

LEGALFOXES LAW TIMES

102 AMENDMENT ACT AND ITS IMPACT ON UNION AND STATES RELATION AN ANALYTICAL STUDY

By SWAPNIL JAISWAL

Abstract

Reservation is a very crucial topic in india . in 2018 there is 102 amendment act has been introduced in which national comission for backward classes has been made by that comission the power of categorizing the obc has been gone into the hands of president . by which there is some conflicts has been created between the union and state relationship . this paper is on the analytical study of the impact of the federal structure of india with the help analyzing the federal structure of india and the reservation sytem of india.



Introduction

The origin of the concept of federalism is a matter on which it is possible to have a variety of approaches, depending on the view which takes on the meaning of federation. The term “Federalism” is derived from the latin word “foedus” meaning covenant. It connotes the theory or advocacy of federal political orders, where final authority is divided between sub-units and a Centre. Sovereignty is constitutionally split between at least two territorial levels so that units at each level have final authority and can act independently of the others in some area. There are thus two authorities for the citizens to oblige politically. This allocation of authority between the sub-units and the Centre may vary. In a typical style, the Centre has powers regarding defence and foreign policy, and the sub-units have powers regarding administration and local activities, trade etc., but

sub-units may also have international roles. The sub-units may also participate in central decision-making bodies.

The concept of written constitutions for governance of a nation is relatively new to human civilization. It may be one of two types - unified or federal. In a unified system of governance, the nation has only one government and it may be divided into provinces. In federal governance, the nation has a central government and it is divided into several states which have local state governments. Thus, an association of several states is called a federal nation and the concept is called federalism. Earlier, a federation was called an empire because of no written constitutions for the federation. The relationship of a state to the empire was governed by relative strength of the state and the empire. At that time, federalism was covered by empiricism, hence the federations were known as empires.

A system of government which has created, by written agreement, a central and national government to which it has distributed specified legislative (law-making) powers, and called the federal government, and regional governments (or sometimes called provinces or states) governments to which is distributed other, specified legislative powers. In Constitutional Law of Canada, author Peter Hogg wrote.

"In a federal state, it is common to speak of two 'levels' of government. The metaphor is apt in that the power of the central authority extends throughout the country, and is in that sense 'higher' than the power of each regional authority, which is confined to its region. Moreover, in every federation, in the event of inconsistency between a federal law and a provincial or state law, it is the federal or national law which prevails. But to speak of the central authority as a 'higher level' of government must not carry the implication that the regional authorities are legally subordinate to the center; on the contrary, they are coordinate or equal in status with the center."

In the words of Dicey, "A federal State is a political contrivance intended to reconcile national unity and power with the maintenance of "State rights". The end aimed at fixing the essential character of federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty are elaborately divided between the common or national Government and also the separate States. the

small print of this division vary under every different federal Constitution, but the final principle on which it rests is clear. Whatever concerns the state as a whole should be placed under the control of national Government. All matters which don't seem to be primarily of common interest should remain within the hands of the several States.

Federalism could be a national Constitution for a body of States which desire union and don't desire unity. A federal State has also been described as a "political contrivance intended to reconcile national unity and power with maintenance of State rights". The essence of a federation is that the existence of a Union and its States and therefore the division of power between the Union and also the States and it's immaterial whether the bond of the Union is weak or strong Federalism features a double set of Governments, each independent in its own sphere.

K.C. Wheare defines central as a corporation of States, which has been formed for general purposes, but within which the member States retain an outsized measure of their original autonomy. A federal administration exists when the powers of the govt for a population are divided considerably in line with a principle that there's a solitary independent authority for the complete area in respect of some matters and there are independent regional authorities for other matters, each set of authorities being co-ordinate to and subordinate to the others within its individual sphere. in line with him, for the existence of a federal principle, it is important that the facility of governance is split between co-ordinate and independent authorities.

The traditional understanding of federalism is reflected in other writings as well. Robert Garran holds that it's "a style of Government within which sovereignty or political power is split between the Central and native boundary line Changes in India Governments, so each of them within its own sphere is independent of the other.

Political federalism may be a political philosophy during which a bunch or body of members are bound along with a governing representative head. The term federalism is additionally wont to describe a system of state during which sovereignty is Constitutionally divided between a central governing authority and constituent political

units (like States or provinces), Federalism may be called because the system during which the facility to manipulate is shared between the national & State Governments, creating what's often called a federation. Proponents are often called federalists.

Federalism helps enshrine the principle of due process of law, limiting arbitrary action by the State. First, federalism can limit Government power to infringe rights, since it creates the likelihood that a legislature wishing to limit liberties will lack the Constitutional power, while the extent of state that possesses the ability lacks the need. Second, the legalistic decision making processes of federal systems limit the speed with which Governments can act. The argument that federalism helps to secure democracy and human rights has been influenced by the contemporary public choice theory. It's been argued that in smaller political units, individuals can participate more directly than in a very monolithic unitary Government. Moreover, individuals dissatisfied with conditions in one State have the choice of moving to a different. Of course, this argument assumes that a freedom of movement between States is necessarily secured by a federal System

'Federalism' is one of those good echo words that evoke a positive response towards many concepts as democracy, progress, Constitution, etc. The term has been seen to be applied to several successful combinations of unity with diversity, pluralism and cooperation within and among nations. When we elaborate upon the essential feature of federalism that the specialists within the field offer, it's noted that all of them seem to contain the subsequent basis points:

- First, in an exceedingly federation the political authority is territorially divided between two autonomous sets of separate jurisdictions, one national and other provincial, which both operate directly from the people.
- Second, the existence of one, indivisible but yet composite federal nation is simultaneously asserted.

The term federalism is additionally accustomed describe a system of state in which sovereignty is constitutionally divided between a central governing authority and constituent political units (like States or provinces). Federalism is that the system within which the facility to manipulate is shared between the national & State Governments,

creating what's often called a federation. Federations here means to involve territorial divisions of authority, typically entrenched within the Constitution which neither a sub-unit nor the Centre can alter unilaterally. as compared, decentralized authority in unitary States can be revoked by the central legislative authority at will. Such entrenchments notwithstanding, some centralization often occurs as a result of the Constitutional interpretations by a federal level Court accountable of settling conflicts regarding the scopes of ultimate legislative and/or judicial authority.

ANALYTICAL STUDY OF 102 AMENDMENT ACT

The Supreme Court, in May 2021, held that the 102nd Amendment Act of 2018 removed the facility of the states to spot socially and educationally backward classes under their territory for grant of quota in jobs and admissions. Constitution (One Hundred and Second) Amendment Act, 2018 The 102nd Amendment Act received the presidential assent and came into effect in August 2018.

The amendment inserted Articles 338B and 342A into the Indian Constitution. Article 338B deals with the structure, duties and powers of the National Commission for Backward Classes (NCBC). Article 342A deals with the facility of the President of India to notify a selected caste as a Socially and Educationally Backward Class (SEBC) and therefore the power of the Parliament to vary the list. The amendment also brings about changes in Article 366.

This amendment gave the NCBC a constitutional status. The Commission was originally founded in 1993. Article 338B The 102nd Amendment inserted Article 338B into the Constitution.

The NCBC thus received a constitutional status after this amendment was passed.

As per the article, the commission shall carry with it the subsequent members who would be appointed by the President: Chairperson Vice-chairperson Three other members

The article provides the duties of the commission as given below: Investigating and monitoring matters associated with the safeguards provided for the socially and educationally backward classes under the Indian Constitution or under the other law or order of the govt. and assessing the working of such safeguards. Inquiring into specific complaints regarding the deprivation of rights and safeguards of the socially & educationally backward classes. Participating and advising on the socio-economic development of the socially and educationally backward classes and appraising the progress of their development. Presenting to the President annually or whenever required reports about the working of these safeguards.

Making recommendations of measures that ought to be taken by the central or state governments for the effective implementation of the safeguards and other measures for the protection, welfare and socio-economic development of the socially and educationally backward classes.

Discharging the other functions with regards to the protection, welfare and development and advancement of the socially and educationally backward classes as decided by the Parliament.

The article also gives the Commission all the powers of a civil court while enquiring into specific complaints regarding the deprivation of rights and safeguards of the socially & educationally backward classes. Article 342A, which was inserted into the Constitution of India through the 102nd Amendment, empowers the President to specify the socially and educationally backward classes with relevance a state or union territory.

A Supreme Court Constitution Bench by a 3:2 verdict ruled that the 102nd Amendment did remove the ability of the states to spot socially and educationally backward classes

under their territory for providing reservations in admissions and employment. in line with the judgement, only the President has the ability to notify a selected caste as SEBC. The states had lost their power to spot backward classes under their territory after the 102nd Amendment.

The majority judgement read, “By introduction of Articles 366 (26C) and 342A through the 102nd Constitution, the President alone, to the exclusion of all other authorities, is empowered to spot SEBCs and include them in a very list to be published under Article 342A (1), which shall be deemed to incorporate SEBCs in reference to each state and union territory for the needs of the Constitution.” The states can only make suggestions to the President or the NCBC for removing, adding or modifying the list of backward classes. But the ability of the states to create reservations in favors of the communities, decide the quantum and sort of reservations, and also the nature of advantages, (that is, aside from identifying the communities/castes) remains intact.

The judgement also held the 102nd Amendment to be valid which it failed to affect the federal nature of Indian polity and also didn't adversely affect the fundamental structure of the Constitution.

102 Amendment Act and Its Impact on State and Union Relations

The Supreme Court, by a majority 3:2, held the 102nd Constitutional amendment, which also led to putting in place of National Commission for Backward Classes (NCBC), took away states' power to spot socially and educationally backward classes under their territory for grant of quota in jobs and admissions. The 102nd Constitution amendment Act of 2018 inserted Articles 338B, which deals with the structure, duties and powers of

the NCBC, and 342A which deals with power of the President to notify a specific caste as SEBC and power of Parliament to alter the list.

A five-judge Constitution bench headed by Justice Ashok Bhushan, in their four separate verdicts, however, was unanimous on other key issues like the Maratha quota law was invalid and also the 1992 Mandal judgement, capping total reservation to 50 per cent, failed to need a relook or relation to larger bench.

While Justice Bhushan wrote 412-page long verdict for himself and Justice Nazeer and was in minority on the purpose whether the 102 Constitutional amendment takes away the correct of states to spot SEBC.

Justice S Ravindra Bhat wrote 132-page long verdict and Justices L Nageswara Rao and Hemant Gupta, in their separate judgements, concurred with Justice Bhat and his reasoning in holding that states have lost their power to spot SEBC under their territory after 102nd Constitutional amendment.

Writing the bulk judgement on this aspect, Justice Bhat, said, "By introduction of Articles 366 (26C) and 342A through the 102nd Constitution, the President alone, to the exclusion of all other authorities, is empowered to spot SEBCs and include them during a list to be published under Article 342A (1), which shall be deemed to incorporate SEBCs in relevance each state and union territory for the needs of the Constitution. "

The states can, through their existing mechanisms, or maybe statutory commissions, can only make suggestions to the President or the Commission, for "inclusion, exclusion or modification of castes or communities" within the SEBC list, Justice Bhat said.

"The states' power to form reservations, in favors of particular communities or castes, the

quantum of reservations, the character of advantages and therefore the reasonably reservations, and every one other matters falling within the ambit of Articles 15 and 16 – except with relation to identification of SEBCs, remains undisturbed," the judgement, endorsed by two other judges, said.

All the five judges of the bench, however, held the 102 Constitutional amendment as valid and it didn't affect the federal polity and failed to violate the fundamental structure of the Constitution.

"Article 342A of the Constitution by denuding States' power to legislate or classify in respect of "any backward class of citizens" doesn't affect or damage the federal polity and doesn't violate the essential structure of the Constitution of India," Justice Bhat said.

All judges also concurred on aspects like the India Shawnee judgement, also referred to as the Mandal verdict, didn't require to be mentioned a bigger bench.

They also concurred on the difficulty that "the Maharashtra State Reservation (of seats for admission in educational institutions within the State and for appointments within the public services and posts under the State) for Socially and Educationally Backward Classes (SEBC) Act granting 12 and 13 per cent reservation for Maratha community additionally to 50 per cent social reservation isn't covered by exceptional circumstances as contemplated in Mandal judgement."

"The government, on the strength of the Maharashtra State Backward Commission Report chaired by M C Gaikwad has not made out a case of existence of extraordinary situation and exceptional circumstances within the state to fall within the exception carved enter India Shawnee judgement," Justice Bhat said.

All judgements said the appointments made in government jobs and admissions in post graduate courts after the Bombay court verdict of 2019 upholding Maratha quota and

September 9, 2020 order of the highest court staying the implementation of quota won't be affected.

The judgement came on a batch of pleas challenging the Bombay supreme court verdict which had upheld the grant of reservation to Marathas in admissions and government jobs within the state.

Complete Analysis of Reservation System

Reservation is a system of affirmative action in India that provides historically disadvantaged groups representation in education, employment and politics. Based on provisions in the Indian Constitution, it allows the Indian government to set *reserved quotas or seats*, which lower the qualifications needed in exams, job openings etc. for "socially and educationally backward citizens.



Reservation is primarily given to any or all 3 groups Scheduled Castes Scheduled Tribes, Other Backward Classes abbreviated as SC, ST, OBC respectively. Originally reservation was only given to SCs and STs but was later extended to OBCs in 1987 after the implementation of the Mandal Commission report. The first are the Scheduled Castes. These communities were variously seen as at the underside or "underneath" the class structure in South Asia, below even the Sudra varna. These castes had hereditary professions like agricultural labourers, manual scavenging, tannery, washing clothes, daily wage workers, fishing and more. They were subjected to the practice of untouchability, which takes the shape of varied social restrictions starting from inability to touch other castes to inability to use the identical water source or maybe sleep in the identical area. Today many of those castes are landless labourers. The next group are the Scheduled Tribes. The definition of this group varies, but the

standards for a Scheduled Tribe "indications of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and backwardness." Most of those groups are considered Adivasis, and therefore the original inhabitants while others are nomadic tribes who were notified as "criminal tribes" under British rule. they vary in modes of existence from subsistence agriculturalists who have had interaction between the surface world to hunter-gatherer groups still within the jungles. Many of them frequently had their lands exploited by Brits during the colonial era. However, within the Northeast, many of the tribes are relatively better-off and possess interaction with the surface world. Examples include the Bodo, Gond, Banjara, and Santal. The third main group are the opposite Backward Classes. They weren't originally within the reservation scheme, but during the premiership of Morarji Desai, the Mandal Commission studied all the communities in India to seek out what castes were "backward" compared to the final population. supported 1931 census data, they estimated 52% of India's population belonged to castes that were "backward" because of various socio-economic factors like wealth or traditional occupation. the likelihood for providing reservation to those people was allowed for in Article 15(4) and Article 16(4), which states the govt. can provide reservation to "backward classes." Although the middle maintains its own list of OBC's, comprising over 5,000 castes and subcastes, each state can create their own backward caste list for in-state reservations. Most OBCs were classified originally within the shudra varna and have low ritual status, but being economically deprived. However, there are other castes within the OBC list who, although ritually low, are considered "dominant castes" for numerical strength and in many cases are the enforcers of the caste hierarchy, including some Brahmin groups.

Critics of Reservation

The Preamble of the Indian Constitution declares to secure Justice-Social, Economic and Political among all its citizens. that the constitution not only abolishes discriminations against any citizen on the grounds of faith, race, caste, sex etc., it also attempts to compensate the age-old discriminations and exploitation of the lower strata of the

society. together with the provisions for equality, it provides for protective discrimination in favors of the weaker sections of the society in a very way of reservation of seats within the legislature and employment in government jobs.

The class structure and also the provision of reservations go together in India. Indian structure could be a caste based hierarchical system. The lower caste people were exploited by the high castes and had suffered the demerits of socio-economic underdevelopment. The aim of reservations is to uplift the weaker sections of the society i.e. Scheduled Castes and Scheduled Tribes at par with the opposite sections. Though it appears as a violation of the principle of equality, yet its justification is sustained by the requirement of a financial aid state.

The Constitution (Art. 46) provides that the state shall promote with special care the tutorial and economic interests of the weaker sections of the people, particularly of Scheduled Castes and also the Scheduled Tribes. the primary Constitutional Amendment Act of 1951 has added clauses 4 to Art. 15 and it provides that nothing shall prevent the state from making any special provision for the advancement of any socially and educationally backward class of citizens or for the SCs and STs. Art. 16(4) further provide that the state may reserve any post or appointment in favors of any backward class of citizens, if in its opinion; they're not adequately represented within the services under the state. But Art 335 lays down that their claim for appointment shall be taken into consideration if it's per the upkeep of efficiency of administration. Art. 338 provides for a Special Commission for the Scheduled Castes and Scheduled Tribes who are appointed by the President. it'll investigate all matters regarding the protection of the interests of SCs and STs and report back to the President. it'll thus, monitor the implementation of the reservation policy and help in removing hindrances within the way of the implementation of this policy.

Art. 334 as amended by the Forty-fifth Amendment of the Constitution in 1980 provides for the reservation of seats for SCs and STs within the House of the People and within the Legislative Assemblies of the States.

Scheduled Caste: The Constitution has defined the term Scheduled Castes. Art. 366(24) says SCs are such castes, races or tribes or parts of groups within such castes, races or tribes as are deemed under Art. 341 of the Constitution. Art. 341 provide that the President after consultation with the Governor of a State will specify by a public notification the castes who are to be considered as SCs.

But ordinarily the Scheduled Castes are low castes who are treated as untouchables as they belong to the “Sudra” segment of the Hindu society. they can't claim the privileges of the people of upper castes called “Savarna” or what English people rulers wrongly called the “Caste Hindus”. The Presidential notification regarding the SCs isn't subject to judicial scrutiny.



A person belonging to a Scheduled Caste must be either a Hindu or a Sikh. This privilege isn't available to the Christians, Muslims, Buddhists etc. just in case someone belonging to a SC becomes a Muslim or a Christian, he cannot have the good thing about reservations.

Scheduled Tribe: The term “Scheduled Tribes” has not been defined within the Constitution. Art. 366(25) says that Scheduled Tribes means such tribes or tribal communities as are deemed under Art. 342. This Art empowers the President to notify publicly such tribes or tribal communities.

The Parliament has the ability to create any alteration within the list of such SCs and STs by means of addition or subtraction of any name. While the SCs lose protected status on conversion to Christianity or Islam, it's not so within the case of STs. Initially, the reservations were to be for a period of 10 years i.e. only up to 1960. However, the amount was repeatedly increased. In October 1999, the 84th Constitutional Amendment Act further enhanced the availability of reservation for 10 years i.e. 2010. It can even get an additional extension in 2010. Backward Class: Since 1994, another beneficiary group called "Other Backward Class" (OBC) has come under the reservation policy. The term "Backward Class" however, has not been defined by the Constitution. Art. 340 provides for the appointment of a Commission to research the conditions of "Socially and Educationally Backward" classes and to suggest measures for the advance of their condition.

In pursuance of this provision, the govt. of India appointed a Backward Classes Commission in 1953 under the chairmanship of Kaka Kalekar which submitted its report in 1955. But the Commission's report was not unanimous in its recommendations. It related backwardness of a category to its low position within the traditional caste hierarchy of Hindu society, lack of general educational advancement and inadequate representation in Government services and also within the field of trade, commerce and industry. It also treated all women as a backward class.

The Commission identified 2399 backward castes which were deemed eligible for special reservation. because of lack of unanimity, the govt of India failed to implement the report. The Janata Party Government founded the second Backward Classes Commission in 1978 under the chairmanship of Bindheswari Prasad Mandal which submitted its report in 1980.

This report came to be popularly called the Mandal Commission Report. Along with the caste structure, the Commission laid down some social, economic and academic standards for determining backwardness of the people. The Commission held that all told, there have been 3743 Backward Castes including members of non secular and other communities and it constituted 52% of the entire population.

It also recommended that the members of Backward Castes should get 27% of reservations in respect of the governmental jobs and seats in educational institutions. The Commission also accepted that after a change of faith, the backward classes continued to measure with caste based values and backwardness and will not become free from these. so that they should still get the ability of reservation even after conversion.

The Commission recommended that reservations for OBCs should apply to any or all government institutions, public undertakings, government-aided private institutions, universities and also the colleges under the schools. It also recommended that for implementing the system of reservations, a Backward Class Development Corporation should be established.



The National Front Government of Prime Minister V.P. Singh accepted the recommendations in 1990 for implementation. But the choice of the govt was challenged before the Supreme Court which stayed the implementation of the order. In 1991 P.V. Narasimha Rao Government decided to produce 10% of reservation for the economically backward people of the high caste. But the Supreme Court held that in no case, the reservation shall be quite 50% and also the good thing about reservation shall not be available in respect of promotions in jobs .

The 27% of reservations for the OBCs shall not be available to the socially and economically well developed members of the castes. Thus, the creamy layer of OBCs are deprived from reservation. Reservation facility isn't available to Muslims and Indian Christians who are now demanding additional job reservations for themselves.

Conclusion

Although an oversized population amongst the other backward classes on agricultural and allied sectors, they own only a of total acreage within the village. Most of them are landless laborers and better amongst them are marginal agriculturists.

There is no organization on economic lines far, making their position extremely weak within the local economic structure allotment of land in pursuance of the policy of the govt. to the available resources in favours of the weaker section of the also prove the weaker section of the community to be illusory in many forcing them into disputes without making effective support of the authority, position vulnerable and leading to economic ruin frequently.

The higher caste groups shows the sentiments of social more or less the same pattern towards scheduled castes and scheduled tribes in different social situation SCs and STs who constitute 25% of the total population are the masses struggling for his or her survival needs, human rights, social justice. SCs and STs who are relatively unfavorable position in terms of assets, income distribution, urban poor rural artisan's agricultural laborious, small farmers etc. are further marginalized and disadvantaged thanks to increasing inequalities in income resources to access thereto.

Many years after Independence, Yet SCs/STs people are dependent. So to get rid of it still there's great scope of designing and organizing programmers for the upliftment of SCs & STs. The Government at National and State level do declare many programmed for the SC/ST development but how far these programmed reach to them that's matter of inquiry and deliberation. The labour and wages paid to dalit could be a major concerned in unorganized sector of India. it's treated as debt default as far as economy is anxious Bonded labour amongst the dalit labour may be a National shame, because dalit compose a majority of the 40 million bonded labourers in India. Issue of reservation thus isn't confined to apportionment of few jobs here and there, but a socio-economic upliftment measure for those who have remained behind for hundreds of years thanks to the typical social conditions prevailing within the country. the state cannot prosper ignoring the chronic social inequalities prevailing in social life. Issue of reservation can't be perceived in isolation but it's to belinked with the general social condition of backwards at large and more particularly scheduled castes and scheduled tribes who are the worst sufferers of social fad. it's to be noted that nothing has altered within the last five decades of independence. India's freedom struggle and nationalist movement charged the govt. of independent India with a mandate for equality and social change.

This mission further reinforced by initiatives of Dr. Ambedkar has resulted in significant changes through empowerment laws and 275 affirmative policies. The socio-political landscape of India has also been transformed by the growing strength of SC/ST/OBC electoral power.

In addition, the urbanization process has created new opportunities for migration and mobility allowing a number of these people to flee the stifling environment of rural caste society. The policy of reservation isn't the sole or perhaps the most effective option for development within the context of a hierarchically place society like India. Other options include provision of free or cheap good, good quality education in schools which is accessible to everyone, land reforms by giving land to the particular cultivator, strict

implementation of minimum wages, and an entire stoppage of all types of discriminatory behavior whether in villages or in corporate sector. If of these were successfully implemented, there would be no need for reservations for any section of population now. Not only western countries but also the East Asian tigers like South Korea, Japan, china are very successful in implanting above measures. that's why they're much sooner than India as far as social and economic indicators are concerned.

