On the Maratha Reservations Judgment: Part II

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Apart from holding the Maratha reservations unconstitutional, the Supreme Court also interpreted the 102nd amendment to take away the power of state governments to designate communities as "socially and educationally backward classes." This particular aspect of the Court's judgment is poorly reasoned, goes contrary to the express provisions of the Constitution and threatens to upset well-set principles and practices in relation to reservations in India.

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The Supreme Court's constitution bench judgment in *Dr Jaishree Laxmanrao Patil v The Chief Minister*[1] (hereinafter "Patil") not only struck down the 2018 Maharashtra law but also interpreted the Constitution (One Hundred and Second Amendment) Act, 2018 ("102nd Amendment Act") to the Constitution. Unlike its unanimous conclusion that the 2018 Maharashtra law was unconstitutional, the Court was unable to agree on the interpretation of the 102nd amendment. The five judges were split three to two on this aspect with Justice Ravindra Bhat, Justice Nageswara Rao and Justice Hemant Gupta in the majority and Justices Ashok Bhushan and Abdul Nazeer in the minority.

Continuing the analysis of the Patil judgment from last month's column (Kumar 2021), in this column, I will first give a brief background to the 102nd amendment itself and its content before going into an analysis of the opinions of the judges on its interpretation. Given that Justice Bhat has delivered the opinion with the most detailed reasoning on this aspect on behalf of the majority and Justice Bhushan has spoken for both himself and Justice Nazeer, I will be comparing the approaches of the two judges in this context. In my view, Justice Bhat's approach to interpreting the 102nd amendment is constitutionally unsound and in this column, I will also explain why, arguing that Justice Bhushan's approach to the matter is correct.

Why did the 102nd amendment come up?

One of the grounds taken by the parties challenging the validity of the 2018 Maharashtra law granting reservations to the Maratha community was that subsequent to the 102nd amendment, states had no constitutional authority to determine which groups were "socially and educationally backward" for the purpose of being granted reservations.

The 102nd amendment inserted two new articles into the Constitution of India, namely Article 338B (which provides for the National Commission for Backward Classes [NCBC]) and Article 342A which relates to the manner in which socially and educationally backward classes (SEBCs) are to be identified for the purposes of the Constitution. Further, clause (26C) was introduced into Article 366 to state that the term "socially and educationally backward classes" for the purposes of the Constitution means such classes as deemed under Article 342A. The scope of Article 342A was what was in question in Patil.

Article 342A has two clauses. The first states that the President shall, with respect to a state or union territory, have the power to designate a community as an SEBC for the purposes of the Constitution. The second clause states that Parliament shall have the power to include or exclude from the "Central List" such SEBCs as it deems fit.

It was the contention of the petitioners that with the coming into force of 342A, state governments have been deprived of the power to designate communities as SEBCs, even for the purposes of state government jobs and educational seats. Whereas there is one common list of all Scheduled Castes (SCs) and Scheduled Tribes (STs) in India,[2] the practice with SEBCs was that the state government would identify one set of SEBCs (a state list) and the union government would identify one set of SEBCs (a central list) for their respective universities and jobs. The contention of the petitioners in Patil was that Article 342A put an end to this and there would only be one list for all state and central jobs and seats.

Strictly speaking, it was not necessary for the constitution bench to go into this argument since they had already held that the 2018 Maharashtra law was unconstitutional on other grounds. However, given that three of the six questions framed for the constitution

bench included the interpretation of the 102nd amendment, the judges chose to go into the issue.

What the Supreme Court Said

On the question of how to interpret Article 342A, Justice Bhushan's minority opinion is fairly straightforward—relying on well-established principles of constitutional interpretation and looking at the intent of Parliament in introducing the said clauses, his opinion comes to the conclusion that Article 342A does not, in any way, intend to take away the power of the state government to identify its own list of SEBCs.[3] The "Central List," referred to in clause (2) of Article 342A only refers to the list prepared by the union government and cannot possibly mean to include a list for both states and the union.

Justice Bhushan notes two specific instances in which the union government has clarified the intent and purpose of the 102nd amendment. Once before the select committee of the Rajya Sabha[4] and once on the floor of the Rajya Sabha itself.[5] In both instances, the union government and its representatives clarified that the 102nd amendment would not in any way take away the power of the state governments to identify SEBCs for the purpose of jobs and seats. Since the Attorney General for India also took the same position in court, Justice Bhushan has no difficulty in giving the intended interpretation to Article 342A.

However, Justice Bhat takes a dramatically different view. In his view, it is not necessary to look at the views of the union government in either the parliamentary committee or the floor of Parliament but a strict and literal interpretation should be given to the 102nd amendment. He agrees with the petitioner and concludes that the 102nd amendment did indeed intend to strip states of their powers to designate communities as SEBCs and therefore, the Maharashtra government's 2018 law granting reservations to Marathas was illegal.

However, the immediate implication of this line of reasoning is also that all state legislation and orders which identify SEBCs also stand immediately voided. While the union governent itself took pains to paint that all such legislations would not be voided when the 102nd amendment would come into force, when the Court held thus, the legal effect would be that all reservations for SEBCs in all states would be null and void with effect from the date on which the 102nd amendment came into force. To address the enormous chaos this could cause, the majority effectively stays its own judgment till such time as the President comes out with a comprehensive list for all states as well.

In the next section, I will highlight the problems with the line of reasoning used in Justice Bhat's judgment.

Who Got It Right?

The majority's attempts at providing reasons for this bizarre conclusion are tortured and contrary to the well-established canons of constitutional interpretation. Nothing in the text of Article 342A indicates that states are deprived of their legislative powers to identify which are the socially and educationally backward castes—a power that is derived not from Article 16(4) but rather from Article 245 read with Article 246, Entry 41 of List II and Entry 25 of List I.[6] Nothing in Article 342A even remotely hints at limiting the legislative power of the state government to notify SEBCs. Such an express limiting of the power of the state being absent, it would not be open to the Supreme Court to read in such an implied limitation (or even extinction) of the power of the state government with respect to identifying SEBCs.[7]

On the other hand, Justice Bhat's opinion places great emphasis on the similarity in wording between Article 342A on the one hand and Articles 341 and 342 on the other. Articles 341 and 342 give the union the exclusive power to determine which community would be considered part of SCs and STs for the purposes of the Constitution.[8] Likewise for clauses, on a surface reading, there is a similarity between the provisions in question. The definition of a "SC" and "ST" for the purposes of the Constitution reads very similar to the definition of SEBC as inserted by the 102nd amendment. However, there is a crucial difference—whereas Articles 341 and 342 refer to "the list," Article 342A specifically refers to a "Central List."

The obvious implication of this is that the President issues the list of SEBCs with respect to each state and union territory only insofar as a "Central List" is concerned. This is also the interpretation that the union itself places on this clause. However, Justice Bhat brushes aside this interpretation holding that "Central List" means the list prepared by the President. This seems like an overly convenient reading of Article 342A—where the words are similar to Articles 341 and 342, the same implications have to be given. But even where the words are clearly different, the rest of the clause must still be interpreted in the same manner as Articles 341 and 342!

Repeatedly it is mentioned that there is no need to make use of external material (such as committee reports and speeches in Parliament) to interpret the clauses in question because they are so clear. Yet, at the same time, pages and pages are expended to try and explain the meanings of words and phrases which are apparently so obvious!

Conclusions

The Supreme Court's interpretation of the 102nd amendment therefore goes contrary to the text of the amendment itself, ignores the clearly stated intention of Parliament in passing such amendment and unsettles very settled practices and jurisprudence on the matter of reservations for SEBCs. Contrary to

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the Court's strained reading, there was never an intention of Parliament to recreate the system for designating SCs and STs in the context of SEBCs.[9] Similarity of certain phrases notwithstanding, the very fact that clause (2) mentions a "Central List" should suggest that Parliament intended the scope of Article 342A to be restricted only to SEBCs who can avail of the union government reservations and benefits.

Even beyond its flawed reasoning, the majority's view on the interpretation of Article 342A promises more chaos and uncertainty in the regime governing reservations—a fact even Justice Bhat's judgment seems to be aware of while mandating status quo until the President issues a notification with a list of SEBCs. Even assuming that no caste which currently enjoys SEBC status were to be left out, does it mean that states are not free to create subcategories in the same way that they are restricted in the context of SCs and STs? Does it also imply that members of a caste designated as SC in one state will be entitled to the benefit of educational and job reservations in a state it does not have such status? And does the NCBC even have the capacity to individually identify, conduct research and comprehensively opine on the suitability of all castes for inclusion into the category of SEBC under Article 342A?

All these concerns have rightly prompted the union government to approach the Supreme Court in seeking a review of the Patil judgment—specifically on the question of the interpretation of the 102nd amendment (Mathur 2021). One hopes that the Court sees the enormous errors of reasoning and chaotic consequences of its interpretation of the 102nd amendment and takes a second look at the issue.

NOTES

1 Civil Appeal 3123 of 2020, https://main.sci.gov.in/supremecourt/2019/23618/23618_2019_35_1501_27992_judgment_05-May-2021.pdf, viewed on 15 June 2021.

2 Per Articles 341 and 342 of the Constitution respectively.

3 Patil, para 414–15, pp 370–71.

4 See "Report of the Select Committee on the Constitution (One Hundred and Twenty Third Amendment) Bill, 2017," viewed on 15 June 2021, https://prsindia.org/files/bills_acts/bills_parliament/Select%20Comm%20-%20123rd%20(A)%20bill,%202017.pdf.

5 Speech extracted in Patil, para 380, pp 329–31.

6 See *Saurabh Chaudhri v Union of India* (2004), 5 SCC 618.

7 *V Surendra Mohan v State of Tamil Nadu* (2019), 4 SCC 237.

8 *E V Chinnaiah v State of AP* (2005), 1 SCC 394.

9 It must also be pointed out here that the Supreme Court is itself in the process of re-examining whether Articles 341 and 342 absolutely removes the power of the state government to create subcategories within the SC and ST list. See *State of Punjab v Davinder Singh* (2020), 8 SCC 63.

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