

RGICS



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RGICS LEGISLATIVE BRIEF

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**The Constitution (One Hundred and Twenty-
Third Amendment) Bill, 2017**

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KEY MESSAGES

1. Article 342A, as proposed, would be violating the concept of federalism as the states will be deprived of their Constitutional rights and power to declare any class as socially and educationally backward within the state
2. The President will be vested with wider powers to specify the socially and educationally backward classes in the various states and union territories in consultation with the governor of the concerned state which implies that while the governor's advise would be sought, he does not have the authority to dismiss the President's recommendation.
3. The Parliament will be appointed as the appropriate authority to amend the list of backward classes thus essentially relieving the government of its duty to include or exclude communities in the list.

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PART I. INTRODUCTION

The Constitution (One hundred and twenty third Amendment) Bill 2017 was introduced in the Lok Sabha by the Minister of Social Justice and Empowerment on 5th April 2017. It aims to accord a constitutional status to the National Commission for Backward Classes at par with the Commissions for Scheduled Castes and Tribes. The Amendment Bill empowers the President to specify the socially and educationally backward classes in the various states and union territories the provisions of the Bill although a law passed by the parliament is required to amend the list of backward classes. Until now it was the discretion of the Government to include a class in the list but emerging protests from various communities across states might be reason behind the the government shifting the onus of deciding on to the Parliament. However the main aim of the Bill, which is to remove the difference of status between the NCBC and the NCST/NCSC is a step towards securing social justice since it might ensure that debates on such issues will be more comprehensive and transparent, was largely accepted in the Lok Sabha.

The Bill was passed by the Lok Sabha and was sent to the Rajya Sabha where it was referred to a Select Committee for a more detailed scrutiny. It was passed with 3 three amendments to clause 3 of the Bill in August 2017. The amendments sought changes in the composition of the pressed commission along with reservation for a woman and minority community member. Another amendment spoke about protecting the rights of states by making their recommendations binding. Since the versions of the Bill passed by both the houses are different, it cannot receive the President's assent and has to be returned to the Lok Sabha. It will be discussed in the Winter Session 2017.

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PART II: BACKGROUND

The Constitution of India provides for protection against discrimination on the basis of religion, race, caste, sex, place of birth. It also provides for safeguards to citizens from a socially or educationally backward class in the form of reservations and ensures that a real and concrete guarantee of equal citizenship is extended to excluded sections of society. This was an unconditional commitment towards promoting social justice and eradicating all forms of caste discrimination. In this process, reservation was viewed as a crucial tool but it was only a mean to achieve the end goal of an inclusive society.

The National Commission for the Scheduled Castes and Scheduled Tribes came into being consequent upon passing of the Constitution (Sixty-fifth Amendment) Act, 1990. The said Commission was constituted on 12th March, 1992 replacing the Commission for the Scheduled Castes and Scheduled Tribes set up under the Resolution of 1987. Under article 338 of the Constitution, the National Commission for the Scheduled Castes and Scheduled Tribes was constituted with the objective of monitoring all the safeguards provided for the Scheduled Castes and the Scheduled Tribes under the Constitution or other laws. Post the judgement of Indira Sawhney vs Union of India, the Supreme Court directed the government to constitute a permanent body for entertaining, examining and recommending requests for inclusion and complaints of over-inclusion and under-inclusion in the Central List of Other Backward Classes. The National Commission for Backward Classes Act was enacted in 1993 and the NCBC was created as a statutory body under it. Currently under the NCBC Act, the Commission merely has the power to recommend inclusion or exclusion of communities in the OBC list. It has no power to look into the matters regarding welfare and development of backward classes or address their grievances and the same has been assigned to the Scheduled Caste Tribunal.

The National Commission for the Scheduled Castes has recommended in its Report for 2014-15 that the handling of the grievances of the socially and educationally backward classes under clause (10) of article 338 should be given to the National Commission for Backward Classes. It was suggested that the Commission be alleviated to the status of a constitutional body at par with the other two commissions with the power to specify the socially and educationally backward classes.

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PART III. POLITICAL CONTEXT

Several aspects of the Bill appears to be a political strategy aimed at strengthening a voter base among the OBCs which will mostly be at the expense of regional parties with a dominant presence amongst the OBC communities. Political mobilisation on the basis of caste is certain to splinter the vote banks of regional parties like the Samajwadi Party and Rashriya Janata Dal who have been accused to catering to the demands of the dominant castes among the OBCs. Also, the setting up of the Commission to examine the sub-categorisation of 5,000-odd castes in the central OBC list to ensure sub quotas for the extremely backward classes also appears to be a move in pursuance of the upcoming General Elections. The 11 states which had previously mooted and introduced the proposal of a sub quota have reaped the electoral benefits of the same and the ruling government expects similar results in the several upcoming state elections. Many observers have termed this decision to set up a Commission to introduce sub quotas as the successor of the Mandal Commission which changed the political scene in the country in 1990 by eroding the Congress Party's traditional vote bank and led to emergence of backward caste regional political powerhouses. It is believed the further sub-categorisation of OBCs for reservation benefits would set in motion another political upheaval and changes in coalitions by bringing forth a new class of non dominant classes which can essentially contribute to the government's aim to exploit caste equations and rebrand themselves as the party of the poor.

Interestingly, the onus of amending the List has also been shifted to the Parliament which will absolve the ruling party of its duties towards the same. In the light of the growing agitations by the Jats, Marathas, Patels, Kapus and the many other communities for inclusion as OBC, this move appears to a manoeuvre by the government to evade the responsibilities of deciding on the same.

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PART IV. KEY FEATURES OF THE BILL

- The Bill grants constitutional status to the NCBC at par with the National Commission for Scheduled Castes and the National Commission of Scheduled Tribes and empowers it address and redress grievances made by members of OBCs.
- It states that the President may specify the socially and educationally backward classes in the various states and union territories in consultation with the governor of the concerned state. The power to amend the list of backward classes has been shifted from the government to the Parliament.
- State governments will no longer have the right to maintain and revise their own OBC lists, just as they are unable to affect the lists of SCs and STs.
- The central and state governments will be required to consult with the NCBC on all major policy matters affecting the socially and educationally backward classes.
- The NCBC will have the powers of a civil court while investigating or inquiring into any complaints.

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PART V. KEY ISSUES

Three major changes, ranging from constitutional to political and caste equations, are likely to result from the passing of this Bill.

- i) Granting of constitutional status shifts the power to revise the Central List of Backward Classes from the Central Government to the Parliament.
- ii) The Bill might not result in the benefit of the backward classes if state governments are stripped of their power to assign backward classes status as per their social context
- iii) The Bill is not considered to be transformative by many as it does not introduce any new methods to deal with the internal differentiation and extensive disparities that exist among different Dalit, Adivasi and backward communities.

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PART VI. ANALYSIS

i) Affront on the federal structure

The Bill's primary objective is to grant constitutional status to the NCBC and to designate the Parliament as the authority to notify the revision of the backward classes list. While this move strengthens the position of the Commission, it might undermine the federal framework and the authority of states to include or exclude any particular class within the ambit of OBC. It has been alleged that shifting this power to the Parliament and the President will result in the erosion of the states' role. Due to the complexity and diversity of backward classes across the country, inclusion or exclusion from the list of SEBC for the purpose of reservation in any state can be effectively carried out only by a state backward classes commission as per the Supreme Court judgment. NCBC can identify the SEBC only to grant reservations to positions under the Government of India or under any other authority of GOI or under authorities under the control of the GOI. In other words, NCBC cannot identify SEBCs for reservation in positions created by any state or state authority. Further, the proposed Article 342A would take away all the powers vested in and exercised by the states all along. This provision in its current form will result in divesting the states of its power to add/delete any SEBC to/from the list of OBCs in the states. The amendments passed by the Rajya Sabha on the insistence of the oppositions members ensured that states would be able to participate and advise on who should be included or excluded from the list of socially and educationally backward classes. This was necessitated since a combined reading of Article 342A¹ and 366(26c)² makes it clear that once the 123rd amendment passes, only the Union government can determine whether a caste is socially and educationally backward or not. There is no language in the Bill to ensure that the president is bound to take into account the opinion of the governor. Despite this amendment, the move to centralise the entire process has resulted in an affront to federalism wherein the government has denied the states their vested right to identify backward class and provide them with benefits.

While this bears consequences on the existing structure of federalism, the underlying rationale behind this move can be viewed in terms of a political manoeuvre. The government's move comes at a time when the Jat and Patidar agitation is demanding OBC status for their communities. The commission has powers to examine requests for inclusion of any community in the list of backward classes and hear complaints of over-inclusion or under-inclusion, following which it advises the Union government. Moreover, by shifting the power to amend the list onto the Parliament, the government has successfully transferred its responsibility. Although critics have termed this as an abrogation of the government's duty, many consider this to be an effort to curb insinuation of these movements and agitations by opposition parties. So far, opposition parties have promoted movements demanding reservation like those of the Jat, Maratha or Patidar to create roadblocks and set backs for the party in power while promoting their interests. Since the power to grant reservation rests with the central government, the anger of the agitators can easily be directed towards the party in power at the Centre. With the new Bill, the

¹Article 342A(1) says that "President may specify" the SEBC that shall "for the purposes of this Constitution" deemed to be SEBC in relation to that state

² A new sub-clause 26(C) has been added: "'socially and educationally backward classes' means the backward classes as are deemed under article 342A for the purposes of this Constitution"

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authority to grant reservation will rest with parliament where opposition parties are also represented – thus deterring the irresponsible behaviour of opposition parties. Henceforth, opposition parties will also have to be seen to be playing a constructive role in resolving the complex issues raised by the clash of interests of the different castes and communities comprising the backward classes.

ii) Transformative vs reformist

The Bill in its original form provided for a 3 member NCSRBC which was not seen as adequately representative. The amendment to expand the membership of the Commission from 3 to 5 by including 1 woman member and a representative of the minority as pushed forward by the opposition in Rajya Sabha ensured that the Commission has a better insight into the local contexts and has a more diverse understanding of the disabilities and prejudices faced by the Backward Classes. The initiative to set up the NCSEBC was portrayed as an opportunity to enable the subdivision of quotas so that the emerging inequalities within castes comprising the backward classes can be addressed. But for the Bill to be successful in doing so, it has to be seen if it is capable of fundamentally altering the existing scenario or is merely an improvement on the present system. The new commission may be a ploy to extend reservation not only to dominant castes but to the so-called ‘upper’ castes. The Bill should not be another mechanism to perpetuate caste divisions as it would not only make a mockery of the reservation system but would also be politically and ethically retrograde. The Patidars who are one of the largest and best organised communities in Gujarat fighting for reservation is an example of how reservations have been equated to a welfare benefit that can be granted to any community depending on their electoral significance. In the constitutional view, reservation is explicitly and exclusively about redressing caste discrimination and inequality. By giving the proposed NCSEBC a constitutional status, the government has widened merely expanded the ambit of reservation as per the ethos behind the constitutional provision that reservation can only be given on the basis of social and educational backwardness. But it has failed to bring about any structural change within the commission which can effectively address the myriad of challenges facing this group of people.

However the government has set up a Commission to examine the sub categorisation of the castes listed in the Central OBC list to ensure a more equitable distribution of opportunities in central government jobs and educational institutions. The concept of creamy layer as highlighted by the landmark Indira Sawhney judgment reflected the disparities that exist within the backward classes and wherein the dominant classes avail the majority of the benefits leaving the poorer in an even more helpless state. It was in this regard that the NCBC recommended that those with an un-equal status cannot be treated equally and measures are required to bring them on par with the advanced classes. Even though the Constitution does not recognise economic criteria as a basis of reservation, the Supreme Court in the State of Andhra Pradesh And Others vs U.S.V. Balram (1972) and Indra Sawhney And Others vs Union Of India (1993) held that the creamy layer be excluded from the purview of reservation benefits. The report of the Commission is still awaited and its suggestions would play a crucial role in determining the extent to which this Bill would be successful in ameliorating the conditions of the classes it claims to protect.

Class and caste identities are mutually reinforcing in this system of reservations. NSEBC should take Socio economic and Caste Census 2011 into account and prepare a deprivation index clubbing together social, educational and economic factors to make OBC reservation more rational. This Bill does not take into account

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caste but backward classes as defined in provision. Caste may be the sole yardstick for Dalit reservation but for OBC reservation, a multitude of factors must be stitched together. Reservation policy must incorporate provisions for identification of communities that have reaped disproportionate benefits and their subsequent removal from list lest the objective behind the policy is defeated. The system of assigning a community as backward should be for social transformation and not political hegemony. The Bill should aim to address reservation as a genuine requirement in terms of progressive social intervention instead of reducing it to a tool for political mobilisation and petty political ends.

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PART VII. CONCLUSION

In the context of the 21st century, a policy like reservation is faced with many tough challenges. The language of backwardness flattens and erases the important distinctions between varied forms of discrimination and social exclusion. These discriminations and distinctions are varied in its forms and proportions and the disabilities each class face is significantly different. To address and eliminate caste discriminations and the prejudices, the proposed Bill should empower the state commissions to specify backward classes within its jurisdiction on the advice of the President. The Centre's usurpation of this power might not be in the best interests. While granting the Commission a constitutional status is a step towards empowering the commission to deal directly with matters concerning the OBC, the Bill in its present form might not be sufficient to substantially alter the effectivity of the working of the Commission. The following changes may be incorporated into the Bill

- 338B Clause (5) should be modified to include the participation of the Commission in the planning process of socio-economic development of the socially and educationally backward classes and to evaluate the progress of their development and not just play an advisory role. This will be in consonance with the provisions of the SC and ST commissions.
- 338B Clause (3), Sub-Clause 9 to be removed to give state Government the powers to identify SEBC as in the current Act.
- 338B Clause (4) should be amended to empower the position of the governor with respect to specifying backward classes within state jurisdiction as per the advice of the respective state commissions.

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PART VIII. BACKGROUND INFORMATION AND DOCUMENTS

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