ARE RESERVATIONS FUNDAMENTAL RIGHTS: CURIOUS CASE OF AFFIRMATIVE ACTION, AND INDIAN ACADEMIA

—*Abhishek Mishra**

Abstract—Bhartiya state is first and foremost a welfare state; and Bhartiya constitution is first and foremost a social document (borrowing this phrase from Granville Austin). Bharat has been land of teacher, or 'gurus' who have contributed in philosophy, physics, mathematics, law, spirituality and health and medicine. This paper argues that post-independent constitutional India has been less than fair to those who had constituted India long ago or who gave India her 'grund norm' as Kelsen explained in his seminal work 'Pure Theory of Law. The premise of argument is that reservation, as an affirmative action or equality of fact, is as much applicable on academicians in India within constitutional scheme. This write-up explores constitutional provisions and case laws of Supreme Court of India from the prism of reservation therein and claims of academician therefor.

Keywords: Reservations, Fundamental Rights, Affirmative Action, Equality, Academia.

* PhD Fellow, University of Hamburg, 2.1 B, 37 Landseiker Strass, Rahlstedt, Hamburg, Germany <mishraabheeshek@gmail.com>.

I. FUNDAMENTAL RIGHTS AND INDIAN CONSTITUTION

Part III Indian Constitution is unique in its own way because it is one of those rare parts of Constitution, which restricts, limit and curtail the otherwise omnipotent State. It proscribes the "State" to not make any law that takes away or abridges fundamental rights. It also exhorts that if State does make such laws, i.e. laws, which contravene fundamental rights, then such laws are void to the extent of their contravention with fundamental rights.[1] Thus, Part III contains certain rights, which cannot be limited or restricted by the state action except as provided in these rights itself. Power of the state to make laws is seriously curtailed if it has a repercussion on unfettered enjoyment of fundamental rights; and at the same time it has granted the power of judicial review[2] to Supreme Court of India (SC). The power of Judicial Review of under Part III of the constitution flows from combined reading of Art.32[3] and Art.13(2). The significance of Part III of the Constitution of India can be understood by the following ruling of the Supreme Court[4] that a law made by Parliament or State Legislature could only be dislodged by it if they either lack competence or violative of fundamental rights.

> "The statute enacted by Parliament or a State Legislature cannot be declared unconstitutional lightly. The court must be able to hold beyond any iota of doubt that the violation of the constitutional provisions was so glaring that the legislative provision under challenge cannot stand. Sans flagrant violation of the constitutional provisions, the law made by Parliament or a State Legislature is not declared bad. his Court has repeatedly stated that legislative enactment can be struck down by court only on two grounds, namely (i) that the appropriate legislature does not have the competence

---

1 See, Art. 13(2), Constitution of India.

2 See, *K.S. Puttaswamy* v. *Union of India*, (2019) 1 SCC 1, p. 114, See, *Binoy Viswam* v. *Union of India*, (2017) 7 SCC 59; Supreme Court ruled that, "No doubt, in exercises of its power of judicial review of legislative action, the Supreme Court, or for that matter, the High Courts can declare law passed by Parliament or the State Legislature as invalid. However, the power to strike down primary legislation enacted by the Union or the State Legislatures is on limited grounds. Courts can strike down legislation either on the basis that it falls foul of federal distribution of powers or that it contravenes fundamental rights or other constitutional rights/provisions of the Constitution of India. No doubt, since the Supreme Court and the High Courts are treated as the ultimate arbiter in all matters involving interpretation of the Constitution, it is the courts which have the final say on questions relating to rights and whether such a right is violated or not. The basis of the aforesaid statement lies in Art. 13(2) of the Constitution which proscribes the State from making "any law which takes away or abridges the right conferred by Part III", enshrining fundamental rights. It categorically states that any law made in contravention thereof, to the extent of the contravention, be void."

3 Art.32, Constitution of India provides for the right to move to Supreme Court for the enforcement of the rights conferred by Part III of the Constitution.

4 See, *State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312, pp. 321-322 and 325-27.

> to make the law, and (ii) that it does not (sic) take away or abridge any of the fundamental rights enumerated in Part III of the Constitution or any other constitutional provisions. In McDowell and Co. while dealing with the challenge to an enactment based on Article 14, this Court stated in ... A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone viz. (1) lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. ... if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by sub-clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or the other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them."

II. SCHEME OF EQUALITY IN INDIAN CONSTITUTION

The most consequential of all the fundamental rights as inscribed under Indian constitution is equality before the law and equal protection of the laws under Art.14 thereof. It is always perplexing or counter intuitive to comprehend the distinction between the two. To start with; equality before the law is a transformative constitutional idea. What is transformative constitutional idea? It simply transforms a polity of nobles or blue bloods into polity of equals. No king is superior to its citizen just because s/he is king or queen, or no society would be consisting of people who are noble or others as commoners. This scheme of nobility of king as superior being is possible when legitimacy of government flows from divine sovereignty of which king is representative. However, if the theory of legitimacy of government is derived not from Almighty God but from the constituents of its society, the society becomes constitutional society, and legitimacy of such government's rests with the people, therefore such sovereignty is called popular sovereignty. In divine sovereignty the book which constitute the society happens to be religious book to which the king/queen subscribe or take oaths too to protect it. In such society, the prime sovereign functions were to protect the religion, which springs from

the book of king/queen's faith. Moreover, equality among people is not possible in these societies, as it will be divided between believer and non-believer, and other such dogmas springing from these books, viz. inferiority of women and consequently inequality between sexes of human beings.

European scholars re-theorize the legitimacy and sovereignty of the government, such as, to name a few, Kant in Perpetual Peace,[5] and Locke in 'Two Treatise of Government'.[6] These scholars contributed to transform the theory of governance from rule of person to rule of law, also transforming empires into republics. These republics would say to have rule of law if they have responsible governments, a sine qua non requirement for rule of law. Nevertheless, the credit to coin the term Rule of Law is bestowed upon A. V. Dicey, which he used in his treatise on 'The Law of the Constitution'.[7] The rule of law constitutes a republic with right of the people at the core of the polity.[8] Dicey recognized three most distinct feature of rule of law, of which two are mentioned here. Firstly, *'no man is punishable or can lawfully be made to suffer in body or goods except for distinct breach of law established in the ordinary legal manner before the ordinary Courts of the law. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint*." In simple words, rule of law envisages a government, which does not have arbitrary powers.[9] Secondly, rule of law signifies that "'*rule of law' as characteristic of our country, not only that with us no man is above the law, but (what is a*

---

[5] See, Immanuel Kant, Perpetual Peace: A philosophical Sketch, <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>. (Accessed on 12 September 2020).

[6] See John Locke, Two Treatises of Government, ed. P. Laslett, Cambridge, 1967, pp. 6-10. Online <http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf>. (Accessed on 12 September 2020).

The first Treatise rejected the theory of Divine Right of the Kings and in his second Treatise he scrutinized and analyzed the meaning of political power "True Original, Extent, and End." However, before writing about the political power, he rejected the theory of that all government is absolute monarch and that no man is born free, and consequently political absolutism. He wrote, "I think it may not be amiss to set down what I take to be political power. That the power of a magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave. All which distinct powers happening sometimes together in the same man, if he be considered under these different relations, it may help us to distinguish these powers one from another and show the difference betwixt a ruler of a commonwealth, a father of a family, and a captain of a galley. 3. Political power then I take to be a Right of making laws with Penalties of Death, and consequently all less penalties, for the Regulating and Preserving of Property and of employing the force of the Community, in and all this only of the public Good."

[7] See, A.V. Dicey, *The Law of the Constitution*, London, 1889, p. 171.

[8] ibid. p. 174. Also see, *State of W.B.* v. *Anwar Ali Sarkar*, AIR 1952 SC 75, In the words of SC, "The first part of the article, which appears to have been adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus enshrines what American Judges regard as the "basic principle of republicanism."

[9] see, A.V. Dicey, *The Law of the Constitution*, London, 1889, p. 177. Dicey writes, "During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power."

different thing) that here every man, whatever be his rank or condition, subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[10] This postulate of rule of law, he termed as legal equality.[11]

First and foremost, the phrase of these two rights warrants focuses on the words, 'the law' and 'the laws'. Equality is before 'the law', and equal protection of 'the laws. Phrase 'the law' would signify the very concept of law as a whole and its singularity as constitution from which all other laws springs or flows. Phrase the laws in 'equal protection of the laws' envisages many laws or plural laws, and therefore, every such law would have its own equality of persons according to the aim and purpose of such legislation or executive actions. Thus, it empowers the state to classify persons who are to be treated distinctively, solely for the purpose of that law. For example, reasonable classification would vary and change with varying laws, in some laws classification would make a distinction between women inter se, or between women and men. To illustrate, maternity leaves make a distinction between working who are pregnant, and women are not pregnant, a woman who does not wish to become mother cannot argue that she is being discriminated against woman who wishes to be pregnant by granting her paid leaves which she(first woman) is not entitled to. The recent triple talaq legislation[12] discriminates between married men who are Muslims and married men who are not Muslims, as it is only applicable on Muslim men. Thus, different laws would discriminate differently and that would be equal protection of the laws.

It empowers the state to discriminate to enforce legal equality of rule of law. Therefore, rule of law first creates a level playing field by providing a scheme of government, which is governed through rules of law instead of rule of persons. In rule of person, the whims and fancies of the ruler decides the rights and obligation, if any, of subjects and is always subject to arbitrary creation and enforcement of rules. Equal protection of laws would not be possible if there is not rule of law and rule of law, in turn, is impossible without equality before the law.

III. EQUAL PROTECTION OF THE LAWS

The concept of equal protection of the laws in Indian Constitution is borrowed from American Constitution. In Yick Wo v Hopkins,[13] U.S. Supreme Court spelled out the content of the provision as a "*pledge of the protection of the equal laws.*" Supreme Court of India has on many occasions explain the true meaning of this right of individuals. It explained that "equal protection of the laws" as *"laws that operate alike on all persons under like circumstances.*

---

[12] See, Ss. 3 and 4 of The Muslim Women (Protection of Rights on Marriage) Act, 2019, <http://egazette.nic.in/WriteReadData/2019/209473.pdf>. (Accessed on 26 October 2020). The Act is applicable on only those cases which are triple-talaq as defined under S. 2(c), ibid, i.e. (talaq-e-biddat).

And as the prohibition under the article is directed against the State, which is defined in article 12 as including not only legislature but also the Governments in the country, article 14 secures all person within the territories of India against arbitrary laws as well as arbitrary application of laws."

It affirmed the meaning in Chiranjit Lal,[14] "*the State in the exercise of its governmental power must of necessity make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must posses for that purpose large powers of distinguishing and classifying person or things to be subjected to such laws. But classification necessarily implies discrimination between persons classified and those who are not members of that class." It is the essence of a classification."*

Equal protection of laws is an enabling power to the state and is negative in its content, however, positive in its intent, whereas equality before the law is positive, in its content and intent both. Additionally, later is absolute and formal,[15] and former is conditional, contextual, situational, and proportional.[16] To illustrate, equal protection of the laws does not see every individual as equal to others, its looks for context and situations, before tracing equality among people. Therefore, equal protection of the laws empowers the state to discriminate, to promote equality or achieve equality through the state powers. Whereas, equality before of the law strip the power of the state to treat anyone differently, i.e. king and subject are both same in the eyes of law. Further, as far as the relationship between these two rights under Art.14 and their relationship with the power of the state is concerned, equality before law, takes away the power of the state to discriminate or being arbitrary in enforcing the rights of the people. On the other hand, equal protection of the laws, expects the state to exercise its power to discriminate. Thus, if state does not create equality among equals, it will fail in its duty to protect the rights of the individuals under Part III of the constitution. The state is, therefore, mandated to discriminate through various kinds of laws depending on the subject matter of law and context in which it has been legislated or notified. To conclude, equal protection of laws caters to 'equality in fact',[17] whereas equality before the law is equality in law.

---

[14] See, *Chiranjit Lal Chowdhury* v. *Union of India*, AIR 1951 SC 41: 1950 SCR 869.

[15] See, *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212: AIR 2007 SC 71, while recognising two different concepts of equality as embedded under Art. 14, SC observed, "*Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society."*

[16] Explaining equal protection of laws as different facets of equality, SC termed it proportional, it observed, "*Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy." Ibid.*

[17] It is for this purpose that Granville Austin has termed Indian Constitution first and foremost a social document. See, Granville Austin, *The Indian Constitution: Cornerstone of A Nation*, Oxford, 1999, p. 50.

Thus, equality before the law bars classification whereas equal protection of the laws entitles that state create s*intelligible differentia* or reasonable classification. The word law which is singular in equality before the law envisages constitutional equality, every one must submits to the majesty of law, and plural laws in equal protection of laws provides for legal equality which means different law may be made for different people or group of people to uphold the constitutional equality. For example, a rich man is equal to poor man as far as constitutional governance is concerned; believer or non-believers of a particular faith are same as far as granting of rights to people are concerned.

However, legal equality would be absurd if we apply this constitutional equality to legal equality, for example, if we subject a rich man to flat rate of taxation of 40 percent of total income, and same rate of taxation for a poor man, the constitutional equality would result in absurd legal equality. It is absurd because, in this illustration, equality would create more inequality. Legal equality means both the poor and rich subjects themselves to the law, and the constitutional equality means it is prerogative of the different laws to treat the rich and poor different, also called as affirmative action[18] of the state. Affirmative action has been defined by apex court as,

> "There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide level playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalizing results with respect to various groups. Both the conceptions constitute "equality of opportunity." It is the equality "in fact" which has to be decided looking at the ground reality."

For example, Income Tax Act, 1969 may excuse an individual with certain income per annum from paying any taxes, and at the same time put the rich person in highest slab of tax, if the tax system of country is progressive taxation instead of pro rata.

Supreme Court in the State of Bombay v F. N. Balsara[19] has laid down seven principles which governs the reasonable classification power of the state,

1. "The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

---

[18] See, *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212: AIR 2007 SC 71.
[19] See, *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class and yet the law hits only a particular individual or class.
3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
4. The principle does not take away from (foe State the power of classifying persons for legitimate purposes.
5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.
6. If a law deals equally with members of a well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
7. While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

Thus, Supreme Court has recongnised and affirmed on many occasions that under equal protection of laws state is duty bound to make laws which creates equality among equals. Now, before, I examine the duty of the state to make laws that would create reservation in public employment, let us first examined the concept of reservation in public employment.

IV. RESERVATION AND CONSTITUTION OF INDIA

Reservation for the purpose of this essay is the reservation in public employment. It is etched under in Art.16(4)[20] of Part III, Arts.330, 334 and 335 of part XVI, and under Art.243D[21] Part IX of Indian Constitution. However, we are not concerned with reservation, which is subject matter of Art.243D or Art.330, I am only concerned with reservation as scheme under Art.16.[22]

[20] See, Art.16(4), "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

[21] It provides for the reservation of the seats in every Panchayat for Scheduled Castes and Scheduled Tribes.

[22] The distinction between two different concept of reservation was also made in *M. Nagraj* v. *Union of India* (2006) 8 SCC 212: AIR 2007 SC 71, The Supreme Court observed. "Our Constitution has, however, incorporated the word 'reservation' in Article 16(4) which word is not there in Article 15(4). Therefore, the word 'reservation' as a subject of Article 16(4) is different from the word 'reservation' as a general concept."

Reservations under Art.334 or 243D are political reservation for the representation of Scheduled Castes (SCs) and Scheduled Tribes (ST in the House of the People and Legislative Assemblies, and Panchayat respectively. Both these kinds of reservations are temporary in nature. Moreover, Art.330 governs Art.243D.[23] Art.334 envisages that reservation under Art.330 should only last ten years, which has been incrementally increased by the Parliament at the lapse of every ten years. The Constitution (One Hundred and Twenty Sixth Amendment) Act, 2019 (Amendment Act) has extended the reservation for SCs and STs which was due for expiration on January 25, 2020, for another ten years,[24] now political reservation for SCs and STs in House of the People and State Legislature till 2030.

It must be emphasized that temporary character of reservation under Art.330 because of Art.334 which has nothing to do with the reservation under Art.16(4) read with Art.335. There seems to persist a confusion regarding Art.334 and its relationship with Art.16(4). They both are similar to the extent that they deal reservation. However, there is nothing else which is common between these two constitutional provisions. Art.334 read with Art.330 seeks reservation for SCs, STs and Anglo-Indians; Art.16 (4) seeks reservation for 'any backward class of citizens". Art.330 read with Art.334 seeks reservation in House of the People and Legislative Assemblies of the State; Art.16 (4) seeks reservation in public employment. Art.334 is temporary in nature and was originally applicable for ten years as is explicitly mentioned in the Constitution; reservation under Art.16(4) read with art.335 does not have any such temporal constitutional mandate or sun set clause therein. Thus, reservation in Art.330 is temporary in nature and to keep it going constitutional amendment is required every ten years under Art.334; whereas the reservation granted to claimant of Art.335 (Schedule Tribes and Schedule Caste) or claimant under Art.16 (4) (any backward class of citizens) does not require constitutional amendment, for it is an enabling provision empowering the State to make reservation in its executive action or plenary legislative power. Art.334 is *strictosensu* concerns with political reservation of Art,330; Art.16(4) envisages the reservation as measure of equality of opportunity for adequate representation for efficiency in the administration in public employment.

---

[23] See, Art. 243-D(5), Constitution of India which provides that, The reservation of seats under clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in article 334."

[24] Art.334 originally stipulated that reservation of SCs and STs in the House of the People or State Legislative Assembly would continue only for ten years and thereafter it would automatically come to an end. Every ten year through constitutional amendment act, the number of years is changed, for example, from ten years to presently seventy years through Constitutional (One Hundred and Twenty Sixth) Amendment Act has replaced the word the word sixty years to seventy years.

Having laid down the distinction between Art.330 read with Art.334 and Art.16(4). It is imperative here to see what is it that a reservation is consists of. Supreme Court of India has explained the meaning of the term reservation as used in Art.16(4).[25] It stated,

> "Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts." The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The Constitutional scheme and context of Article 16 (4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration."

A reservation, therefore, is a special and preferential treatment of varying degrees. The scope and ambit of the term reservation under Art.16 (4) has various categories, of which reservation is the highest form of special treatment and other categories of special treatments are concession, preference and exemption.

An illustration of what are the other categories of special treatment that constitutes reservation, than the reservation itself as special treatment for the purpose of Art.16(4), is N. M. Thomas case.[26] The facts of the case was that State Subordinate Service Rules, 1958 laid down the rule that no person shall be eligible for appointment to any service or any post unless he possessed such special qualifications and has passed such special tests as maybe prescribed in that behalf in the Special Rules. A departmental test was laid down for internal candidate who were seeking promotion from a lower division clerk to the next higher post of upper division clerk. For such internal candidates the Government of Kerala made it obligatory for an employee to pass the special departmental tests. Later on, Rule 13A was introduced sometime which gave

---

[25] See, *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 215: AIR 1993 SC 477. The law was laid down by the Supreme Court while answering the question "whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?" Prior to this case Supreme Court in *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310: AIR 1976 SC 490, per Beg. J., described reservation as "to keep back or hold over to a later time or place for further treatment."

[26] See, *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310: AIR 1976 SC 490.

temporary exemption from passing the departmental tests for a period of two years.

The rule also provided that an employee who did not pass the unified departmental tests within the period of two years from the date of introduction of the test would be reverted to the lower post and further said that heshall not again be eligible for appointment under this rule. Out of 51 vacancies, which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. A Harijan Welfare Association represented to the State Government that a large number of Harijan employees in the State service were facing immediate reversion as a result of this rule and requested the Government to grant exemption in respect of Scheduled Castes and Scheduled Tribes employees from passing the obligatory departmental tests for a period of two years with immediate effect. Accordingly, the State Government introduced rule 13AA giving further exemption of two years to members belonging to Scheduled Tribes and Scheduled Castes in the service from passing the tests referred in Rule 13 or Rule 13A.

It was argued before the court that that Art.16(4) permits only reservations in favour of backward classes but not such an exemption.

Supreme Court found the Rule 13AA not to be violative of Art.14 and Art.16(1) of the Constitution of India. The Court reasoned that,

> "If there is a rational classification consistent with the purpose for which such classification is made equality is not violated…There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Under Art.16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class."

Most importantly the Apex Court stated that idea of reservation is inherent in the idea of equal opportunity,[27]

> "Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Preferential representation for the backward classes in services with due regard to administrative efficiency is a permissible object and backward classes are a rational

[27] See, *id*, Also see, *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212: AIR 2007 SC 71.

> classification recognised by the Constitution. Therefore, differential treatment in standards of selection is within the concept of equality."

The Constitutional Scheme of Reservation under Art.16 (4) in public employment or constitutional appointments: The constitutional scheme of reservation in public employment can be categorised as; expressed and inherent (latent); and as power and right. The express provision for reservation is contained in Art.16(4), which empowers or enables to state to do so, but does not constitute a right. Inherent scheme of reservation in public employment constituting a fundamental right is scattered around various provision of the constitution, viz. Preamble, Art.14,[28] Art.16(1),[29] Art.335[30] read with Art.14 or Art.16(1) and Art.124(3)[31]read with Art. 14 or Art.16(1), and Art.76(1) read with Art.14 or Art.16(1). It is imperative here mention a distinction between public employment and constitutional appointment, public employment would be something which is subject matter of Art.16 read with Part XIV. Constitutional appointment may not be considered as an employment of the nature of services, arguably, subordinate to constitutional functionaries, these are appointments through the agencies of public service commission as envisaged under constitution and are subject to doctrine of pleasure under Art. 310. Constitutional appointments would be appointments made by constitutional functionaries inter se, for example, Art.124 envisages President to appoint Chief Justice of India or other puisne Supreme Court Judges who are qualified to be so.

Let me first discuss the express provision in the Constitution. The express provision for reservation is laid down under Art.16(4). It states that, "*Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State*." Although, Art.16 (4) does not use the word public employment, instead it uses the word 'services'; however, marginal note of Art.16 uses the phrase "*Equality of opportunity in matters of public employment*." It is settled law that marginal notes of a section or article, in case of constitution may not be looked at for the purpose of construing the section.[32] However, the *side-note although it forms no part of the section, is of some assistance,*

---

[28] Art. 14 contains provisions that ensure equality before law and equal protection of law to every person in India.

[29] Art. 16(1) provides that "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

[30] Art. 335, Constitution of India provides for the claims of members of the Scheduled Castes and the Scheduled Tribes to services and posts of public employment.

[31] It might be argued that appointment to a Supreme Court, as its Judge might not be a public employment. If it were to be considered as public employment the claim would lie in Art.16 (1), if not, the fundamental right would be traced in Art. 14.

[32] See, *State of Bombay* v. *Heman Santlal Alreja*, 1951 SCC OnLine Bom 71: AIR 1952 Bom 16.

inasmuch as it shows the drift of the section.[33] Without deliberating much further it becomes quite clear from the phrase 'service under the state'[34] read with words appointment and posts makes it an public employment. Apex Court[35] has this to say while recognizing the significance of public employment,

> "Therefore, the concept of 'equality of opportunity' in public employment concerns an individual, whether that individual belongs to general category or backward class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a backward class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimization of these conflicting interests and claims."

Art.16 (4) does not use the word employment, instead uses the word appointment or post, however, Art.16(1) does use the word employment and appointment. It must also be noticed that former talks about 'service under the state' and later speaks of 'any office under the state'. The word office means 'position of authority or service, typically one of a public nature. Service, as noun, means, inter alia, 'a period of employment with a company or organization'.

Art.16 (4) is an enabling clause or enabling provision, which empowers the state to make reservation in favour of any 'backward class of citizens'.An enabling provision grants discretionary power to the state vis-à-vis certain obligation or duty that it must perform keeping in mind the societal needs and conditions. They are enacted to balance equality with positive discrimination. However, an enabling provision does not create a right therefore, it is non-enforceable. The nature and law of enabling provision with regard to Art.14 and Art.16 has been explained by Apex Court,[36]

> "The object in enacting the **enabling provision**s like Articles 16(4), 16(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated

---

[33] See *Sr. V.J. Dhanapal* v. *Union Bank of India* – Madras High Court: Appeal No.: C.R.P (PD). No. 3697 of 2017; Judgment Date,: 17-Jan-18.

[34] A clue can also be drawn from Part XIV of the constitution that deals with the topic of Services Under the Union and States. This whole part is concerned with the employment in Union or State Government.

[35] See, M. Nagraj v. Union of India, (2006) 8 SCC 212: AIR 2007 SC 71.

[36] See, M. Nagraj v. Union of India, (2006) 8 SCC 212: AIR 2007 SC 71.

> above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that **enabling provision**s are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed here in above. Therefore, there is a basic difference between 'equality in law' and 'equality in fact'."

For any reservation under Art.16(4) to exist there must be an action by the State, executive or legislative.[37] These reservations can only be made for 'any backward class of citizen' which is not 'adequately represented in the services in the state'. Consequently, before state could apply its powers therein to make any reservation, it has to satisfy that reservation is made for 'any backward class of citizens' who are not adequately represented in the public employment. The power under Art.16 (4) cannot be used if the beneficiary of reservation does not belong to any backward class of citizen. In the words of Apex Court,[38] "*The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in.*" This discretionary power under 16(4) would be unconstitutional if in a given case the exercise of power by the state overlooks or disregard these conditions. Who constitute 'any backward class citizens' is not the subject matter of this essay; therefore I would not delve into that. Supreme Court has answered this question in very many cases of which Indra Sawhney is final words.

---

[37] See, Indra Sawhney v. Union of India, 1992 Supp (3) SCC 215: AIR 1993 SC 477, "Accordingly, we hold, agreeing with Balaji, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case." Indra Sawhney approved that findings of *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649, "Then it is urged that even if special provision can be made by the State under Art. 15(4) the said provision must be made not by an executive order but. by legislation. This argument. is equally misconceived. Under Art. 12 the State includes the Government and the Legislature of each of the States, and so, it would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides, where the Constitution intended that a certain action should be taken by legislation and not by executive action, it has adopted suitable phraseology in that behalf Articles 16(3) and 16(5) and are illustrations in point. Both the said sub clauses of Art. 16, in terms, refer to the making of the law by the Parliament in respect of the matters covered by them. Similarly, Articles 341 (2) and 342 (2) expressly refer to a law being made by Parliament as therein contemplated. Therefore, when Art. 15(4) contemplates that the State can make the special provision in question, it is clear that the said provision can be made by an executive order."

[38] See, *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212: AIR 2007 SC 71.

Art.16 (1) and Reservation in public employment or constitutional appointments: Art.16(1) states that, "*there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State*." Art.16 (4) is a facet of Art.16(1).[39] Art.16 as a whole is in an extension of fundamental right to equality as enshrined under Art.14 for matters of power of state to make a reservation in the public employment.[40] Article16 (4) is merely an enabling provision and not fundamental right,whereas Art.16(1) is a fundamental right because it is a part of Art.14.

It permits reasonable classification vis-à-vis equality of opportunity in public employment. One question that regularly came up to the Supreme Court was as to the relationship between Art.16(1) and Art.16(4). The argument was that reservation is a violation of general rule of equality of opportunity of Art.16(1). Since reservation in public employment has been expressly provided under Art.16(4), therefore it is exception to the rule of Art.16(1).

In other words, Art.16(1) prohibits and proscribe any kind of reservation in the public employments because it mandates that there shall be "*equality of opportunity for every citizens of India*", whereas Art.16(4) expressly empowers the state to make reservation for any class of backward citizens. Therefore Art.16(4) violates, arguably, the principle of equality under Art.16(1), and this violation has a constitutional sanction. Therefore, any inequality in opportunity of public employment must be restricted to scheme of Art.16(4), and anything beyond and over that would be violative of fundamental right of equality under Art.14, in general, and Art.16(1), in particular.

Nevertheless, Art.16(4) is part of the scheme of Art.16, therefore, the reservation envisaged thereunder is an exception to the principle of equality of Art.16(1). For example, it was argued that if State decides to extend the reservation to physically disabled group of people,[41] not as any class of backward citizens, but independent from them, this will be violative of Art.16(1) because it provides for the equality of opportunity rule in public employment and at the same time not sanctioned under Art.16(4). Thus, for physically disabled people to claim reservation in public employment they must be classified as any

---

[39] See, *Ajit Singh* v. *State of Punjab*, (1999) 7 SCC 209; also see, *Indra Sawhney* v. *Union of India* 1992 Supp (3) SCC 215: AIR 1993 SC 477; *State of Kerala* v. *N.M.Thomas*, (1976) 2 SCC 310: AIR1976 SC 490.

[40] See, *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 215: AIR 1993 SC 477, "Article 14 enjoins upon the state not to deny to any person "equality before the law" or "the equal protection of the laws" within the territory of India…The content of the expression "equality before the law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV…." Also see, *M. Nagraj* v. *Union of India*, (2006) 8 SCC 212: AIR 2007 SC 71, the Supreme Court stated while citing Indra Sawhney, "pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1), which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of principle of equality under Article 14."

[41] See, *Siddaraju* v. *State of Karnataka*, (2020) 19 SCC 572.

backward class of citizen by the state, and in the absence of such classification, state would be barred to exercise of power under Art.16(4). By the same token, if the State however, decides to extend the reservation the Mushar community (a community that eats rats) reservation in public employment as the group has been identified as backward class of citizens,[42] this would be valid but as an exception to Art.16(1). The SC in Indira Sawhney rejected the argument,[43] it explained the scope and ambit of Art.16 in following words, "*we wish to clarify one particular aspect. Article 16 is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article. 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Clause (1) of Article 16 appointments and/or posts can be reserved in favour of a class.*"

While answering the specific question that whether Art.16(4) in an exception to Art.16(1), it decided,

> "In our respectful opinion, the view taken by the majority in Thomas is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that Clause (4) of Article 16 is not exception to Clause (1) of Article 16. It is an instance of classification implicit in and permitted by Clause (1)."

Further while answering the question, whether Art. 16(4) is exhaustive of the very concept of reservations, it decided that,

---

[42] The determination of " any backward class of citizen' could be done under Art.340, where President may by order appoint a commission to investigate the conditions of socially and educational backward classes within the territory of India and difficulties under which they labour. Once a report of the commission would form the factual background of the backwardness of a community, it would require the state to apply the rule of equality through reservation and transform in into equality in fact based on statistics and data of report.

It must be kept in mind all the time that 'any backward class of citizens' is neither qualified with the word 'castes' or 'socially and educationally'. It simply uses the word 'any backward class of citizens', there can be many such groups identifiable as backward class of citizens, which might not necessarily just be caste.

[43] See, *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 215: AIR 1993 SC 477.

> "we are of the opinion that Clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in Clause (1) is exhausted thereby. To say so would not be correct in principle."

However, while recognizing that reservation is possible under Art.16(1), SC warned that it should be used in very exceptional situation. In the words of SC, *"It is in very exceptional situations, and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under Clause (1).*"[44]

Last but not least, the answer to the question "whether Art. 16(1) does not permit any reservations", was also given in negative. It held that, "*we must reject the argument that Clause (1) of* Article 16 *permits only extending of preferences, concessions and exemptions, but does not permit reservation of appointments/posts.'*"[45]

V. ARTICLE 16-FACET OF ARTICLE 14

The conclusion that could be drawn from the Indira Sawhney case is that Art.16(4) is an enabling provision, but Art.16(1) is a fundamental right as well as enabling provision. Although, the court did not clarify which facet of Art.14 is Art.16(1)? Art.14 has two independent fundamental rights and both cannot be termed as one and same thing or duplicate or other. In simple words, equality before law is not and cannot be identical, either in its content or form or, both, to equal protection of laws. Therefore, question arises which facet of Art.14 is explicitly present in Art.16(1) and which is latent. It is safe to deduce by perusing the text of Art.16(1) that patent in its language is equality before the law, and latent in it is, equal protection of the laws.

One argument could be that equal protection of laws cannot be read in the text of Art.16(1), for simple reason that it is not expressly written thereunder. If that be the proposition, it would result in Art.16(1) only representing or containing equality before the law aspect of Art.14. In other words, it could be argued that since Art.16(1) is mere extension of what is already present in Art.14, thus, former restricts the application of fundamental right of equality before the law to the limited aspect of opportunity in public employment. And equal protection of laws clause has been given limited application to the extent of identifying any backward class of citizen and give the reservation in public employment. Consequently, I could argue that Art.16(1) represents equality

[44] *Ibid.*
[45] *Ibid.*

before the law of Art.14 to the limited field of public opportunity, and equal protection of the laws is present in Art.16(4). Now, the power to distinguish for positive discrimination is to be traced in equal protection of the laws clause, and not in the equality before the law clause. Consequently,Art.14 is containing two different and independent fundamental rights of formal equality and proportional equality or equality in fact, therefore Indira Sawhney decision would be an erroneous judgment, because it decided that reservations can be given under Art.16(1). Equality before the law cannot have two meanings one for Art.14 and another for Art.16(1). Further, it will be absurd to argue that intelligible differentia is possible under equality before the law clause of Art.14, because SC itself has laid in umpteen number of case laws that power to make laws making differentiation without discrimination[46] is distinct feature of equality protection of laws.

How do we reconcile the case laws of Supreme Court on the relationship between Art.14 and Art.16(1) is an intriguing question then? In other words, Art.16(1) is equality before law and Art.16(4) equal protection of laws, former is fundamental rights and later is merely an enabling clause, Lets imagine a hypothetical question, if Art.14 merely stated that, "The State shall not deny to any person equality before the law within the territory of the law", could SC interpreted Art.14 as containing the enabling power of state to discriminate? While researching the concept of equality before the law, it would have always resulted as creating a republic form of democratic state, and at the most arbitrariness could have been found to be part of the scheme thereof. American cases would have suggested that enabling power of affirmative action is a consequence of 'equal protection of laws', and not of equality before law. Perhaps SC would have read equality before law containing the provision of equal protection of the laws.

It is prudent here to mention the rule of interpretation of constitution as laid down by HC of Bombay[47] "*In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than words themselves. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance.*" SC in re Gujarat Assembly[48] further explained the rule of interpretation of constitutional provisions,

> "In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than words themselves. The significance of the change

[46] See, *E.V. Chinnaih* v. *State of A.P.*, (2005) 1 SCC 394, in this case it was held by the SC that a legislation is not amenable to challenge as being violative of Art.14 if its purpose is to give effect to Arts.15 and 16. Also see, *Preeti Srivastava* v. *State of M.P.*, (1999) 7 SCC 120.

[47] See, *Vijay Namdeorao Wadettiwar* v. *State of Maharashtra*, 2019 SCC OnLine Bom 2100.

[48] See, *Special Reference No. 1 of 2002, In re*, (2002) 8 SCC 237. Also see, *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324: AIR 1993 SC 1804.

> of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance the line of their growth. It is aptly said that the intention of the Constitution is rather to outline principles than to engrave details."

The constitutional jurisprudence on Art.14 and Art.16 in India is unequivocal that former contains two fundamental rights of equality before the law and equal protection of the laws, and Art.16(1) contains both component therein, at least post Thomas and Indira Sawhney judgment.

VI. IS RESERVATION A FUNDAMENTAL RIGHT

The scheme of fundamental rights, as far as enforceability is concerned, in Part III is governed by Art. 13(1) and Art.13(2) read with Art.32. The former declares all pre-constitutional laws void to the extent of their contravention with the substantive fundamental rights provided from Art.14 to Art.32, later proscribes the state, as defined under Art.12, to not to make any law which abridges or takes away fundamental rights and if the state does, then such laws are void to the extent of their contravention with the fundamental rights. The question of reservation, in public employment,is a fundamental right or not would be governed through the combined reading of Arts.14 and 16 and 19(1)g), these are substantive rights, which gets teeth under Art.13(2).Supreme Court in no uncertain terms in Indira Sawhney case has made it the law of the land that, "reservation is fundamental rights" because it can be made not only under Art.16(4), which is an enabling provision, but it can also be made under, Art.16(1) which is enforceable fundamental right. In the ratio of Indira Sawhney, SC held that,

> "Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' - as explained in this Judgment. (Para 60) (3)(a) A caste can be and quite often is a social class in India."

A substantive fundamental right is of two kinds; one caste a negative obligation on the state and another castes positive obligation on the state. SC explained the meaning of positive and negative obligation on the state vis-à-vis Art.19 in following terms,[49]

[49] See, *Indibily Creative (P) Ltd.* v. *Govt. of W.B.*, 2019 SCC OnLine SC 564.

> "Article 19 stipulates that all citizens shall have the freedoms which it recognises. Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing 'negative' restraints on the state these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained."

Further in Indian Medical Association[50] the SC held that,

> "The courts could of course, also, impose positive constitutional obligations on the State, where the abnegation of those positive and affirmative obligations, encoded within fundamental rights itself, were so gross as to constitute a fraud on the face of the Constitution."

There is no doubt that Art.16 (4) is an enabling clause and not a fundamental right, however, it is equally true that Art.16 (1) is a fundamental right of reservation in the public employment. The only safeguard that has been flagged by the SC is that beneficiary of intelligible differentia thereunder [Art.16 (1)] must not be used for all and sundry.[51] A jurist is not certainly all and sundry given it is expressly mentioned under Art.124(3)(c).For example, Art.16 (1) has to be read in conjunction with Art.335. Art.335 posits that state is under constitutional obligation vis-à-vis appointments in public employment, i.e. services and posts, to consider the claims of members of Schedule Caste and Schedule Castes. Let us understand the relationship between Art.335 with Art. 16(1) and Art.16(4). If the state while exercising its power under Art.16 (4) classifies any backward class of citizens sans the Schedule Caste or Schedule Tribe, i.e., Schedule Caste (SC) are not classified as 'any backward class of citizens' or Schedule Tribes (ST) are not being classified as the same, wouldn't it defeat the claim under Art.335. Therefore, the question to ponder is that 'is claim of SC and ST under Art.335 sanctioned only under Article 16(4) or the claims could also be honoured under Article 16(1) and Article 14. Let's assume, in a notification identifying 'any backward class of citizens' Union Executive has not recognized Schedule Tribes (ST) as the class of person who are beneficiaries of Art. 16(4), does that mean ST's claim have been exhausted and rendered inconsequential? Must SCs and/or STs be backward class of citizen to enjoy claims of Art.335?

Now, the question, therefore, is what is Art.335, is it a mere constitutional provision, which does not constitute a claim or right of the people of ST

---

[50] See, *Indian Medical Assn.* v *Union of India*, (2011) 7 SCC 179.

[51] See, *Indira Sawhney* v. *Union of India*, 1992 Supp (3) SCC 215: AIR 1993 SC 477.

community or is it a constitutional right for the community of SC and ST beyomd Article 16(4)? Could a community, other than SC and ST constitutionally force or pursue, say under Article 32, the State under Art.16. Whether under Article 16(4) for it to be declared as any backward class of citizens, to exercise its power thereunder, or under Article 16(1) to grant them reservation in any other capacity as a class of citizens which is not backward class of citizen? Let's analyse a different scenario, if the member of an ST community takes an offence to the proposition that they should be clubbed with people who are 'backward', rather they claim the representation in public employment because of uniqueness of their society and not because of their backwardness. Indeed, many tribes in North-East of India has converted to religions such as Christianity, so the social backwardness can't be ascribed to them,[52] and Supreme Court has made it very clear there can be no classification on the sole ground of economic reasons.

Instances of such claims or constitutional sanction, i.e. of intelligible differentia, to certain class of persons to a public employment or constitutional appointments are to be found in Constitution itself, viz. Art.124 (3), Art.76 (1) and Art.335. These provisions are ***constitutional intelligible differentia,*** which are in-built in the constitutional scheme of things. A constitutional intelligible differentia is, therefore, a constitutional right favouring such people and creating a positive obligation on all the organs of the state to honour their constitutional promise. The promise, inter alia, to the people of India is that of equality of opportunity in our preamble. This pledge and constitutional intelligible differentia take precedence over statutory intelligible differentia because the constitutional framers did not want it to be left to the political consideration of future governments.

Whatever be the jural classification of these constitutional provisions [Article 335 or Article 124(3) (c)], i.e., whether a claim under public employment or constitutional sanctions of equal protection of the laws, they do create a legitimate expectation which is enforceable under Art. 14, or Art. 16 (1). Supreme Court, in the context of appointment under Art.124, itself has emphasized that it is mandatory for the state to give due consideration every legitimate expectation. Supreme Court, in the context of appointment under Art.124, itself has emphasized that it is mandatory for the state to give due consideration every legitimate expectation. In the words of Supreme Court in **Re: Presidential Reference Case**[53]

> "…Apart from recognising the legitimate expectation of the High Court Judges to be considered for appointment to

[52] In Indra Sawhney Supreme Court has decided that a group of people from other religions could also be catagorised as 'any backward class of citizens'' within the ambit of Art.16 (4). *Ibid*.

[53] See, *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739: AIR 1999 SC 1.

> the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented.
>
> Due consideration of every legitimate expectation in the decision making process is a requirement of the rule of non-arbitrariness and, therefore, this also is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court. Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority."

Thus, a legitimate expectationis a claim that obliges the State under Art.l4 to take positive action to fulfill their duty to take action to fructify these claims. In the absence of a statutory action or executive action to fulfill these constitutional duties, they would be enforceable in the same manner as violation of a fundamental right through the instrumentality of a statute or executive action. Enforceability[54] of fundamental rights need not be adversarial, i.e., if there is a claim of an individual in the constitution, it should not first wait for action or inaction.

Enforceability of fundamental rights under Art.16(1): As seen above in Medical Association the Supreme Court has held that it could impose positive constitutional obligations on the State, where the rejection of those positive and affirmative obligations are encoded within fundamental rights itself. It is very clear that State is bound to appoint jurists as Jurists as the Supreme Court Judge. Supreme Court of India is a constitutional court,[55] it is not merely

---

[54] See, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.

[55] In the words of Hans Kelsen, "The application of the constitutional rules concerning legislation can be effectively guaranteed only if an organ other than the legislative body is entrusted with the task of testing whether a law is constitutional, and of annulling it if-according to the opinion of this organ- it is "unconstitutional." There may be a special organ established for this purpose, for instance, a special court, a so called "constitutional court"; or the control of the constitutionality of statues, the so called, "judicial review" may be conferred upon the ordinary courts and especially upon the supreme court. The controlling organ may be able to abolish completely the "unconstitutional" statute so that it cannot be applied by any

the highest appellate court of law. It has original jurisdiction such as Art.131, 32 and power of judicial review which makes it more of a negative legislator[56] then a regular Court of Appeal.

Additionally, Art.124 (3) envisages three kinds of eligible person who must be appointed as Supreme Court Judge, given the constitutional character thereof. Jurists has been made eligible to be appointed at SC. Undoubtedly a jurist must be distinguished from a lawyer and Judge as qualification for a judge who could be appointed as SC Judge, otherwise 124(3)(c) would be rendered meaningless. Moreover, a jurist is not a person who is qualified to be Judge of a High Court.[57] Therefore, Art.124 (3)(c) is of great significance and cannot be rendered as dead letter of law in the constitution, which has been effectively repealed, as it does not find any mention in memorandum of procedure of appointment of Supreme Court Judges.[58] A perusal of the procedure that a collegium needs to follow for the suitability of a prospective eligible candidate leaves no room of uncertainty that the design and scheme of collegium only considers the eligible person who are either 'Advocate' of any 'Bar' or a Judge at the 'Bench' of any High Court. Similarly, Art.76 envisages that anyone who is qualified to be SC Judge under Art.124(3) could be also appointed as Attorney General of India.

These provisions are unequivocally part of Art.14 and Art.16(1) creating legitimate expectations which creates a positive obligations for the State to create a reservation in favour of a jurist. Given the wordings of Art.124 (3)(c), the name of Jurist may be recommended by the President (read Ministry of Law and Justice) for their approval. One third of the total strength of a sanctioned number of judges of SC by 'The Supreme Court (Number of Judges) Act, 1956'[59] which is thirty three at the moment and thirty four including the Chief Justice of India.

---

other organ." See, Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution", 4 J. Pol. 183, 187(1942). Also see, Tom Ginsburg, "Building Reputation in Constitutional Courts: Political and Judicial Audiences", 28 Ariz. J. Int'l & Comp. L, Vol. 28. No. 3, 539-568. <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2441&context=journal_articles>. (Accessed on 5 September 2020) For the importance of the Kelsenian model of Constitutional Courts and their importance.

[56] ibid. for discussion on Jurist and its meaning see, Abhishek Mishra, "Collegium and Appointment of Judges at Supreme Court: Has Supreme Court Become Imperium in Imperio", 9 RMNLUJ, 2017, pp. 18-41.

[57] See, Art. 217(2), Constitution of India.

[58] See, Memorandum Showing the Procedure for Appointment of the Chief Justice of India and Judges of the Supreme Court of India <https://doj.gov.in/appointment-of-judges/memorandum-procedure-appointment-supreme-court-judges> (Accessed on 19 October 2020).

[59] See, The Supreme Court (Number of Judges) Amendment Act, 2019 with effect from 9th August 2019, <http://kja.nic.in/data/pdf/hc-cir-amd/37%20OF%202019%20-%20THE%20SUPREME%20COURT%20(NUMBER%20OF%20JUDGES)%20AMENDMENT%20ACT,%202019.pdf>. (Accessed on 19 October 2020).

The question is how these provisions could be enforced or could the state be compelled to appoint a jurist as Supreme Court Judge? Answer is yes, however, the arbiter in this writ petition would be Chief Justice of India. This again opens the Pandora's Box as to the justiciability of appointment, following is the SC's opinion[60] as far as justiciability of appointment of SC judges is concerned,

> "Justiciability Appointments and Transfers: The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judiciary review of those decisions, which is ordinarily needed as check against possible executive excess or arbitrariness. Plurality of Judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness or bias, even subconsciously, of any individual. The judicial element being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in. other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of Judges information of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness…
>
> It is therefore, necessary to spell out clearly the limited scope of judicial review in such matters, to avoid similar situations in future. Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision making…"

VII. CONCLUSION

There is no doubt that reservation is fundamental right under Art.16 (1) and Art.14 for all those who are not 'any backward class of citizens'. The beneficiary of reservation is not just 'any backward class of citizens', there are and there could be other beneficiaries who are not 'any backward class of citizens'.

---

[60] See, *Special Reference No. 1 of 1998, In re*, (1998) 7 SCC 739: AIR 1999 SC 1.

The Supreme Court in Indira Sawhney case has settled the question. Anyone who is claiming reservation under Art.14 and Art.16(1) must satisfy that there are exceptional and strong constitutional grounds which requires them to claim it from the state. Supreme Court can direct the state to fulfill their positive obligations, in case there is no action by the state in terms of granting them reservation.

I have made a case for Jurist, read 'academician' who are qualified for the appointment as Supreme Court Judges and deserves reservation at the constitutional posts. One interesting aspect of this is that these rights of reservation of Jurist can't be enforced under Art.32 of the Constitution because of the decision on justiciability of appointment of judges in catena of its judgment.

Although the many cases SC has also held that it can obligate a state to enforce a positive obligation, this decision of SC is in direct conflict with the Re: Presidential Reference (1999) where the SC held that appointments at SC are unenforceable. The position of fundamental right of reservation of jurist becomes more convoluted because of the Memorandum of Procedure for the appointment of judges and collegium system because Collegium considers appointment under Art.124 (3) as a subject matter of Bar and Bench, whereas appointment at SC of a Judge is subject matter of Bar, Bench and Academia. To conclude, I must reiterate the SC's position on the matter of non-enforcement of a positive obligation, which is content of fundamental rights, is a FRAUD on the constitution. The positive obligation into enforcement fundamental rights of Jurist to be appointed as Supreme Court judge with a quota of thirty three percent of total sanctioned strength must be respected by SC and revisits its case regarding the non-enforceability of appointment of judges at SC. Anything less than this is Fraud on the constitution of continuing nature.