubt why did this act went through the tables so peacefully. Along with restoring the power of the states to declare their own SEBCs list it also makes the judgement passed by the SC meaningless. This amendment act may increase the number of legislations passed by different states to give quotas to various communities living in that state, similar to the Maratha reservation Act. The centre has tried to show a sensible and sagacious character by doing so. Apart from, 102nd and 105th amendment act, there were cases like *Jaishri Laxmanrao Patil case*,³⁵ that contributed to change this provision of the constitution which was earlier enjoyed by the central government only. Now it will be interesting to see how various states are going to make use of this act and what will be the court's reaction after that. From the Mandal commission report to OBC reservation and *Indira shawhney case*,³⁶ to the 105th constitutional amendment act, the events have been very interesting even leading to severe protests. What happens in future will be very snappy to see.

³⁴ R Krishnan, '30 years since Mandal commission recommendations – how it began and its impact today' (*The Print*, 7 August 2020) <<https://theprint.in/theprint-essential/30-years-since-mandal-commission-recommendations-how-it-began-and-its-impact-today/477260/>> accessed 12 September 2021

³⁵ *Jaishri* (n 3)

³⁶ *Indira* (n 32)