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BATTLE LINES DRAWN: STUDYING THE HISTORY OF RESERVATIONS IN INDIA.

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ABSTRACT:

OUR CONSTITUTIONAL FRAMEWORK IS BASED ON THE THREE AGENCIES OF THE STATE – THE LEGISLATURE, THE EXECUTIVE, AND THE JUDICIARY – MAINTAINING A CHECK AND BALANCE OVER EACH OTHER. THE OVERLAP BETWEEN THE FUNCTIONS, ROLES, AND RESPONSIBILITIES OF THE ORGANS OF THE STATE OFTEN LEAD TO A TUSSLE BETWEEN THE JUDICIARY ON THE ONE HAND AND THE EXECUTIVE OR THE LEGISLATURE ON THE OTHER. THIS PAPER SEEKS TO STUDY THIS THEME OF CONFLICT IN THE CONTEXT OF THE ISSUE OF RESERVATIONS IN FAVOUR OF BACKWARD CLASSES. THE PAPER OPENS WITH A BRIEF INTRODUCTION GIVE A BACKGROUND TO THE THEME. THE NEXT SECTION OF THE PAPER EXAMINES THE KEY CONSTITUTIONAL PROVISIONS AND THE DEBATES IN THE CONSTITUENT ASSEMBLY DEALING WITH THE ISSUE OF RESERVATIONS. THIS IS FOLLOWED BY AN ANALYSIS OF THE POST-INDEPENDENCE JURISPRUDENCE ON RESERVATIONS WITH A SPECIAL EMPHASIS ON EXAMINING THE MANNER IN WHICH THE CONFLICT BETWEEN THE LEGISLATURE AND JUDICIARY WAS RESOLVED. THE FINAL SECTION OF THE PAPER PROVIDES SHORT CONCLUDING REMARKS OF THE AUTHOR BASED ON THE ANALYSIS.

KEYWORDS: RESERVATION, AMENDMENT, ARTICLE 29, 30 OF INDIAN CONSTITUTION, LEGISLATURE, JUDICIARY.

INTRODUCTION:

Our Constitutional framework is based on the three agencies of the State – the Legislature, the Executive, and the Judiciary – maintaining a check and balance over each other. The separation of powers between the three organs of the state, under our Constitutional system,

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does not consist of 'impassable barriers' rather the Executive, the Legislature, and the Judiciary share powers and responsibilities. Chandrachud, J. speaking for the Supreme Court of India in Indira Gandhi v. Raj Narain[1] described the overlapping functions of the State organs in the following manner:

"Montesquieu's "separation" took the form, not of impassable barriers and unalterable frontiers, but mutual restraints, or of what afterward came to be known as "checks and balances". The three organs must act in concert, not that their respective functions should not ever touch one another."

The overlap between the functions, roles, and responsibilities of the organs of the State often leads to a tussle between the Judiciary on the one hand and the Executive or the Legislature on the other.[2] In this paper, we will examine the theme of tension and conflict between the Judiciary and the Legislature/ Executive in the backdrop of the issue of reservations for socially and economically backward classes and the sequence of Constitutional amendments in that context.

Due to the framework described above, the conflict between the State organs has been a running theme. It was first witnessed in the right to the property line of cases that represented a direct clash between the legislative will to re-distribute land and the judicial defence of existing land rights based on the then fundamental property right.[3] A tenuous balance was ultimately achieved with the Kesavananda Bharati judgment promulgating the 'basic structure doctrine, but excluding the right to property from its ambit.[4]

Another area that has been the hotbed for conflict between the Judiciary and the Legislative/ Executive branches is the expanded concept of public interest litigation through which the Judiciary has taken over what is normally viewed as pure Legislative/ Executive functions,

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[1] 1975 (Supp) SCC 1 at 260. See also N.W. Barber, Prelude to Separation of Powers, 60:1 Cambridge Law Review 59, 88 (2001): "[t]he failure of the three branches of government to maintain their Integrity under examination is matched by the ease with which functions can change hands."

[2] Granville Austin famously noted about the relationship between the legislature/ executive and the Judiciary that: "[t]he relationship between these branches of government was at once mutually Respectful and highly conflicted." See Granville Austin, Working a Democratic Constitution: A History Of the Indian Experience, Oxford University Press, Delhi: 2003, p. 18

[3] Shankari Prasad v. Union of India AIR 1951 SC 458; Sajjan Singh v. State of Rajasthan AIR 1965 SC 845; I.C. Golak Nath v. State of Punjab AIR 1967 SC 1643; Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

[4] 4 Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

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such as drain management, forest management, construction, etc.[5] Legal scholar Lavanya Rajamani explains it thus:

"Judges in their activist avatar reach out to numerous parties and stakeholders, form fact-finding, monitoring or policy-evolution committees, and arrive at constructive solutions to the problems flagged for attention by public-spirited citizens. ….Where there is a perceived 'vacuum in governance, the Court rushes to fill it."[6]

The widening of the judicial role and its expansion to cover perceived gaps left by the Legislature and the Executive has contributed to increased conflicts between the State organs. This paper seeks to study this theme of conflict in the context of reservations. The next section of the paper examines the key Constitutional provisions and the debates in the Constituent Assembly dealing with the issue of reservations. This is followed by an analysis of the post-independence jurisprudence on reservations with a special emphasis on examining the manner in which the conflict between the legislature and judiciary was resolved. The final section of the paper provides short concluding remarks of the author based on the analysis.

FRAMING OF THE INDIAN CONSTITUTION: A MANDATE FOR RESERVATIONS:

The key provisions in the Constitution of India dealing with the issue of reservation in favor of Scheduled Castes **(SCs),** Scheduled Tribes **(STs),** Socially and Economically Backward Classes **(SEBCs),** and Economically Weaker Sections **(EWS)** are Articles 15 and 16. Article 15 deals with reservations in education and public access, whereas Article 16 deals with reservations in public employment.

The principles governing reservations in educational institutions are further addressed in Articles 29 and 30 of the Constitution. Articles 29 and 30 specifically address the right of communities to conserve their distinct language, script, or culture and to establish and administer educational institutions of their choice.[7] There are also ancillary provisions in

[5] Anuj Bhuwania, Courting the People – Public Interest Litigation in Post-Emergency India, New York: Cambridge University Press, 2017, p. 5, 50.
[6] As quoted in Anuj Bhuwania, Courting the People – Public Interest Litigation in Post-Emergency India, New York: Cambridge University Press, 2017, p. 4.
[7] India Const. Art. 29 cl.1.
India Const. Art. 29 cl. 2.

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Articles 330 to 342A that deal with specific instances of reservations in the Lok Sabha, government services, and the establishment of commissions.

The above Constitutional provisions were drafted with great care after long and detailed discussions amongst the members of the Constituent Assembly. A perusal of the broad contours of the issues discussed is instructive for the analysis in this paper.

The primary objective of the debate was to determine the classes that should be covered under their ambit. It was proposed that Article 15(3) be amended to permit positive discrimination in favor of Scheduled Castes or backward tribes, who suffer from backwardness owing to an unfortunate legacy of the past, in the same manner as it does for women and children.[8] In this vein, Prof. K.T. Shah, the elected member from the State of Bihar, noted during the Constituent Assembly Debates:

"There seems to have been some exceptions introduced which might permit denominational, sectarian, or communal institutions not only to flourish; but to flourish at the cost of the public. I think it would be a very vicious principle if we tolerate this kind of exclusiveness which would be a blot on real democracy. If you mean definitely and clearly that there shall not be any sectarian or denominational exclusiveness; if you mean definitely and clearly that places of such utility as schools or hospitals or asylums shall not be reserved for any reason for the members of a given sect or community, then I think it is not too much to demand that these should be made open and accessible to all citizens of this country." [9]

On the other hand, some members of the Constituent Assembly resisted the changes as they felt that these provisions are revolutionary in character and may not be easily accepted by Indian society.[10] Still, others felt that the special provisions in favor of backward classes should be for a limited period of time.[11] Fears were also expressed about the courts misinterpreting these provisions inter alia because of the vagueness of the term 'backward'[12]

India Const. Art. 30 cl.1

[8] Book No. 2, Constituent Assembly Debates, 29 November 1948, p. 655. Ultimately, the amendment Was not carried out on account of a fear that it would result in the Scheduled Castes and Tribes being Segregated from the general public. See Book No. 2, Constituent Assembly Debates, 29 November 1948, p. 661.

[9] Supra n.7 (CAD), p. 651.

[10] Supra n.7 (CAD), p. 659.

[11] Supra n.7 (CAD), p. 680.

[12] Supra n.7 (CAD), p. 657-8, 686, 692-3. Interestingly, during the discussion, the criteria of social, Economic and educational backwardness was framed by some members. See Supra n.7 (CAD), p. 689-

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as well as of more and more classes of persons being unable to resist the temptation to claim backwardness and seek inclusion in the special protections.[13]

Despite a few stray reservations, the Constituent Assembly Debates reflect a widespread consensus amongst the members of the Constituent Assembly that a strong constitutional mandate for reservations for backward classes would go a long way towards putting an end to age-old disabilities/ suffering.[14] The goal was to give the scheduled classes a place in society.[15]

Ultimately, express provisions were made in the Constitution to enable the legislature and the executive to make protective measures, including reservations, for the weaker sections. The contentious issues of interpretation, to use the words of T.T. Krishnamachari, were left "to the good sense of Parliament, the legislatures, the Supreme Court and the advocates."[16] With this understanding, the Constitution of India was brought into force with a specific mandate for reservations in favor of the backward classes that hitherto had been deprived of the benefits of Indian society.

The Constitutional provisions on the reservation have been the subject matter of several court rulings, which attempt to balance what is perceived as excessive legislative/ executive actions. Simultaneously, there have also multiple amendments to widen the ambit of reservations as well as to counteract the effect of judicial determinations. The next section of the paper examines the key judicial pronouncements and consequential amendments to show how the legislative/ executive and judicial branches have clashed and compromised to try and balance the competing interests.

RESERVATIONS: THE TUSSLE BETWEEN COURTS AND THE LEGISLATURE

Since the early days of the Indian Republic, reservations in favor of SCs, STs, SEBCs, and EWS' have been a contentious issue that has seen regular clashes between the legislative and judicial branches. The legislature and executive branches have usually sought to increase the ambit of reservations by increasing the level of reservation as well as the number of classes covered within it, while a wary judiciary has sought to keep a check on legislative populism by restraining what it felt was an excessive reservation.

90, 697.
[13] Supra n.7 (CAD), p. 681.
[14] Supra n.7 (CAD), p. 657.
[15] Supra n.7 (CAD), p. 665.
[16] Supra n.7 (CAD), p. 698.

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A study of the constitutional/ legislative and judicial history of reservations reveals that neither branch has shied away from the conflict. There have been periods of conflict, often with the organ perceived as having greater legitimacy in the public eye prevailing, followed by a brief détente and another period of conflict.

Phase 1: The Story begins – a Dominant Legislature This story of conflict begins as far back as 1951 when the Supreme Court of India was called upon to consider the validity of a government order granting reservations in the admission of students to the Engineering and Medical Colleges based on caste and religion.[17] The Government sought to protect the reservations by relying on Article 46 of the Constitution, which charges the State with promoting with special care the educational and economic interests of the weaker sections of the people.[18] The court struck down the order as ultra vires of Article 29(2) by treating it as an instance of denial of admission on the ground of religion, race, caste, or language. The court rejected the government's contention in strong terms holding that:

"The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State policy have to conform to and run as a subsidiary of the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood…. If the arguments founded on article 46 were sound then clause (4) of article 16 would have been wholly unnecessary and redundant. Seeing, however, that clause (4) was inserted in article 16, the omission of such an express provision from article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds."[19]

These were the days of a strong legislature consisting largely of the very same persons who were part of the Constituent Assembly that framed the Constitution of India. These members

[17] State of Madras v. Champakam Dorairajan AIR 1951 SC 226.
[18] Id
[19] Id. This stand regarding the subservience of the DPSPs in favour of fundamental rights was Eventually abandoned in favour of reconciliation and harmonization of the provisions. See Minerva Mills Ltd. V. Union of India AIR 1980 SC 1789.

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of the legislative branch felt the court had gone astray from what they had intended while enacting the Constitution – the provisions, as per them, were not meant to be read so as to restrict their ability to carry out the social justice goals laid down in the Constitution. The legislative branch felt that the ruling would act as a permanent roadblock. Granville Austin describes the prevailing situation in the following manner:

"The decision struck an essential dimension of the social revolution. The government immediately sought to repair the damage through the First Amendment….The potential danger presented by these decisions to many of the Constitution's 'special care' provisions convinced the Cabinet Committee on the Constitution that it needed to amend Article 15…"[20]

The legislature consisting of eminent personalities, many of whom were members of the erstwhile Constituent Assembly, did not accept the court's countermanding of their will. Not satisfied with the stand taken by the court, the legislative branch immediately promulgated the Constitutional First Amendment amending Article 15. By these amendments, Clause (4) was introduced in Article 15 to specifically clarify that Article 29(2) would not prevent the State from making special provisions for SCs, STs, and SEBCs.[21] The First Amendment to the Constitution, in effect, nullified and reversed the Supreme Court's ruling in Champakam Dorairajan.[22]

The strong legislative action was intended to ensure the primacy of the legislature especially when it came to achieving the goal of social revolution. Granville Austin describes the effect of the First Amendment in the following manner:

"The First Amendment was consequential far beyond its immediately visible content. It established the precedent of amending the Constitution to overcome judicial judgments impending fulfillment of the government's perceived responsibilities to the seamless web and particular policies and programs."[23]

This was followed by a long period of legislative dominance on the subject of reservations with the judicial branch taking a backseat. While there were some instances where the courts

[20] Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford University Press, 2003, p. 94-96.
[21] Constitution (First Amendment) Act, 1951.
[22] Supra n. 16. See also Venkataramana v. State of Madras AIR 1951 SC 229ff
[23] See State of Kerala v. N.M. Thomas AIR 1976 SC 490 and Akhil Bhartiya Soshit Karamchari Sangh

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interfered with the legislative policy on the reservation[24], by and large, the determination leaned in favor of the legislative will.[25]

Phase 2: A weakened legislature, a stronger judiciary

The judiciary's next attempt to curtail the wide legislative power for granting reservations came with the judgment of Indra Sawhney v. Union of India.[26] By this time, the legislative and executive branches were widely viewed as having overstepped with their attempts to implement the recommendations made in the Mandal Commission Report[27] has led to widespread protests across the country.[28] At the same time, the judiciary had gained greater strength and legitimacy in the eyes of the populace by using the PIL jurisdiction to take charge of many issues of public importance and by challenging the legislature on issues such as Constitutional amendments. Seizing the moment, the Supreme Court in Indra Sawhney laid down a set of principles to govern the issue of reservations:

(i) The constitutional bar under Article 16(2) against discrimination on the ground of race, religion, or caste is as much applicable to Article 16(4) as to Article 16(1) as they are part of the same scheme and serve the same constitutional purpose.[29]

(ii) Identification of a backward class by caste alone is unconstitutional.

(iii) The state has to evolve occupational, social, educational, and economic criteria of universal application to identify the backwardness of a class.

(iv) Reservation being an extreme form of protection should not exceed 50% of the total seats.

(v) Reservation in promotion is constitutionally impermissible.

(vi) 'Creamy layer' amongst the backward class of citizens must be excluded.

(vii) Reserved seats for a year cannot be carried forward to the next year.

The ruling marked a sea change in the Supreme Court's approach to the matter of reservation. For long, after the initial skirmish, the court had taken a hands-off approach. But with the Mandal era events having weakened the legitimacy of the legislature's stance on reservations, the Supreme Court rose from its slumber to push back strongly.

[24] Supra n. 16. See also Venkataramana v. State of Madras AIR 1951 SC 229ff
[25] See State of Kerala v. N.M. Thomas AIR 1976 SC 490 and Akhil Bhartiya Soshit Karamchari Sangh
[26] 1992 Supp (3) SCC 217.
[27] Report of the Second Backward Classes Commission, Government of India, 1980.
[28] Jyoti Thakur, Explained: What Was Mandal Commission Report & Why It Is Cited During Reservation Debates, India Times, 04.10.2021, https://www.indiatimes.com/news/india/what-wasmandal-commission-report-other-backward-castes-reservation-scheduled-castes-550850.html.
[29] Indra Sawhney Etc. Etc vs Union Of India And Others, Etc.on 16 November, 1992 Equivalent citations: AIR 1993 SC 477, 1992 Supp 2 SCR 454.

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The court's strengthened position and newfound will to prevent legislative excesses in the matter of reservation are well expressed in the following passage:

"Reservation in public services either by legislative or executive action is neither a matter of policy nor a political issue. The higher courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has the potential of constitutional repercussions."[30]

It was hoped that the decision would put an end to the issues relating to reservations, but the matter did not rest here.

Phase 3: Judiciary's role as a mediator :

Carrying forward the theme of conflict, the seminal ruling was followed by a series of Constitutional amendments to protect the legislative/ executive powers.[31] By the 77th and 85th Amendments, Clause (4A) was introduced in Article 16 to permit reservations in matters of promotion and consequential seniority for Scheduled Castes and Tribes.[32] The 81st Amendment introduced Clause (4B) to permit the carry forward of unfilled reserved vacancies in a year to succeeding years.[33] The 82nd Amendment brought in a proviso in Article 335 to permit relaxation in favor of SCs and STs in qualifying marks in any examination and lowering the standards of evaluation for promotion.[34] The 89th Amendment established the National Commissions for Scheduled Castes and Tribes.[35] The Amendments undid the effect of some of the key findings of the Supreme Court in Indra Sawhney.[36]

The 77th, 81st, 82nd, and 85th Amendments were challenged on the ground of violation of the basic structure of the Constitution[37] and came up for the consideration of the Supreme Court in M. Nagaraj v. Union of India.[38] In its ruling, the court acknowledged that "it is the

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[30] Supra n. 25 (Indra Sawhney).
[31] See M.P. Singh, Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure, 1 NUJS L. Rev. 193 – 218 (2008), p. 195-6.
[32] Constitution (Seventy Seventh Amendment) Act, 1995 and Constitution (Eighty Fifth Amendment) Act, 2001.
[33] Constitution (Eighty First Amendment) Act, 2000.
[34] Constitution (Eighty Second Amendment) Act, 2000.
[35] Constitution (Eighty Ninth Amendment) Act, 2003.
[36] Supra n. 25 (Indra Sawhney).
[37] By this time, the basic structure doctrine for testing amendments to the Constitution laid down in Kesavanand Bharati's case (Supra n. 4) was well established in the Indian legal landscape.
[38] (2006) 8 SCC 212.

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State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment." [39]

Overall, the Supreme Court sought a balance by upholding the amendments, while at the same time restricting some of the wide-ranging conclusions that could follow from the Amendments by holding that:

(i) Articles 16(4A) and (4B) flow from Article 16(4) itself and do not alter its structure.

(ii) The controlling factors, i.e. backwardness, inadequacy of representation, and overall administrative efficiency, would continue to apply and would have to be determined based on the data to be collected.

(iii) The court can enquire into the criteria and data based on which SEBC classification is done.[40]

(iv) The government will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

In the same time frame, the Supreme Court also delivered the judgment in P.A. Inamdar v. the State of Maharashtra.[41] The judgment, inter alia, proscribed the legislature and the executive from making reservations in unaided professional educational institutions viewing it as a serious encroachment on the right and autonomy of private professional educational institutions.

The ruling was widely viewed as an encroachment upon the 1st Constitutional Amendment. M.P. Singh, an eminent Constitutional scholar, has strongly criticized the Inamdar judgment concluding:

"in Inamdar, the Court brought the private educational institutions at the level of unaided minority schools which were exempted from the requirement of reservation. In the process,

[39] Supra n.36 (Nagaraj), para 45.

[40] See also B.K. Pavitra v. Union of India (2017) 4 SCC 620. Sections 3 and 4 of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to The Posts in the Civil Services of the State) Act, 2002 were struck down on the ground that an exercise For determining "inadequacy of representation", "backwardness" and the impact on "overall Efficiency" had not preceded the enactment of the law.

[41] 1 (2005) 6 SCC 537. In the Inamdar ruling, the Supreme Court sought to clarify the earlier decisions In TMA Pai Foundation v. State of Karnataka (2008) SCC 481 and Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697 dealing with the rights of private educational institutions.

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the Court rewrote, rather subverted, the Constitution both in respect of reservation as well as minority rights."[42]

Almost immediately, the legislative wing enacted the 93rd Amendment to the Constitution.[43] The 93rd Amendment introduced Article 15(5) to specifically permit reservations in educational institutions for SCs, STs, and SEBCs and thereby nullify some of the wide-ranging effects of the Inamdar decision. The political consensus on the subject is evident from the fact that the 93rd Amendment was passed unanimously by a multi-party Parliament with no political party having an absolute majority.[44] This also led to protests by applicants to seats in educational institutions, though on a smaller scale and with lesser intensity than those seen post-Mandal in the 1990s.[45]

The Supreme Court examined the 93rd Amendment in Ashok Kumar Thakur v. Union of India.[46] In doing so, the judiciary played the role of a mediator between the legislative branch and the forces of civil society. The court upheld the constitutional validity 93rd Amendment vis-à-vis government-aided institutions but refrained from determining the question of its applicability to unaided institutions.[47] The court also held that in the determination of other backward classes, the "creamy layer" from amongst them would be excluded. But the **"creamy layer"** test was held inapplicable for SCs and STs.

The decision in Ashok Kumar Thakur was met with broad level approval – the government dropped its objections on the "creamy layer" issue; the protests gradually died down.[48] The decision brought about a détente and was followed by a period of relative calm and stability.

Phase 4: A period of calm :

The next phase in the saga begins in 2018 with the legislature continuing the process of extending reservations and enhancing the legislative/ executive power in the matter. The 102nd Amendment established the National Commission for Backward Classes too, inter alia, and recommend measures for the protection of SEBCs.[49] The amendment also sought to introduce greater clarity in the identification of SEBCs. The President was empowered to

[42] Supra n. 29 (M.P. Singh), p. 197.
[43] Constitution (Ninety Third Amendment) Act, 2005.
[44] Supra n. 29 (M.P. Singh), p. 194.
[45] Supra n. 29 (M.P. Singh), p. 197
[46] Supreme Court of India, judgment dt. 10.04.2008 in WP(c) no. 265/2006.
[47] One of the judges, Bhandari J., held the 93rd Amendment to be invalid to the extent of its Application to private unaided institutions.
[48] Supra n. 29 (M.P. Singh), p. 198.
[49] Constitution (One Hundred and Second Amendment) Act, 2018; Article 338B.

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notify the SEBCs for any State or Union Territory and the Parliament was empowered to issue notifications for the inclusion of classes within the Central List of SEBCs.[50] Soon after, the 103rd Amendment brought in Articles 15(6) and 16(6) to provide for protective measures and reservations based on economic weakness.[51]

The Supreme Court considered the issue regarding the preparation of the list of SEBCs in B.K. Pavithra v. Union of India.[52] In what can be viewed as a de-escalation, it was held that the Constitutional invalidity of a law does not fetter legislative power to remedy the basis of invalidity. The court also took a step back on the issue of judicial review of the list of SEBCs holding that, while a study has to be conducted for this purpose, the scope of judicial review of the report or list is very limited, and mere errors in the methodology or report do not invalidate the same.[53]

The validity of the 102nd Amendment was also considered by the Supreme Court in Jaishree Laxmanrao Patil v. The Chief Minister.[54] The 102nd Amendment was upheld as being consistent with the Federal structure contemplated in the Constitution. It was directed that as per the amendment, the President alone can identify SEBCs – the States can only make suggestions and recommendations. The court also reiterated the 50% ceiling limit laid down in Indra Sawhney and that this can only be exceeded in extraordinary and exceptional circumstances. The court struck down the reservation for the Maratha community in addition to 50% social reservation due to the lack of any exceptional circumstances.

The judgment on the issue of the power to identify SEBCs being exclusively reserved with the President was viewed as a departure from the Parliamentary intent. In fact, the court had delivered a split verdict on this issue with one of the Judges – Bhushan, J. – relying on the background material to hold that there was no parliamentary intent to deprive states of this power. It was felt that by deviating from the Parliamentary consensus on the issue, the court has paved the way for another Constitutional amendment.[55]

[50] Article 342A.
[51] Constitution (One Hundred and Third Amendment) Act, 2019.
[52] (2019) 16 SCC 129.
[53] See Sangal, Whipping up the 'cream'?* Indian Supreme Court and its Decision in B.K. Pavitra-II, 4(4) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY 68 (2020) for a critique of this Ruling.
[54] 2021 (3) KLT 465.
[55] Santosh Krishnan, Maratha Reservation Verdict: Legally Right or Getting it Right?, 25 May 2021, The Leaflet, theleaflet.in/maratha-reservation-verdict-legally-right-or-getting-it-right.

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Sure enough, the Parliament followed up with the 105th Amendment seeking to reassert its original intent.[56] By the amendment, Clause (3) was added to Article 342A to make it clear that States and Union Territories would maintain a list of SEBCs for their purposes.

CONCLUSION :

The judiciary in India, unlike many countries, was charged with a special mandate to carry forward a social revolution, rather than merely preventing excesses by the legislative or executive branches. Granville Austin notes that:

"The Judiciary was to be an arm of the social revolution, upholding the equality that Indians had longed for during colonial days, but had not gained – not simply because the regime was colonial and perforce repressive, but largely because the British had feared that social change would endanger their rule."[57]

One of the consequences of the special mandate given to the judiciary is that it is expected to entrench upon what are traditionally viewed as legislative or executive domains. The judiciary, for the most part, has not shied away from its constitutional mandate. It has stepped in on many occasions and issues where the legislature or executive agencies have dithered. It has also not hesitated to check the legislature and executive when excesses were found.

The tumultuous history of the reservation saga, as the analysis in this paper seeks to show, presents a stimulating case study of the manner in which India's constitutional jurisprudence developed through a continuous tussle between the legislature/ executive on one side and the judiciary on the other. Some commentators put forth that the battle has less to do with the constitutional provisions and more to do with the views of each State organ on the policy of reservation itself.[58]

My analysis is that one key element in the final outcome of each skirmish in the battle on reservations has been the extent of public legitimacy enjoyed by warring institutions – the government and the judiciary – at the time of the dispute. In each phase, the State organ that enjoyed greater legitimacy in the public eye has held the upper hand.

[56] Constitution (Hundred and Fifth Amendment) Act, 2021.
[57] See Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press, Delhi: 1999, p. 204.
[58] Supra n. 29 (Singh), p.200. Professor M.P. Singh has summarised the issue with these poignant Words: "Therefore, the fight about reservation in the courts and outside has not been about the right To equality or any other right; it is basically against the policy of reservation as such".

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