

“Legislative Analysis: The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017”

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I. Introduction

A. Overview and Timeline of the Bill

The Ministry of Social Justice and Empowerment introduced the Constitution (One Hundred and Twenty Third Amendment) Bill, 2017 in the Lok Sabha on 5th April 2017. The aim of the Bill was to accord constitutional status upon the National Commission for Backward Classes (NCBC), thereby bringing it at par with the Commissions for Scheduled Tribes and Scheduled Castes (NCST and NCSC). It further sort to repeal the National Commission for Backward Classes Act, 1993 through another simultaneously deliberated Bill. The Lok Sabha passed the Bill on 10th April 2017 and it went to Rajya Sabha for its concurrence, which passed it with an amendment on 31st July and returned it to the Lok Sabha on 1st August 2017. The Lok Sabha passed it with alternate amendments on 2nd August 2018.¹ The Bill inserted Article 338B which helped in creating a NCBC.²

B. Purpose of the Legislation

Apart from according constitutional status to the NCBC, the Bill vested the President with wider powers to specify the socially and educationally backward classes (SEBC) in the various States and Union Territories.³ Since the Parliament will be appointed as the appropriate authority to amend the list of backward classes, it relieves government of the duty of inclusion or exclusion of communities in the list. This showcases the shift in the transfer of the power of the Central Government to the Parliament. The Commission would be accorded with the powers similar to the civil court. Giving the Constitutional status would also mean the Commission would function more effectively by giving it autonomy in various matters and also in dealing with the complaints regarding other backward castes on its own.

C. Social and Political Context

Previously, the government had the discretion to include a class in the list. However, numerous protests across various states to be included under the list of backward classes, is stated to be a probable reason behind the transfer of powers to the Parliament. The events

¹ National Commission for Backward Classes (Repeal) Bill, 2017 Passed in Parliament, Press Information Bureau, Government of India, Ministry of Social Justice & Empowerment, 6th August 2018; Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=181587>.

² The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017, Bill no. 12 of 2017, Available at: https://www.prsindia.org/sites/default/files/bill_files/Constitution%20%28123rd%20Amendment%29%20Bill%2C%202017_0.pdf.

³ Legislative Brief, The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017, PRS Legislative Research. Available at: <https://www.prsindia.org/billtrack/constitution-one-hundred-and-twenty-third-amendment-bill-2017>.

leading up to this are grounded in deeper Constitutional history and its basic principles- to protect its citizens against discrimination on the basis of caste, sex, religion, place of birth and to secure equality among all its citizens in the form of affirmative action to the sections of the society that are oppressed or backward in the society.

The NCSC and NCST were constituted under Article 338 of the Constitution to monitor all the safeguards provided for the SCs and STs under the Constitution.⁴ Consequent to the judgement of *Indira Sawhney and Others v Union of India*,⁵ the Supreme Court directed the Government of India to constitute a permanent body with the objective of assisting in inclusion and dealing with the complaints of issues relating to inclusion of other backward classes in the Central List. The Government subsequently established the NCBC as a statutory body under the 1993 Act. However, under this Act the NCBC merely had the power to recommend inclusion or exclusion of communities in OBC list. It had no power regarding the welfare and development matters of backward classes or to address their grievances, which was in turn assigned to the Scheduled Caste Tribunal.

The NCSC recommended various suggestions to the government in 2015. One of the major recommendations was regarding clause 10 of Article 338, which accords the NCSC powers to handle and decide grievances of the socially and educationally backward classes. NCSC recommended that the same should be transferred to the NCBC and suggested that the NCBC be brought at par with the NCSC and NCST, by according to it a constitutional status.

There also appears from the Bill a political influence aimed at strengthening voter bases among the OBCs. This would be at the expense of regional parties which have a dominant presence amongst the OBC communities. Political mobilization on the basis of caste is certain to fragment the vote banks of regional parties. Furthermore, the constitution of NCBC to assess the sub-categorization of around 5000 castes in the Central OBC list to guarantee sub quotas for the extremely backward classes also seemed to be a move in pursuance of the upcoming General Elections. The motive is believed to be that the further sub-categorization of OBCs for reservation benefits could lead to another political upheaval and alterations in coalitions by creating a new class of non-dominant classes. This could contribute to the aim of the government to exploit caste equations and rebrand themselves as the party of the poor. Since the onus of amending the List has been shifted to the Parliament, it absolves the ruling party of its duties regarding the same. In the context of the increasing agitations by many communities like the Marathas, Jats, Kapus, etc. for their inclusion as OBC, this shift in

⁴ National Commission for Scheduled Castes, The Hans India, February 02, 2017. Available at: <https://www.thehansindia.com/posts/index/Young-Hans/2017-02-02/NATIONAL-COMMISSION-FOR-SCHEDULED-CASTES/277638>.

⁵ 1992 Supp (3) SCC 217.

responsibility could be move by the government to evade the responsibility of deciding on such sensitive matters.⁶

II. Legislative History

Before the introduction of this Bill, the NCBC had limited powers with regard to backward classes. The Commission previously had powers only with regard to examining the requests made by castes for the inclusion in the central list of Backward Classes, to resolve any issues of over inclusion and under inclusion of backward classes and to provide advice to the Central government in such matters.

A. Formal Deliberations:

The legislators had wide range of issues to debate on with respect to the ongoing bill. This bill was discussed along with the National Commission for Backward Classes (Repeal) Bill, 2017. Some of the key points from the debate are as follows:⁷

1. There was strong opposition by some legislators against the introduction of Article 342A, which grants the President unanimous power in terms of inclusion and exclusion of backward classes. The opposition was made citing the reason that the Article gave sweeping power to the Central Government and undermined the role of the states.
2. Further, a question was raised from the opposition party regarding the applicability of NCBC's recommendations with respect to the states which have their own list of backward classes.⁸ It was clarified by the Minister of Social Justice and Empowerment that these recommendations would not affect the State's list in any manner. Another member from the ruling party commented that creation of NCBC with constitutional powers would go a long way in effective implementation of the rights accorded to that section of the society.⁹
3. An Amendment was moved by members of the opposition with regard to a change in the composition of the Commission. In the original draft of the Bill, there was a provision to constitute NCBC with three members and the same was debated extensively due to inadequacy reasons and administrative issues. This amendment was passed by the Rajya Sabha and expanded the composition to five members. This amendment also mandated the inclusion of one woman and a minority

⁶ Legislative Brief, The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017, PRS Legislative Research. Available at: <https://www.prsindia.org/billtrack/constitution-one-hundred-and-twenty-third-amendment-bill-2017>.

⁷ Government Bill-Consideration and Passing, The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017 and The National Commission for Backward Classes (Repeal) Bill, 2017, Available at: http://rsdebate.nic.in/rsdebate56/bitstream/123456789/680459/1/ID_243_31072017_p803_p924_27.pdf.

⁸ Parliament Monsoon Session Updates: Lok Sabha passes Bill for constitutional status to National Commission for Backward Classes, 2nd August 2018; Available at: <https://www.firstpost.com/politics/parliament-monsoon-session-updates-ls-passes-bill-for-constitutional-status-to-national-commission-for-backward-classes-4873801.html>.

⁹ *Id.*

committee representative.¹⁰ The amendment was made with the objective of having a better understanding of the difficulties faced by Backward classes at ground level and to provide a better picture of the prevailing issues.

4. A member from the opposition party criticized the ruling party of taking credit of the Mandal Commission report and questioned the number of parliamentarians in the ruling party from Backward classes. There was also a critique of such few representatives from the Backward classes in terms of positions like the speaker, chief minister, president and similar positions of great importance. And added that more should be done with regard to the development of Backward classes at a higher level in the society as well.
5. A Member of Parliament from the ruling party addressed the house with respect to the process involving the inclusion and exclusion of castes in the backward classes list. It was clarified that the process is similar to that carried out the NCSC and NCST. further it was mentioned that there should be a lot of points to be taken into account before inclusion and what was the criteria in 2004 cannot be employed now since that means employing a static view and do not take into account the changing circumstances in the country. This is important because of the varying castes in the country. A certain caste group could be considered as Scheduled Caste in one region but might fall under other backward castes in another region.
6. After a series of debates and a few amendments, the state governments were finally bought into the picture and are now given a very minimalistic role of participating in terms of giving advice to the central government on the matters of inclusion and exclusion of castes under the Backward classes list. The advice given by the states are not binding on anyone and are to be treated as just a suggestion.

B. Recommendations of the Select Committee:

Some of the key issues highlighted by the Select Committee under its recommendations are as follow:

1. The Select Committee recommended that the advice of NCBC on the inclusion and exclusion of castes in the list of backward classes should be binding on the government.¹¹
2. The article 342A was amended from “*President’s approval for every inclusion into and exclusion from the Central List of Other Backward Classes*” to “*The President may with respect to any state or Union Territory and where it is a state, only with prior recommendations of the state government and giving due regard to such recommendation, by public notification, specify the socially and educationally backward classes which shall be deemed to be the central list of socially and*

¹⁰ MV Rajeev Gowda, Parliamentary Impasse on Backward Classes Commission is Being Sidelined, The Wire, August 03, 2017. Available at: <https://thewire.in/politics/backward-classes-commission-parliament-opposition>.

¹¹ Select Committee Report Summary, The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017, PRS Legislative Research, July 19, 2017. Available at: <https://www.prsindia.org/node/530036/chapters-at-a-glance>.

*educationally backward classes in relation to that State or Union Territory, as the case maybe”.*¹²

Sukhendu Sekhar Roy from the Committee expressed his dissent through a note of dissent. One major criticism by him is regarding the loss of power to the state commissions in making provisions for the socially and educationally backward classes under the Article 15 (4) of the Constitution.¹³ He also added that the current bill would be against the spirit of cooperative federalism and would undermine the state government and the state commissions. This Bill suggests a unitary authority which may violate the state jurisdiction and hamper their functioning.

III. Legislative Analysis

One of the major problems that was pointed out by many legislators and scholars across the country was regarding the violation of the federal structure of the government that would occur with the passing of this Bill. Granting the NCBC constitutional status and bringing it to a higher pedestal is a very commendable move but it needs to be analysed at what would be the drawbacks of the same. The transfer of power from the Government to the Parliament reduces the states' role to just providing advice which will not have any binding on anyone is a very huge drawback.¹⁴ It is an understood fact that states would have a better understanding and knowledge regarding the communities and classes of that particular state in that social context, and excluding the state from the process of inclusion and exclusion of castes from the Backward classes list and centralizing the entire process does not seem to have any reasonable backing. It is difficult to understand the social context across the states by a committee set up at a central level with five members who are from across the country which included only one mandatory representative from the minority community.¹⁵

The Bill is silent on the aspect of the binding effect of the governor's' recommendations on the President. This Bill can be seen as very plain and basic since it does not really talk or discuss about any of the nuances involved in the identification of backward classes. It does not specify any special methods which would help in dealing with such variety of castes which are intertwined between the different classes according to their social context. For example, a caste group in a backward area of Andhra Pradesh would fall under Scheduled Castes and the same caste group might come under the list of Other Backward classes in Karnataka. There are considerable number of caste groups which fall under this example and

¹² Select Committee Report Summary, The Constitution (One Hundred and Twenty-Third Amendment) Bill, 2017, PRS Legislative Research, July 19, 2017. Available at: <https://www.prsindia.org/node/530036/chapters-at-a-glance>.

¹³ *Id.*

¹⁴ LS passes amendment bill to accord OBC Commission Constitutional Status, 2nd August 2018. Available at: https://www.business-standard.com/article/news-ians/ls-passes-amendment-bill-to-accord-obc-commission-constitutional-status-roundup-118080201698_1.html.

¹⁵ Maansi Verma, How Political Tussle in the Rajya Sabha Led the BJP to Pass a Truncated Constitutional Amendment Bill for Backward Classes, 17th August 2017. Available at: <https://caravanmagazine.in/vantage/political-tussle-rajya-sabha-led-bjp-pass-truncated-constitutional-amendment-bill-backward-classes>.

this Bill does not have any provision for the process of identification and differentiation in such cases. Nor does it provide a solution to be referred to in such cases.

Article 342 A of the Constitution states that the President can specify the list of SEBC for different states and Union Territories after consulting the governor about the same. He shall specify them through a public notification. After the President specifies the list, the Parliament needs to pass a law to bring the changes to the list of backward classes into effect.¹⁶

A cursory reading of this Article gives a clear understanding that Union Government would become the sole authority in deciding the inclusion and exclusion of the castes under the Backward Classes list. One thing that is clear here is that the federal structure of the country will be violated as the powers of the state in this aspect has been taken away and have been accorded to the President and Parliament completely.

The Constitution speaks about undoing injustice meted out through caste discrimination, inequality and to provide affirmative action to those classes of people, and strive to achieve equality through the same. By granting a constitutional status and giving NCBC such autonomy gives greater scope for misuse of powers.¹⁷ A possible case of misuse of power would be the cases where reservation is granted under the backward classes for vote bank politics. Since there are no explicit criteria which specifies how a backward class should be identified there is a grey area in this aspect. In the cases of *Indira Sawhney and Others v Union of India*¹⁸ and the *State of Andhra Pradesh v U.S.V Balram*¹⁹, the Supreme Court ruled that creamy layers in the backward classes should not be given the benefits of reservation. India is a country where the reservation system has been misused by those who are on the higher strata of that particular group that has been included under the reservation scheme. This is especially significant in cases of Other Backward classes since there is such huge diversity even among the sub groups under the castes. Therefore, the onus is on the NCBC now to identify all such complexities involved and to reach the objective of achieving social justice in the society, the purpose behind the introduction of this bill.²⁰

With the insertion of Article 338B in the Constitution of India, the NCBC now has powers similar to that of a civil court with regards to dealing with the complaints against backward classes. a careful comparison of the provisions relating to Scheduled castes and Scheduled

¹⁶ The Constitution (One Hundred and Twenty Third Amendment) Bill, 2017, Bill no. 12 of 2017, Available at: https://www.prsindia.org/sites/default/files/bill_files/Constitution%20%28123rd%20Amendment%29%20Bill%2C%202017_0.pdf.

¹⁷ Maansi Verma, How Political Tussle in the Rajya Sabha Led the BJP to Pass a Truncated Constitutional Amendment Bill for Backward Classes, 17th August 2017. Available at: <https://caravanmagazine.in/vantage/political-tussle-rajya-sabha-led-bjp-pass-truncated-constitutional-amendment-bill-backward-classes>.

¹⁸ 1992 Supp (3) SCC 217.

¹⁹ 1972 AIR 1375.

²⁰ Shalini Nair, BJP's OBC pitch: How stronger new backward classes panel will function, 18th April 2017. Available at: <https://indianexpress.com/article/explained/bjps-obc-pitch-how-stronger-new-backward-classes-panel-will-function-4617203/>.

tribes makes it evident that this bill seeks to replicate the powers given to NCSC and NCST to the NCBC. Majority of the provisions under 338B are directly borrowed from the powers and responsibilities already given to National Commission for the Scheduled Castes and Scheduled Tribes.

IV. Conclusion

India is a country which is quite familiar with the concept of reservation and the issues surrounding it. It is therefore disappointing when our legislators still try to have blanket laws for different classes- the distinctions and discriminations vary in proportion and in form between each class and their disabilities too are significantly different. Although giving constitutional recognition to the NCBC is a forward step for the welfare of the SEBCs, it has led to the usurpation of the power by the Centre to classify backward classes, which might not be in their best interests. Even though the Commission is now empowered to deal with the concerns of the OBCs directly, it might not be sufficient to substantially alter the effectivity of the Commission's working. By giving constitutional status to the Commission the government has merely widened the ambit of reservation, but has failed to bring about a structural change of the Commission, to enable it to become more effective to address the issues of this class of people.

Upon understanding the effect and agenda which the Bill tries to serve, there seems to be very little social benefit, but rather a shuffle of powers between the Centre and State, with a probable political motive.

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