Article 16(4) A: An Amendment or an Overhaul?

Gautam Rohidekar*

The concept of 'reservations' has been an essential ingredient of our constitutional history since independence. It has elicited different responses from different institutions and today plays an important part in politics, and matters of national governance and has became one of the most important and essential policy decisions for any political party that has assumed the role of governing the country. The author intends to examine the latest chapter in the continuing saga of 'reservations' i.e., reservation in the matter of promotions.

On June 17th, 1995 the latest amendment to the Constitution was brought into force. It reads thus:

Article 16 (4) A:- Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

A cursory look at the amendment would lead to one important but simple conclusion. Article 16(4)-A is couched in almost the same language as Article 16(4) with one important difference. Article 16 (4)-A refers to just SC & STs but Article 16(4) deals with 'backward class of citizens'. This obviously means that OBCs are not covered by Article 16 (4)-A. Whether the omission was one that was intentional or one of negligence one may never know, but it is a significant omission which perhaps would be set right in the future.

The reason for this amendment is not difficult to determine. In *Indra Sawhney V. Union of India,*[1] it was clearly held by 8 judges out of 9 that such a rule i.e., providing for reservation in promotions is unconstitutional. Further the majority also gave the administration 5 years time to slowly weed out the rule.[2] The 5 years period was from the data of judgment in *Indra Sawhney*. It is obvious that this amendment wishes to side step the ruling in *Indra Sawhney* and continue the rule of reservation in promotions.

Several reasons were given in *Indra Sawhney* against this rule. After reviewing all the previous decisions,[3] B.P. Jeevan Reddy, J., specifically

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* III Year B.A., LL.B. (Hons.), National Law School of India University, Bangalore -560 072.

1. AIR 1993 SC 477.
2. *Ibid.*, at p. 573 (Per B.P. Jeevan Reddy, J.).
3. *General Manager, Southern Railway* v. *Rangachari,* AIR 1962 SC 36; *State of Punjab v. Hiralal,* AIR 1971 SC 1777; *Akhil Bhartiya Soshit Karamchari Sangh* v. *Union of India,* AIR 1982 SC 298.

overruled[4] the important cases which addressed this issue. The learned judge insisted on reading Article 16 (4) with Article 335[5] and said that if reservation in promotions was provided for, it would multiply the 'risk' already being suffered by the efficiency in administration by providing for reservation of people on non-meritorious considerations i.e., reservations, which has a direct effect on the efficiency of administration. It was also observed that it would cause a lot of 'heartburn' among colleagues in the same cadre of services i.e., people selected on merit and people who are reserved candidates. This would lead to the creation of a separate category apart from the mainstream. Further the phenomenon of "leap-frogging" i.e., less meritorious candidates making a faster journey through the hierarchy of cadres and acting as seniors to more competent people, was also cited.

Thonmen, J., agreed with the above reasons and also observed that if people are assured of promotions, they would have no incentive to work hard.[6] Further, he also advocated that 'in -house-training' i.e., special courses to teach the reserved candidates how to perform better at their job, would not be unconstitutional. At this point of time, a clarification has to be made. Reservation in promotions is only for those promotions with are made on the basis of merit. It is obvious that reservation cannot be provided for in the case of promotions by seniority.

Even later cases that have had to deal with this issue have not expressed any dissent from this judgement on this issue and have always ratified this principle. In *Union of India* v. *Virpal Singh Chauhan,*[7] it was observed "before parting with these appeals, we feel obliged to reiterate the principle affirmed in *Indra Sawhney* that providing reservation in promotions is not warranted by Article 16(4). The facts of these cases illustrate and demonstrate the correctness of the said holding. They also bring home the intractable problem that arise from such a provision. Problems that defy solutions. No more need we say on this aspect. The decision in *Indra Sawhney* speaks for itself." This makes it clear that the judiciary does not favour this rule in any manner whatsoever.

Since Article 16(4)- A is a constitutional amendment, the only issue to be addressed is whether the amendment violates any part of the basis structure of our Constitution. This theory was put forth in the well known case of *Keshavananda Bharati* v. *State of Kerala*[8] and has been expanded by further important cases. It had already been conclusively shown that Article 16(4)- A impairs efficiency of

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4. *Supra*, n. 1 at p. 572.
5. Art. 335: Claims of Scheduled Castes and Scheduled Tribes to services and posts-The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of the State.
6. *Supra*, n. 2, at p. 673.
7. 1995 (S) SCALE 648 at p. 670 (Per. S.C. Aggarwal and B.P. Jeevan Reddy, JJ.)
8. AIR 1973 SC 1461.

administration. Although administration of public affairs is a very important part of our constitutional scheme, its efficiency will probably not be considered as important as to form part of the basic structure of our Constitution. The need thus arises to look at some other aspects of this doctrine.

Equality is undeniably the most basic feature of our Constitution. There can be no argument over this proposition. Reservation in appointments and admissions was allowed because it purported to serve the goal of achieving larger social equality. It was said that society was unequal and this inequality had to be set right at the time of entry into a profession. But, in the case of reservation in promotions, the class which is being discriminated is at least economically equal. People serving in the same cadre get similar pay for the work they undertake. There is economic equality which is substantially different from what reservation in appointments purports to provide. It must be remembered that reservations in appointment is for all classes of posts and hence people can be recruited directly to higher posts thus making them move up the social ladder. On a macro level, this argument holds good. If people from one class i.e., SC, or ST, or OBC, can be recruited to a higher post, there is no reason to provide for reservation to their fellowmen who are in lower posts. The class as a whole benefits by the direct recruitment rule. The argument is very simple. There is no basis for discriminating against people who serve in the same cadre of services. Hence, the amendment violates equality, a very basic feature and definitely part of the basic structure of our Constitution.

If this argument is not acceptable, then the extent of operation of the amendment can be curtailed. Since Article 16(4)-A is couched in the same language as Article 16(4), the 50% rule propounded in *'Indra Sawhney'* would be applicable. Further, there is nothing in Article 16(4)-A which bars the operation of Article 335.[9] Hence, by reading both of them together the number can be further restricted to less than 50%. Such as interpretation would balance the claims of both efficiency and social justice.

Constitutional arguments apart, it is very clear that Parliament has tried to avoid the apex court's decision by using it's most powerful weapon i.e., the power to amend. It is conceded that policy choice has always been the prerogative of the legislature, but when such policy choice making tries to negate attempts at policy control by the judiciary it acquires an unacceptable colour. Recent history indicates that the Constitution and its interpretation by the Apex Court of the country is strong enough to stall any attempt at sacrificing constitutional principles of the altar of vote-bank politics. One can only hope that the Supreme Court will again rise to the challenge and live up to its reputation.

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9. In *'Indra Sawhney'* Article 16 (4) was read with Article 335.