

## RESERVATION AS A FUNDAMENTAL RIGHT: INTERPRETATION OF ARTICLE 16(4)

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### I. Introduction

From the time of drafting of the Indian Constitution to the current day judgments, the constitutional scope of reservations has remained contentious. In its initial judgments, the Supreme Court of India treated Article 16(4), which provides power to the State to make reservations for backward classes in public employment, as an exception to Article 16(1)<sup>1</sup>, which provides for equality of opportunity. It was further held that Article 16(4)<sup>2</sup> is merely an enabling provision, i.e. it is upon the discretion of the State to provide reservation for backward classes. This position was changed after the larger bench decisions in *State of Kerala v. NM Thomas*<sup>3</sup> (hereinafter “*NM Thomas*”) and *Indra Sawhney v. Union of India*<sup>4</sup> (hereinafter “*Indra Sawhney*”), as it was held that Article 16(4) is not an exception, but a facet of Article 16(1). However, the successive judgments have held reservations under Article 16(4) to be merely an enabling provision, and not a fundamental right.

This article critiques the approach of treating Article 16(4) as a mere enabling provision. It argues that Article 16(4) should be considered a fundamental right, because of judicial interpretation given in the cases of *NM Thomas* and *Indra Sawhney*. I argue that these judgments renewed the constitutional understanding about Article 16(4), which had taken a backseat due to a series of judgments during the first two and half decades after the enactment of the Constitution. I further state that the judicial approach of still treating Article 16(4) as an enabling provision is a result of breach of the precedent in *Indra Sawhney*. I add that the fundamental right to seek reservation is available to Scheduled Castes (SCs) and Scheduled

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<sup>1</sup> Article 16(1) provides: “There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”

<sup>2</sup> Article 16(4) provides: “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.”

<sup>3</sup> (1976) 2 SCC 310

<sup>4</sup> 1992 Supp (3) SCC 217

Tribes (STs) by default, while it would be available to Other Backward Classes (OBCs) after fulfilling the conditions propounded in *Indra Sawhney*.

Part 2 of the paper analyses the trajectory of reservation cases which were delivered during the first two and half decades after the enactment of the Constitution. It narrates that the proposition of Article 16(4) being an enabling provision is linked with the judicial approach of considering Article 16(4) as an exception to Article 16(1). Part 3 discusses the constitutional shift which happened as a result of *NM Thomas* and *Indra Sawhney* decisions. It points out how Article 16(4) was read as consisting of a substantive right of representation. Part 4 analyses the judgments which came after *Indra Sawhney*. It scrutinizes how these judgments, delivered by comparatively smaller benches, deviated from the precedent of larger bench in *Indra Sawhney*. This part argues that the effect of *Indra Sawhney* judgment was chipped away with judicial indiscipline of later court decisions. Part 5 states that the courts ought to hold the State to accountability on implementing the fundamental right to reservation. It also presents an assessment of the possible extent of the fundamental right to reservation. In conclusion, Part 6 criticizes the judicial approach of restricting reservation provisions by one means or the other.

## 2. The ‘Utterly Unsatisfactory’ Judgments<sup>5</sup>

### 2.1 The First Setback from Madras High Court

The discussion on the scope of Article 16(4) must begin with the seven-judge bench decision in *State of Madras v. Champakam Dorairajan*<sup>6</sup> (hereinafter “*Champakam Dorairajan*”). Though the judgment did not directly deal with interpretation of Article 16(4), yet it had repercussions on the future interpretation of said Article and the idea of reservations.

The main premise of this case was a challenge to a reservation policy in form of a Communal G.O., in existence in erstwhile Madras State even before the commencement of the Constitution.<sup>7</sup> The Communal G.O. provided apportionment of the seats in medical and

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<sup>5</sup> I have borrowed this phrase from the speech of Dr. B.R. Ambedkar, which he made while presenting the first constitutional amendment and in reference to *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226. See *Parliamentary Debates*, Parliament of India (1951), page 9006-07, available at [https://eparlib.nic.in/bitstream/123456789/760696/1/ppd\\_18-05-1951.pdf](https://eparlib.nic.in/bitstream/123456789/760696/1/ppd_18-05-1951.pdf)

<sup>6</sup> AIR 1951 SC 226

<sup>7</sup> The Communal G.O. in Madras state was in existence since 1921. See Chintan Chandrachud, *The Cases That India Forgot*, Juggernaut Books (2019), page 113.

engineering colleges between distinct social groups according to certain proportions.<sup>8</sup> In 1950, the said policy was challenged in separate petitions by two Tamil Brahmins, Champakam Dorairajan and Srinivasan, before the Madras High Court on the ground that their fundamental rights under Article 15(1)<sup>9</sup> and Article 29(2)<sup>10</sup> of the Constitution were violated.<sup>11</sup> It was argued that the “two applicants would have been admitted to the educational institutions they intended to join and they would not have been denied admission if selections had been made on merits alone”, and not on basis of division of seats between different groups. Even though Dorairajan had not applied for admission in a medical college, the petitions were allowed by the High Court on 27 July 1950.<sup>12</sup> Reservations in higher education were declared unconstitutional in the same year when the Constitution came into force.

When the Madras State appealed, the Supreme Court, on 9 April 1951, upheld the decision of the High Court. The Supreme Court solely relied upon a plain reading of Article 29(2), and did not deal with the arguments made on Article 14 and 15. The Court held that Srinivasan was denied admission “for no fault of his except that he is a Brahmin and not a member of the aforesaid communities”. It was further added that “Such denial of admission cannot but be regarded as made on ground only of his caste”, which is prohibited by Article 29(2). Therefore, the Communal G.O. was struck down for being discriminatory.

The Court also rejected the argument put forward on behalf of the Madras State that the Communal G.O. fixing proportionate seats for different communities was giving effect to Article 46. It noted that Article 46 was a directive principle, which cannot override the fundamental rights. The Court relied on the wording of Article 16(4) to hold that since a similar provision was not present under Article 29, it significantly indicated that “the intention of the

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<sup>8</sup> Under the Communal G.O., for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis: “Non-Brahmin (Hindus) – 6; Backward Hindus – 2; Brahmins – 2; Harijans (Scheduled Castes) – 1; Anglo-Indian and Indian Christians – 1; Muslims – 1.

<sup>9</sup> Article 15(1) provides: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

<sup>10</sup> Article 29 which occurs in Part III of the Constitution under the head “Cultural and Educational Rights” and with marginal note “Protection of interests of minorities”, runs as follows: “(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

<sup>11</sup> Ajantha Subramaniam remarks that the timing of this case “signalled the effort by Tamill Brahmins to take advantage of a new post-independence political configuration”, where the support of the judiciary was sought against reservation in existence in Madras. See Ajantha Subramaniam, *The Caste of Merit: Engineering Education in India*, Harvard University Press (2019), page 209.

<sup>12</sup> Champakam Dorairajan v. State of Madras, AIR 1951 Mad 120

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.” The Court added that giving effect to Article 46 would have made Article 16(4) as “wholly unnecessary and redundant”.<sup>13</sup>

However, in its full reliance on Article 29(2), the Court made the preliminary error of considering this Article open to every citizen. Even in its plain reading, Article 29 dealt with “protection of interests of minorities”, as clearly indicated by its marginal note. Besides, Article 29, along with Article 30, deal with “Cultural and Educational Rights” of minorities (whether based on religion or language), as the overall content of the two Articles indicates. Brahmins, being one of the most dominant social groups, could not have therefore been covered within the meaning of Article 29.<sup>14</sup> The Court also considered the constitutional provisions in isolation to each other — an approach which was completely overturned in the 1970s.<sup>15</sup>

The implication of *Champakam Dorairajan* judgment was not just that it adopted a formal problematic interpretation or, what scholar Bastin Steuwer calls, “deceptive simplicity”<sup>16</sup>. It also laid down the foundation of a legacy against reservations in the country. As Steuwer has argued, the judgment started “a perennial discussion concerning reservations”<sup>17</sup> — whether caste-based reservations are discriminatory or unjustified, and contrary to the idea of merit. Harvard Professor Ajantha Subramaniam has aptly noted, “[The judgment] laid the groundwork for subsequent arguments about upper-caste rights as consistent with democratic principles and lower-caste rights as a violation of these principles”<sup>18</sup>. In later years, the debate shifted primarily to the constitutional question whether provisions regarding reservations, such as Article 16(4), are exception to the general principle of equality and non-discrimination.

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<sup>13</sup> In later years, the Supreme Court changed this approach, as it read fundamental rights and directive principles harmoniously. See *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

<sup>14</sup> In his writings, Dr Ambedkar had challenged the hegemony of Brahmins in public services. In 1928, he stated; “It is notorious that the public services of the country in so far as they are open to Indians have become by reason of various circumstances a close preserve for the Brahmins and allied castes. The non-Brahmins, the depressed classes and the Mohamedans are virtually excluded from them.” See Anurag Bhaskar, “Reservations, Efficiency, and the Making of Indian Constitution”, *Economic & Political Weekly*, Vol. 56, Issue 19, pages 42-49 (at page 46); See also Chintan Chandrachud, *The Cases That India Forgot*, Juggernaut Books (2019), page 121.

<sup>15</sup> See *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>16</sup> Bastin Steuwer, “Constitutional Crossroads: The shadow of the First Amendment”, *The Caravan* (30 April, 2021), available online at <https://caravanmagazine.in/books/law-first-amendment-constitution>

<sup>17</sup> *Ibid*

<sup>18</sup> See Ajantha Subramaniam, *The Caste of Merit: Engineering Education in India*, Harvard University Press (2019), page 210.

In response to the judgments of the High Court and the Supreme Court in this case, the provisional Parliament, which “had broadly the same composition as the Constituent Assembly”<sup>19</sup>, passed the Constitution (First Amendment) Act, 1951, which inserted clause 4 to Article 15.<sup>20</sup> The provision was inserted to clarify that “any special provision that the State may make for the educational, economic or social advancement of any backward class of citizens may not be challenged on the ground of being discriminatory”<sup>21</sup>. B.R. Ambedkar, as the law minister, used harsh words to criticize the *Champakam Dorairajan* judgment, and termed it as “utterly unsatisfactory”.<sup>22</sup> He added that the constitutional interpretation, such as in this judgment, done “to block the advancement of the people who are spoken of as the weaker class” must be prevented.<sup>23</sup> The first amendment to the Constitution thus solidified an understanding that “equality and non-discrimination must be read so as not to preclude affirmative action” or reservation.<sup>24</sup>

## 2.2 Article 16(4) as an exception to Article 16(1)?

Despite the first amendment, a critical view on reservations was continued by the Supreme Court. A challenge to reservation in public employment was heard by a Constitution Bench of the Supreme Court in *General Manager, Southern Railway v. Rangachari*<sup>25</sup> (hereinafter “*Rangachari*”). A writ petition to restrain the railway administration to implement a policy of reservation in promotions in posts of railway services was allowed by the Madras High Court. When the issue came in appeal, the Supreme Court considered the scope of Articles

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<sup>19</sup> It was a provisional Parliament, as the first general elections had still not happened, and were scheduled for winter of 1951. See Chintan Chandrachud, *The Cases That India Forgot*, Juggernaut Books (2019), page 123.

<sup>20</sup> Article 15(4) provides: “Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”

<sup>21</sup> “The Constitution (First Amendment) Act, 1951”, *Ministry of Law and Justice*, available at <https://legislative.gov.in/constitution-first-amendment-act-1951>

<sup>22</sup> Parliamentary Debates, *Parliament of India* (1951), page 9006-07, available at [https://eparlib.nic.in/bitstream/123456789/760696/1/ppd\\_18-05-1951.pdf](https://eparlib.nic.in/bitstream/123456789/760696/1/ppd_18-05-1951.pdf).

<sup>23</sup> *Ibid*

<sup>24</sup> See Bastin Steuwer, “Constitutional Crossroads: The shadow of the First Amendment”, *The Caravan* (30 April, 2021), available online at <https://caravanmagazine.in/books/law-first-amendment-constitution>. It must also be noted that the basic structure doctrine has been evolved to even defend constitutional amendments. In his concurring opinion in *Govt. of NCT Delhi v. Union of India*, (2018) 8 SCC 501, Justice DY Chandrachud explained: “it is necessary to remember that the exercise of the constituent power may in certain cases be regarded as enhancing the basic structure”. The first constitutional amendment can certainly be considered as enhancing the basic structure that equality and reservation go together.

<sup>25</sup> AIR 1962 SC 36

16(1), 16(4), and 335, to determine whether reservation in promotions is permissible under the Constitution. The judges agreed on the point that Article 16(1) covers all matters related to employment, including that of promotions, and that the SC/STs are inherently included within the meaning of “backward class of citizens” in Article 16(4).

However, only a majority decision of 3:2 held that reservation in promotions would be permissible under Article 16(4). Writing for the majority, Justice P.B. Gajendragadkar (as he then was) held that the power under Article 16(4) can only be applied to provide reservation in promotions, if the State is of the opinion that the backward class of citizens are not adequately represented in the services. This condition precedent in Article 16(4) was held to be referring to both quantitative as well as qualitative representation, i.e. adequate representation not only in lowest rung of services but also in senior posts.<sup>26</sup> Justices K.N. Wanchoo and N. Rajagopala Ayyangar disagreed on this point. Justice Wanchoo held that reservation at all levels of services or “even of a majority of them” would destroy the fundamental right under Article 16(1) or make it “practically illusory”. Justice Ayyangar was of the view that the term “inadequacy of representation” in Article 16(4) “refers to a quantitative deficiency in the representation of the backward classes in the service taken as a whole and not to an inadequate representation at each grade of service or in respect of each post in the service”.

Even though the conclusions were different, the judges were unanimous to declare Article 16(4) as an exception to Article 16(1). The majority noted that this position of Article 16(4) as an exception to the larger principles of equality and non-discrimination was similar to Article 15(4), which, as the majority of judges noted, was “an exception to the prohibition of discrimination on grounds specified in Article 15(1)”. Justice Wanchoo repeated several times in his dissenting opinion that “the exception (under Article 16(4) should not be interpreted so liberally as to destroy the fundamental right (under Article 16(1) itself”. Justice Ayyangar added in his dissent that Article 16(4) *enabled* the State to provide for reservation, “when once the State forms the opinion about the inadequacy of the service.”

All the judges also drew relation between Article 16(4) and 335. While the Court in *Champakam Dorairajan* was not ready to read Article 46 (directive principle) in consonance

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<sup>26</sup> Justice Gajendragadkar held: “The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well.”



with Article 16(4), the judges in *Rangachari* subjected Article 16(4) to Article 335<sup>27</sup>, which included the term “efficiency of administration” in considering the claims of SC/STs in the services. It must be noted that Article 335 is neither a fundamental right nor a directive principle. While the majority upheld reservation in promotions under Article 16(4), it also held that reservation of appointments or posts “mean some impairment of efficiency”<sup>28</sup>, and that “the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts.” The majority advised that “an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration”. Justice Wanchoo said that the consideration of efficiency is implicit in Article 16(4), even though it is not mentioned in the text of the Article. He noted that “efficiency of administration” is to be “jealously safeguarded even when considering the claims” of SC/STs. Justice Ayyangar agreed with Justice Wanchoo’s dissent, and added that there was an “inter-connection between Art. 16 and Part XIV dealing with Services, because Article 335 forms, as it were, the link between Part XIV and the provisions for reservation in favour of the backward communities in Art. 16(4)”.<sup>29</sup>

The *Rangachari* decision (both majority and minority) strengthened the discourse, critical of reservation, which was started in *Champakam Dorairajan*. What was called “merit” in *Champakam Dorairajan* was declared sacred by the name of “efficiency” in *Rangachari*.

### 2.3 Articles 16(4) and 15(4) read in same vein as Exceptions and Enabling provisions

The principles laid down in *Rangachari* were reinforced in *M.R. Balaji v. State of Mysore*<sup>30</sup> (hereinafter “*Balaji*”). A Constitution Bench was hearing the challenge to 68 percent

<sup>27</sup> Article 335 provided: “The claims of the members of the Scheduled Castes and the 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 a State.”

<sup>28</sup> Such a view has been proven as empirically incorrect and biased. See, Ashwini Deshpande and Thomas E. Weisskopf, “Does affirmative action reduce productivity? A case study of the Indian railways”, *World Development* (2014), Vol. 64, pages 169–180; Sukhadeo Thorat, Nitin Tagade, and Ajaya Naik, “Prejudice against reservation policies: how and why?” *Economic and Political Weekly* (2016), Vol. 51(8), pages 61–69.

<sup>29</sup> For a critique, see Anurag Bhaskar, “Reservations, Efficiency, and the Making of Indian Constitution”, *Economic & Political Weekly*, Vol. 56, Issue 19, pages 42-49.

<sup>30</sup> AIR 1963 SC 649

reservation provided to backward classes in engineering, medical, and other technical institutions in the erstwhile Mysore state. This reservation was divided as follows: 28% quota OBCs; 22% for More Backward Classes; 15% for SCs; and 3% for STs. This scheme was challenged on the ground that it is “irrational” and “is a fraud on Article 15(4)”. To adjudicate the issue, the Court had to determine the scope of Article 15(4). The interpretation of said Article was coming directly before a Constitution Bench for the first time.

Writing a unanimous verdict, Justice Gajendragadkar (who had previously authored the majority decision in *Rangachari*) held that since Article 15(4) was added as a response to the decision to *Champakam Dorairajan*, “there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15 and 29(2)”. The Court further held that “it would be erroneous to assume that the appointment of the Commission (under Article 340) and the subsequent steps that were to follow it constituted a condition precedent to any action being taken under Art. 15(4)”. It was added that “backwardness” under Article 15(4) must be “both social and educational”, and “not either social or educational”.

While it was noted that the interests of the society at large would be served by promoting the advancement of the weaker elements in the society, the Court treated the issue of social and economic justice as being contrary to the principle of equality. It was recorded that “for the attainment of social and economic justice Article 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Article 15 or 29(2)... for the citizens constituting the rest of the society”. Finally, it held that a “special provision contemplated by Art. 15(4) like reservation of posts and appointments contemplated by Art. 16(4) must be within reasonable limits”, and thus struck down the 68 percent reservation.

Viewing the reservation provided on a majority of seats as “subverting the object of Article 15(4)”, the Court, though “reluctant to say definitely what would be a proper provision to make” laid down a broad cap of 50% on reservations. It held, “Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case”. The Court introduced the 50% limit as it wanted to defend the notion of “merit”. It was stated: “The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations



of merit are completely excluded by whole-sale reservation of seats in all Technical, Medical or Engineering colleges or institutions of that kind.”

Relying upon his own observations on efficiency under Article 335 made in *Rangachari* case, Justice Gajendragadkar reiterated that any reservation “at the cost of efficiency of administration” is constitutionally impermissible. As the observations in *Rangachari* were made in context of reservation in services made under Article 16(4), Justice Gajendragadkar extended that “what is true in regard to Article 15(4) is equally true in regard to Article 16(4)”. The 50% limit was applied to Article 16(4) as well. However, the judge did not provide any reason for connecting the application of Article 335 (dealing with services) on Article 15(4), which generally dealt with reservation in educational institutions. Furthermore, while the case dealt specifically with interpretation of Article 15(4), the Court interpreted Article 16(4) to say that “unreasonable, excessive or extravagant reservation... would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency”.<sup>31</sup> In making these observations on Article 16(4), the Court added that “in this connection it is necessary to emphasise that Article 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary”. The only reasons to suddenly refer to Article 15(4) as an enabling provision seems to convey a similar proposition for Article 16(4) that it is also discretionary. The Court also started a simplistic, though flawed, narrative of linking backwardness with “primarily” poverty, which would continue to present era.<sup>32</sup>

In summary, the 50% limit in *Balaji* was based on the premise that Articles 15(4) and Articles 16(4) are exceptions to the Articles 15(1) and 16(1), and that there must be a limit on exceptions. In its readiness to set judicially crafted limitations on the reservations, the Court made broad observations on Article 16(4), even though the challenge in the case was primarily

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<sup>31</sup> *Supra* note 28.

<sup>32</sup> In *Balaji*, the Court noted: “It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty.” In a Constitution bench reference order (dated 27 August, 2020), *State of Punjab v. Davinder Singh*, (2020) 8 SCC 1, it was noted: “Reservation is a very effective tool for emancipation of the oppressed class. The benefit by and large is not percolating down to the neediest and poorest of the poor.”

based on the interpretation of Article 15(4).<sup>33</sup> Furthermore, the observation of Article 15(4) being an enabling provision was made in the connection of putting limitation on that Article, as it was read as an exception to Article 15(1).<sup>34</sup>

#### 2.4 The ‘Great Dissent’ of Justice Subba Rao

In the nine-judge bench judgment in *K.S. Puttaswamy (Retd.) v. Union of India*<sup>35</sup> (hereinafter “*Puttaswamy*”), the Supreme Court unanimously declared privacy to be a fundamental right. In his concurring opinion in *Puttaswamy*, Justice RF Nariman termed the dissenting opinion of Justice K. Subba Rao in *Kharak Singh v. State of Uttar Pradesh*<sup>36</sup> as a ‘great dissent’. In that case, Justice Subba Rao recognised a constitutional by protected right to privacy, while the majority opinion declined to recognise such a right.

In my view, the dissenting opinion of Justice Subba Rao in the Constitution bench decision in *T. Devadasan v. Union of India*<sup>37</sup> (hereinafter “*Devadasan*”) must also be considered as a ‘great dissent’.<sup>38</sup> Justice Subba Rao emphasized on the importance of reservation as a facet of equality, contrary to what the previous judgments held. In Part 3 of this article, I narrate that Justice Subba Rao’s position was later approved by larger benches.

In *Devadasan*, a policy of “carry forward rule”<sup>39</sup> was held unconstitutional by a majority of 4:1. The majority of judges noted, “In order to effectuate the guarantee each year

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<sup>33</sup> In *Indra Sawney*, this approach of *Balaji* was disapproved. It was noted, “Since the decision in *Balaji*, it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4)... In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words “socially and educationally” as does Clause (4) of Article 15... Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4).

<sup>34</sup> In *Balaji*, it was stated: “... like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasize that Art. 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.”

<sup>35</sup> (2017) 10 SCC 1

<sup>36</sup> (1964) 1 SCR 332

<sup>37</sup> AIR 1964 SC 179

<sup>38</sup> Ironically, Justice RF Nariman adopted an approach on reservation in *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396, which would be contrary to Justice Subba Rao’s views in *Devadasan*.

<sup>39</sup> “If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies

of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.” While discussing the *Balaji* judgment, the Court reiterated that Article 16(4) is by way of proviso or an exception to Article 16(1), and therefore “cannot be so interpreted as to nullify or destroy the main provision”. It was held that the “overriding effect of clause (4) on clauses (1) and (2) could only extended to the making of a reasonable number of reservation of appointments and posts in certain circumstances”. The need for maintaining the maintenance of efficiency of administration, emphasized in *Rangachari*, was reiterated in this case as well.

In his dissenting opinion, Justice Subba Rao questioned the premises of a strict judicial discourse on reservation which was built up in previous cases. As he noted, “Centuries of calculate oppression and habitual submission reduced a considerable section of our community to a life of serfdom”. It is to undo this situation, Justice Subba Rao held, that the Constitution introduced Article 16(4). It was further emphasized that “the expression ‘nothing in this article’ is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in an what by the main provision but falls outside it.” This was an important observation. Contrary to what previous judgments or the majority in *Devadasan* held, Justice Subba Rao held, “[Article 16(4)] has not really carved out an exception but has preserved a power untrammelled by the other provisions of the Article.”

For the first time, a judge of Supreme Court, even if in a dissent opinion, was treating the reservation provisions not as an exception to the larger equality principle, but an expression of it. How that power ought to be exercised, he noted, is on the discretion of the State, and not for the “Court to prescribe the mode of reservation.” Accordingly, Justice Subba Rao held “reservation of appointments can be made in different ways”, including the provisions for “carry forward” taking into consideration the “entire cadre strength”. However, he also noted that the power under Article 16(4) is directory and permissive.

Justice Subba Rao further questioned the generalised principles which were framed against reservations by previous judgments: First, Article 335 has no bearing in the matter of

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thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year”. See *Devadasan* (Justice Mudholkar’s majority opinion).

construing Article 16(4). Second, even if the appointments were made on minimum qualifications, it is for the State, and not the judges, to consider “how far the efficiency of the administration” would be dealt with. This is because, after all, “the State, which is certainly interested in the maintenance of standards of its administration.” Third, the 50% limit envisaged by *Balaji* was applicable only to educational colleges, and not to services. Even further, since the judgment in *Balaji*, when referring to 50% limit, used expressions such as “generally” and “broadly”, it showed that “the observations were intended only to be a workable guide but not an inflexible rule of law even in the case of admission to colleges.”

While the majority in *Devadasan* reiterated the principles laid down in *Rangachari* and *Balaji*, the dissenting opinion of Justice Subba Rao marked a shift, though in a dissent, in the constitutional understanding of reservations. Justice Subba Rao called out the anxiety of the judges to put limitations on reservations. In particular, Justice Subba Rao questioned the opinion of Justice Gajendragadkar in *Balaji* for its scientifically unproven limit of 50%, over-emphasis on judicial scrutiny of “efficiency of administration”, and eagerness to put limit on Article 16(4), even though its interpretation was not in question in *Balaji*. The importance of Justice Subba Rao’s dissent would be later seen in the cases of *NM Thomas* and *Indra Sawhney*.

## 2.5 Article 16(4): An Exception, not a Fundamental Right

While the decision in *Rangachari* influenced the subsequent court judgments as well as the government to put restrictions of the reservation policy, the dissenting opinion of Justice Subba Rao in *Devadasan* became a ground for government employees from SC and ST communities to make a claim for a mandatory reservation policy of the government.

In the Constitution bench decision of *C.A. Rajendran v. Union of India*<sup>40</sup> (hereinafter “*Rajendran*”), an Office Memorandum of the Union government was challenged under Article 32 of the Constitution on the ground that it did not provide for any reservation in Class II and I services, but only in certain types of Class III and IV Services only. The Court noted that the impugned policy of the Government was made subsequent to the decision in *Rangachari*, after which it was advised that “there was no constitutional compulsion to make reservation for SCs and STs in posts filled by promotion and the question whether the reservation should be

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<sup>40</sup> AIR 1968 SC 507

continued or withdrawn was entirely a matter of public policy”. Because of *Rangachari*’s emphasis on “efficiency”, it was noted that the Union Government decided to withdraw any special treatment to SC/STs in promotions to Class I and Class II. The dissenting opinion of Justice Subba Rao in *Devadasan* was relied upon by the petitioner’s side to argue that “Article 16(4) was not an exception engrafted on Art. 16, but was in itself a fundamental right granted to SCs and STs and backward classes and as such it was untrammelled by any other provision of the Constitution.”

The Court in *Rajendran* unanimously rejected the petition, while holding that the Article 16(4) does not confer any fundamental right to reservation. The reasons for this holding can be summarized into three propositions. First, relying upon the previous decisions of *Rangachari*, *Balaji*, and the majority view in *Devadasan*, the Court reiterated that Articles 14, 15 and 16 form “part of the same constitutional code of guarantees and supplement each other”. While it was held that Article 16 is “only an incident of the application of the concept of equality enshrined in Article 14 thereof”, Article 16(4) “is an exception clause and is not an independent provision and it has to be strictly construed.” Second, the scope of Article 16(4), even according to the minority judgment of Justice Subba Rao on which the petitioner relied, was held to only being “an enabling provision”, which confers a discretionary power on the State to make reservation. It does “not confer any right on the petitioner and there is no constitutional duty imposed on the Government” to make reservations for SC/STs “either at the initial stage of recruitment or at the stage of promotion”. Third, it was held that the language of Art. 16(4) must be interpreted in the context and background of Article 335, which gives “paramount importance” to “efficiency of administration”, which in turn requires no reservation “in the higher echelons of service”.

The decision in *Rajendran* clearly denied recognising a fundamental right to reservation. However, the reasoning adopted, and precedents followed in this judgment would be subsequently overturned.

### 3. The Constitutional Shift in *NM Thomas & Indra Sawhney*

#### 3.1 Article 16(4) held as a part of Article 16(1)

In *NM Thomas*, a seven-Judge Bench dealt with the validity of a test-relaxation rule for SCs and STs in promotions from lower division clerks to upper clerks.<sup>41</sup> The rule gave preferential treatment to SC/STs. The said rule was upheld by a 5–2 majority of the Court. All the judges wrote their separate opinion. A majority of four judges (Ray, Mathew, Fazal Ali, Krishna Iyer) upheld the rule under Article 16(1). According to the majority, Article 16(4) was held to be facet of Article 16(1). While in his concurrence, Justice Beg upheld the rule under Article 16(4), Justices Khanna and Gupta gave dissent, and considered the rule to be unconstitutional.

The majority of four judges noted that Articles 14, 15(1), and 16(1) guarantee the content of equality for everyone, including those for backward classes. Other methods of advancement such as preferences to under-represented backward classes were held to be valid under within Article 16(1), which permits reasonable classification, similar to that of Article 14. As Justice Fazal Ali noted, the clerks belonging to SC/STs were only given a further extension of time to pass the test because of their backwardness, and not any exemption from passing the test. This could only be done under Article 16(1) and not under Article 16(4). It was held by the majority that preferential treatment for members of the backward classes can mean equality of opportunity for all citizens.

In elaboration, Chief Justice Ray held that “Article 16(4) indicates one of the methods of achieving equality embodied in Article 16(1).” Justice Mathew noted that “If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1)”, but “an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up-to the point of making reservation.” Justices Fazal Ali and Krishna Iyer explicitly disagreed with previous judgments which considered Article 16(4) to be an exception to Article 16(1), and approved the dissent of Justice Subba Rao in *Devadasan*. In the words of Justice Fazal Ali, “Clause (4) of Article 16 of the Constitution cannot be read in isolation but has to be read as part and parcel of Article 16(1)

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<sup>41</sup> Under the rule, the Kerala government granted “temporary exemption to members already in service belonging to any of the Scheduled Castes and Scheduled Tribes from passing all tests (unified and special or departmental tests) for a period of two years”. See *NM Thomas*.



and (2)". Justice Krishna Iyer held that Article 16(4) is "an illustration of constitutionally sanctified classification". He added, "Article 16(4) need not be a saving clause but put in due to the over-anxiety of the draftsman to make matters clear beyond possibility of doubt" for the rights of SC/STs, whose "only hope is in Article 16(4)".

Justices Fazal Ali and Krishna Iyer also expressed doubt on the rigidity of the 50% limit on reservations put out by *Balaji* judgment. Justice Fazal Ali noted that the 50% limit is "a rule of caution and does not exhaust all categories". He added that as "to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases." For instance, he stated a reservation of 80% jobs for backward classes of citizens in a State would be justified, if their population constituted 80 per cent of the total population. Both Fazal Ali and Krishna Iyer further agreed that 50% limit cannot be used to exclude "carry forward" rule, as the recruitment depends on "the total strength of a cadre". Justice Fazal Ali also noted that in considering Article 16(4), "one should not take an artificial view of efficiency", and that "a concession or relaxation in favour of a backward class of citizens particularly when they are senior in experience would not amount to any impairment of efficiency".

Disagreeing with the majority, Justice HR Khanna held that the question of giving preferential treatment for members of backward classes could not be contained in Article 16(1), and had to be located in Article 16(4). Justice Khanna further opined that if it was permissible to "accord favoured treatment" to backward classes under Article 16(1), then Article 16(4) "would have to be treated as wholly superfluous and redundant", and therefore the Court should not accept a view which would have the effect of rendering Article 16(4) "redundant and superfluous."<sup>42</sup> Accordingly, he held that "preferential treatment (to SC/ST clerks in the case) is plainly a negation of the equality of opportunity for all citizens" in employment under the State. According to Justice Khanna, Article 16(4) was "a proviso or exception" to Article 16(1), and could not be applied beyond a limited way, otherwise the "ideals of supremacy of merit, the efficiency of services and the absence of discrimination in sphere of public employment would be the obvious casualties". Justice AC Gupta agreed with the view of Justice Khanna on Article 16(4).

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<sup>42</sup> Justices Khanna and Gupta adopted the approach taken in *Champakam Dorairajan*, *Balaji* and other cases.

While Justice Beg agreed with the majority to uphold the rule of relaxation, he disagreed with them on the point of preferential treatment being located within Article 16(1). On this point, Justice Beg concurred with Justices Khanna and Gupta. Though it is not clear from judgment whether Justice Beg considered Article 16(4) as an exception to Article 16(1), Justice Beg held that test-relaxation could only be given under Article 16(4).

Even though the majority in the seven-judge bench decision of *Thomas* did not explicitly overrule *Devadasan*, the principles enunciated in *Thomas* were a departure from the decisions in *Devadasan* and *Balaji*. In his concurring opinion in a three-judge bench decision in *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*<sup>43</sup> (hereinafter “*ABSKS*”), Justice O. Chinappa Reddy summarized the constitutional shift created by *NM Thomas*: “All five learned judges who constituted the majority were emphatic in repudiating the theory (propounded in earlier cases) that Article 16(4) was in the nature of an exception to Article 16(1). All were agreed that Article 16(4) was a facet, an illustration or a method of application of Article 16(1)”. The majority in *NM Thomas* also did not refer to Article 16(4) as enabling.

If Article 16(4) is a facet of Articles 14, 15, and 16(1), then it would become a fundamental right in itself, which would be enforceable in courts.<sup>44</sup> As Justice Chinappa Reddy noted in *ABSKS*, Article 16(4) recognises that the right to equality of opportunity includes the right of the underprivileged to conditions comparable to or compensatory of those enjoyed by the privileged”. The post- *NM Thomas* jurisprudence accepted “the principle to treat equally what are equal and unequally what are unequal”, and that “to treat unequals differently according to their inequality is not only permitted but required”.<sup>45</sup> *NM Thomas* also dismissed the strict efficiency argument propounded in *Rangachari* and other judgments.

### 3.2 *NM Thomas* approved in *Indra Sawhney*: Article 16(4) as a fundamental right

The enforceability of reservations as effected by *NM Thomas* was confirmed in a nine-judge bench decision of *Indra Sawhney*. The Court was dealing with the validity of 27% reservation provided to OBCs and 10% reservation for economically weaker sections (EWS)

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<sup>43</sup> (1981) 1 SCC 246

<sup>44</sup> Marc Galanter, *Law and Society in Modern India*, Oxford India Paperbacks (1992), page 277.

<sup>45</sup> *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558

in the vacancies in posts and services under the government of India which were to be filled by direct recruitment. This was in addition to 22.5% reservation given to SC/STs. By a 6-3 majority opinion, the Court upheld the constitutional validity of the 27% reservation provided to the OBCs, provided that the socially advanced persons/sections (“creamy layer”) are excluded from the benefits of this reservation. The 10% EWS reservation was struck down.

Seven out of nine judges clearly reinforced that Article 16(4) is a facet of Article 16(1).<sup>46</sup> Justice RM Sahai, in his dissent, also noted that Articles 16(1) and 16(4) operated in the “same field”. This, in effect, makes a total of eight out of nine judges, who found Article 16(4) as a part of Article 16(1). On this point, the majority view in *Devadasan* was explicitly overruled, and the decision in *Balaji* was termed as “untenable”. It was declared that “the view taken by the majority in *Thomas* is the correct one”.<sup>47</sup>

It was held that Article 16(4) is an instance of classification implicit in and permitted by Clause (1). The plurality opinion of Justice BP Jeevan Reddy clarified this in clearest terms: “even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.” Justices Pandian, Sawant, Kuldip Singh, and Sahai agreed on this point of classification permitted by Article 16(1), of which Article 16(4) explicitly provides jobs-reservation for backward classes.<sup>48</sup>

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<sup>46</sup> M.H. Kania, C.J., M.N. Venkatachaliah, S.R. Pandian, A.M. Ahmadi, Kuldip Singh, P.B. Sawant, and B.P. Jeevan Reddy, JJ.

<sup>47</sup> *Indra Sawhney* (Justice Jeevan Reddy’s plurality opinion)

<sup>48</sup> Justice Pandian stated: “No Reservation can be made under Article 16(4) for classes other than backward classes. But under Article 16(1), reservation can be made for classes, not covered by Article 16(4).”

In his concurring opinion, Justice Sawant stated: “Clause (4) of Article 16 is not an exception to Clause (1) thereof. It only carves out a section of the society, viz., the backward class of citizens for whom the reservations in services may be kept. The said clause is exhaustive of the reservations of posts in the services so far as the backward class of citizens is concerned. It is not exhaustive of all the reservations in the services that may be kept. The reservations of posts in the services for the other sections of the society can be kept under Clause (1) of that Article.”

On this point, Justice Kuldip Singh’s dissenting opinion also stated: “Thus the State power to provide job reservations is wholly exhausted under Article 16(4). No reservation of any kind is permissible under Article 16(1). Article 16(4) completely overrides Article 16(1) in the matter of job-reservations... Article 16(4) thus exclusively deals with reservation and it cannot be invoked for any other form of classification. Article 16(1), however, permits protective discrimination, short of reservation, in the matters relating to employment in the State-services.”

Justice Sahai held a similar view in his dissent: “Article 16(4) being part of the scheme of equality doctrine it is exhaustive of reservation, therefore, no reservation can be made under Article 16(1) ... Preferential treatment in shape of weightage etc. can be given to those who are covered in Article 16(1) but that too has to be very restrictive.”

In his plurality opinion, Justice Jeevan Reddy noted that the objective behind Article 16(4) was the “sharing of State power”, as the State power, which was “almost exclusively monopolised by the upper castes i.e., a few communities, was now sought to be made broad-based”. Therefore, Article 16(4) aimed at “empowerment of the deprived backward communities - to give them a share in the administrative apparatus and in the governance of the community.” Justice Jeevan Reddy held that “for assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally”. The plurality opinion further clarified that “No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4)”, and that, this understanding is clear, which need not be explained. In his concurrence, Justice S. Ratnavel Pandian noted explicitly, what was already there<sup>49</sup> in the reasoning of other judges, that Article 16(4) is “proclaiming a ‘Fundamental Right’ enacted about 42 years ago for providing equality of opportunity in matters of public employment to people belonging to any backward class”. He added that “it is highly deplorable and heart-rending to note” that this fundamental right “has still not been given effect to in services under the Union of India and many more States”. The reasoning given by the majority of judges thus considers Article 16(4) as a fundamental right.

This understanding is also strengthened from the fact that majority of judges in *Indra Sawhney* did not hold Article 16(4) to be an enabling provision. Justice Thommen, in his dissenting opinion, was the only judge to have considered Article 16(4) as an exception to Article 16(1), and therefore “an enabling provision conferring a discretionary power on the State”. In his dissent, though Justice Sahai had noted that Articles 16(1) and 16(4) operate in same field, but held that only the former is by default enforceable in a court of law. According to him, Article 16(4) is “not constitutional compulsion but an enabling provision”, which “operates automatically whereas the other comes into play on identification of backward class of citizens and their inadequate representation”.

The plurality opinion authored by Justice Jeevan Reddy, and even the dissenting opinion of Justice Kuldip Singh, did not make any such distinction between Articles 16(1) and 16(4). In fact, Justice Jeevan Reddy’s plurality opinion rejected a submission by senior advocate, Ram Jethmalani, who argued that Article 16(4) is an enabling provision and not a source of power.<sup>50</sup> Though Justice Sawant also held 16(4) as a facet of Article 16(1), but he

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<sup>49</sup> Seven other judges had held Article 16(4) to be a part of Article 16(1).

<sup>50</sup> Justice Jeevan Reddy’s plurality opinion noted: “Mr. Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself.

noted that “Article 16(4) is couched in an enabling language”. However, he added a caveat to it, “The reservations in the services under Article 16(4), except in the case of SCs/STs, are in the discretion of the State.” This meant that Justice Sawant viewed reservation for SC/STs as mandatory. Other judges had also considered SC/ST to be already within the term “backward class”.<sup>51</sup> Justice Pandian also referred to Article 16(4) as “an enabling provision and permissive in character overriding Article 16(1) and (2)”, but he clarified that this “enabling” nature does not give any discretion to the State. As he summed it, “The power conferred on the State under Article 16(4) is one coupled with a duty and, therefore, the State has to exercise that power for the benefit of all those, namely, backward class for whom it is intended.” This explanation of ‘power + duty’ makes Article 16(4) a mandatory provision – a fundamental right for backward classes, as Justice Pandian also noted in one of the paras of his concurring opinion.

Therefore, in effect, only two judges (Thommen, Sahai) in *Indra Sawhney* held Article 16(4) as a mere “enabling provision” for making reservation for SC/STs, and only three judges (Thommen, Sahai, Sawant) held it enabling for all backward classes.<sup>52</sup> The majority of judges in *Indra Sawhney* thus also placed Article 16(4) on the pedestal of fundamental rights.

Even though Articles 16(1) and 16(4) were held to be operating in same field, a majority of judges endorsed a general limit of 50% on reservations contemplated in Article 16(4).<sup>53</sup> This would seem to be a contradiction in itself, because the 50% limit was previously envisaged, when Article 16(4) was considered as an exception to Article 16(1) on the reasoning that the exception cannot exceed the main rule. The judges argued that it was now done to harmonise the rights under Articles 16(4) and Article 16(1).<sup>54</sup>

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He submits that unless made into a law by the appropriate Legislature or issued as a rule in terms of the proviso to Article 309, the “provision” so made by the Executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Sri Jethmalani.” In the case, Ram Jethmalani had appeared for the State of Bihar.

<sup>51</sup> Justice Jeevan Reddy’s opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself), Justice Pandian’s concurring opinion.

<sup>52</sup> Even if one argues that Justice Kuldeep Singh agreed entirely with Justice Sahai’s reasoning (though he did not seem to explicitly agree on this point), that still does not make it the majority opinion of *Indra Sawhney* to hold Article 16(4) as mere enabling.

<sup>53</sup> Justice Jeevan Reddy’s plurality opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself) was in favour of a flexible limit of 50%. i.e it could be breached in certain circumstances. Justices Kuldeep Singh, Sahai, and Thommen were in favour of a strict 50% limit.

<sup>54</sup> For a critique of the 50 % limit, see Alok Prasanna Kumar, “Revisiting the Rationale for Reservations: Claims of ‘Middle Castes’”, *Economic & Political Weekly* (2016), Vol. 51, Issue 47, pages 10-11.

However, the majority<sup>55</sup> also held that while 50% limit shall be the rule only under Article 16(4), it could be breached out in “certain extraordinary situations inherent in the great diversity of this country and the people”. The plurality opinion authored by Justice Jeevan Reddy noted, “It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative”. The opinion called for “extreme caution” to be exercised and a “special case made out”. Both Justices Pandian and Sawant did not find any logic in the 50% limit and did not consider reservations over 50% to be violative of Article 14 or 16. Both judges noted the extent of reservations beyond 50% would depend upon the facts and circumstances of each case.<sup>56</sup> Justice Pandian further noted, “The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula.” Though he put a caveat here that “reservations made either under Article 16(4) or under Article 16(1) and (4) cannot be extended to the totality of 100%”.

Reservation in promotions was declared as unconstitutional by a majority of eight judges on the ground that it dilutes efficiency of administration.<sup>57</sup> Justice Ahmadi refrained from expressing an opinion on the ground that the issue was not argued before the Court, thereby upholding the argument of the Union government that “Constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case.” The Court, however, held that its verdict on promotions would operate “only prospectively” and would “not affect promotions already made, whether on temporary, officiating or regular/permanent basis”.

*NM Thomas* and *Indra Sawney* authoritatively rejected the view of previous Constitution bench judgments (*Rangachari, Balaji, Devadasan, Rajendran*), which considered Article 16(4) as mere enabling, and that it is an exception, and not a fundamental right in itself. These two judgments clarified that right to reservation itself is a fundamental right under

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<sup>55</sup> Justice Jeevan Reddy’s plurality opinion (on behalf of M.H. Kania, C.J., M.N. Venkatachaliah, A.M. Ahmadi JJ., and himself); Justice Pandian; Justice Sawant.

<sup>56</sup> Justice Sawant’s concurring opinion noted: “It has already been pointed out earlier that Clause (4) of Article 16 is not an exception to Clause (1) thereof. Even assuming that it is an exception, there is no numerical relationship between a rule and exception, and their respective scope depends upon the areas and situations they cover. How large the area of the exception will be, will of course, depend upon the circumstances in each case.”

<sup>57</sup> For a critique of the efficiency argument, see Anurag Bhaskar, “Reservations, Efficiency, and the Making of Indian Constitution”, *Economic & Political Weekly*, Vol. 56, Issue 19, pages 42-49.



Articles 16(1) and 16(4). *Indra Sawney* also reiterated that SCs and STs shall be deemed backward for the purpose of reservations.

#### 4. Judicial Indiscipline: Post 1995

##### 4.1 Deliberate judicial ignorance to move back to *Balaji* era?

Before the five-year deadline set by *Indra Sawney* on reservation in promotions could end, the Parliament passed the 77th amendment to the Constitution in June 1995. The Union Government inserted a new clause (4A) after Article 16(4), which restored the constitutional power of the State to provide “reservation in matters of promotion to any class or classes of posts” in public services to SC/STs. The Statement of Objects and Reasons of the amendment noted the representation of SC/STs in public services has not reached the “required level”.<sup>58</sup>

After the reservation in promotions were restored, two judgments in the cases of *Union of India v. Virpal Singh Chauhan*<sup>59</sup> (hereinafter “*Virpal*”) and *Ajit Singh (I) v. State of Punjab*<sup>60</sup> (hereinafter “*Ajit Singh I*”) introduced the concept of a “catch up rule”, according to which the senior general category candidates who were promoted after SC/ST candidates would regain their seniority over such SC/ST candidates promoted by reservation earlier. However, other three-judge benches in *Ashok Kumar Gupta v. State of Uttar Pradesh*<sup>61</sup> (hereinafter “*Ashok Kumar Gupta*”) and *Jagdish Lal v. State of Haryana*<sup>62</sup> (hereinafter “*Jagdish Lal*”) took a view contrary to *Virpal* and *Ajit Singh I*, and held that the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights. This conflict between *Virpal and Ajit Singh I* on one side, and *Ashok Kumar Gupta* and *Jagdish Lal* on the other, led to a reference to a Constitution bench in the case of *Ajit Singh II v. State of Punjab*<sup>63</sup> (hereinafter “*Ajit Singh II*”).

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<sup>58</sup> The Constitution (Seventy Seventh Amendment) Act, 1995, *Ministry of Law and Justice (Govt. of India)*, available at <https://legislative.gov.in/constitution-seventy-seventh-amendment-act-1995>

<sup>59</sup> AIR 1996 SC 448

<sup>60</sup> (1996) 2 SCC 715

<sup>61</sup> (1997) 3 SCR 269

<sup>62</sup> AIR 1997 SC 2366

<sup>63</sup> (1999) 7 SCC 209

The Constitution Bench was asked to clarify the general rule relating to seniority<sup>64</sup> in matters of reservation in promotions, and whether the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights. The Court considered Articles 14 and 16(1) as “the permissible limits of affirmative action by way of reservation under Articles 16(4) and 16(4A)”. It was held that while the “right to be considered for promotion” is a fundamental right within Article 16(1), reservation in promotions under Articles 16(4) and 16(4A) “do not confer any fundamental rights nor do they impose any constitutional duties”. It was added that the said articles “are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation”. It was noted, “There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1)”. This view was clearly contrary to *NM Thomas* and *Indra Sawhney*.

In coming to its conclusion of upholding the “catch up rule”, the Constitution Bench in *Ajit Singh II* relied upon judgments rendered by previous Constitution Benches in *Rajendran* and *Balaji*. However, the Court did not even discuss the decisions in *NM Thomas* and its approval in *Indra Sawhney*. As mentioned in this article, the position of law on reservations in *Balaji* and *Rajendran* was completely changed after *NM Thomas* decision. Ironically, while referring to *Rajendran* and *Balaji*, the Court noted that “Unfortunately, all these rulings of larger Benches were not brought to the notice” of the bench in *Ashok Kumar Gupta* and *Jagdish Lal*, which considered that *Indra Sawhney* reiterated the reservation as a fundamental right. What Justice Jeevan Reddy’s plurality opinion in *Indra Sawhney* had held about maintaining a balance of 50% limit in making reservations, the judges in *Ajit Singh II* quoted it in a very different context - whether Article 16(4) is a fundamental right.<sup>65</sup> In fact, the excerpt of Justice

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<sup>64</sup> In simple words, the question was: whether the candidates from general category, who were senior at lower level, would regain their seniority on being promoted at a later date than SC/ST candidates who were promoted earlier through reservation.

<sup>65</sup> In *Ajit Singh II*, the Constitution bench cited the following excerpt from Justice Jeevan Reddy’s opinion in *Indra Sawhney* to claim that Article 16(4) is not a fundamental right: “It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to Clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are restatements of the principles of equality enshrined in Article (14). The provision under Article 16(4) - conceived in the interests of certain sections of society - should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.” However, the next sentence in Justice Jeevan Reddy’s opinion (which *Ajit Singh II* choose to omit from the quote) makes it clear that the point was on 50% limit, and not on 16(4) not being a fundamental right: “From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.”

Reddy's decision cited in *Ajit Singh II* clearly noted that Article 16(4) is not an exception to Article 16(1).

The *Ajit Singh II* bench being a smaller bench than *Indra Sawhney* was bound by the latter decision. In disobeying *Indra Sawhney*, it showed judicial indiscipline, which seems to be deliberately done to restrict the right of reservation. However, whatever may be the reasons in showing this indiscipline and inconsistency, the *Ajit Singh II* decision made efforts to take the constitutional jurisprudence back to the era of *Balaji*, which was declared as “untenable” in the larger bench decision in *Indra Sawhney*.

After *Ajit Singh II* decision, the Parliament enacted a series of constitutional amendments. The Constitution (Eighty First Amendment) Act, 2000 which added Article 16(4B), allowed the States to “carry forward” the unfulfilled/backlog vacancies from previous years beyond 50% limit. By way of 85<sup>th</sup> constitutional amendment, the Parliament negated the “catch-up rule” (upheld by *Ajit Singh II* decision) by amending Article 16(4A) to mean “matters of promotion, with consequential seniority”<sup>66</sup> with retrospective effect.

#### 4.2 The Continued Misappropriation of *Indra Sawhney*

The constitutional amendments regarding reservation in promotion with retrospective effect were challenged in 2002. A Constitution Bench in *M. Nagaraj v. Union of India* (hereinafter “*Nagaraj*”) unanimously upheld the validity of these constitutional amendments, but not before subjecting them to certain conditions. The unanimous judgment, authored by Justice SH Kapadia, laid down that any law under the said constitutional amendments can be made only if the State collects “quantifiable data” showing backwardness of SC/STs, their inadequacy of representation in services, efficiency of administration, exclusion of creamy layer, and that the 50% ceiling limit in reservations is not breached.<sup>67</sup>

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<sup>66</sup> Consequential seniority, in simple words, would mean that if a person (A) from the SC/ST category is, by reservation, promoted earlier than a senior person (B) belonging to the general category, then person (A) would be considered the senior at the higher-level post. This would remain, even after the person (B) from the general category is eventually promoted to the same post.

<sup>67</sup> For a critique of the conditions set by *Nagaraj* decision, see Anurag Bhaskar and Surendra Kumar, “Promotions, Creamy Layer, and the Reservation Debate”, *SSRN* (December, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3755254](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755254)

In *Nagaraj*, without discussing the previous judgments on the issue, the Court started with the presumption that, “Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4A) is enabling.” Later on, it referred to *Ajit Singh II*. It was held: “If Articles 16(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision, then Articles 16(4A) and 16(4B) are also enabling provisions... The State is not bound to make reservation for SC/ST in matter of promotions”. As explained under previous sub-heading, the view of *Ajit Singh II* was contrary to *Indra Sawhney*, and *Nagaraj* repeated the same.

The *Nagaraj* bench had referred to the holding in *Indra Sawhney*, but ironically to decide against it. By a majority of 8-1, the judges in *Indra Sawhney* case had categorically held that Article 16(4) is a part of the equality principle enshrined in Article 16(1). Contrary to this authoritative holding, the Constitution Bench in *Nagaraj* case ruled that Article 16(1) and Article 16(4) “operate in different fields”, and like *Ajit Singh II*, illegally sought to take the constitutional jurisprudence to pre-*NM Thomas* era.

*Indra Sawhney* had also warned against a special or strict standard for scrutiny of constitutional provisions on reservation, but *Nagaraj*, in effect, adopted a strict standard, as it laid down certain prerequisites before the right under Article 16(4) and 16(4A) can be availed of. Even the *Balaji* judgment, on which the *Nagaraj* bench relied, had held against a mandatory condition precedent to any action to implement reservation.<sup>68</sup> The strict standards made it impossible to implement reservations, as several cases struck down the policies by applying the criterion laid down by *Nagaraj*.<sup>69</sup> The bench also applied the standards of determining OBCs on SCs and STs.<sup>70</sup>

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<sup>68</sup> To repeat, in *Balaji*, it was held: “It is true that the Constitution contemplated the appointment of a Commission whose report and recommendations, it was thought, would be of assistance to the authorities concerned to take adequate steps for the advancement of Backward Classes; but it would be erroneous to assume that the appointment of the Commission and the subsequent steps that were to follow it constituted a condition precedent to any action being taken under Art. 15(4).”

<sup>69</sup> *Anil Chandra v. Radha Krishna Gaur*, (2009) 9 SCC 454; *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467; *UP Power Corporation v. Rajesh Kumar*, (2012) 7 SCC 1; *General Categories Welfare Federation v. Union of India*, (2012) 7 SCC 40; *Rohtas Bhankar v. Union of India*, (2014) 8 SCC 872; *S. Panneer Selvam v. State of Tamil Nadu*, (2015) 10 SCC 292; *Chairman & Managing Director, Central Bank of India v. Central Bank of India SC/ST Employees Welfare Association*, (2015) 12 SCC 308; *Suresh Chand Gautam v. State of UP*, (2016) 11 SCC 113; *BK. Pavitra (I) v. Union of India*, (2017) 4 SCC 620.

<sup>70</sup> Furthermore, the judgment in *Indra Sawhney* had adopted the test of “backwardness” and “creamy layer” for determination of status of other “backward classes”. By subjecting the SCs and STs to the “backwardness” and “creamy layer” criteria, Justice Kapadia (and other judges) in *Nagaraj* went against

It is for these reasons that the correctness of *Nagaraj* was doubted. Yet, another Constitution Bench in the case of *Jarnail Singh v. Lachhmi Narain Gupta*<sup>71</sup> (hereinafter “*Jarnail Singh*”) refused to refer *Nagaraj* decision to a larger bench.<sup>72</sup> In effect, the Constitution Bench decisions in *Ajit Singh II*, *Nagaraj*, and *Jarnail Singh* chipped away the constitutional jurisprudence settled in the larger bench of *Indra Sawhney*. The minority view in *Indra Sawhney*, that Article 16(4) is a mere enabling provision, was misappropriated as that of majority, by *Ajit Singh II* and *Nagaraj*. There can be no justification for this indiscipline or deliberate ignorance.

#### 4.3 The Effect of Indiscipline in later decisions

Because of the indiscipline of the Constitution benches, there were repercussions on the rights of SCs and STs. While on one hand, the reservation policies were being struck down by applying the standards set in *Nagaraj*, on the other, the State was left unaccountable if it decided not to implement the right to reservation.<sup>73</sup>

In a two-judge bench decision in *Suresh Chand Gautam v. State of Uttar Pradesh*<sup>74</sup> (hereinafter “*Suresh Chand Gautam*”), a writ petition was filed under Article 32 with the prayer to commanding the respondent State to enforce Articles 16(4A) and 16(4B) or, alternatively, directing the Respondents to constitute a committee which could do survey and collect necessary qualitative data of SCs and STs in services, as provided in *Nagaraj*. The petition was dismissed on the ground that the larger benches such as *Nagaraj* have held that the State is not bound to make reservation for SCs and STs in matter of promotions, and as a result, “there is no duty” on the State.

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the larger Bench ruling in *Indra Sawhney*, which held SCs and STs to be deemed backward for the purpose of reservation. The 50% limit was reiterated again, as the *Nagaraj* decision noted that “even if the State has compelling reasons,... the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50%”. However, there was no discussion done on his aspect, and this was abruptly added into the conclusion.

<sup>71</sup> (2018) 10 SCC 396

<sup>72</sup> The *Jarnail Singh* bench, despite having same strength as *Nagaraj* bench, revised *Nagaraj* to the effect that it removed the condition for collection of data for determining the backward of SCs and STs. Ideally, the issues should have been referred to a larger bench. For a critique of *Jarnail Singh*, see Anurag Bhaskar and Surendra Kumar, “Promotions, Creamy Layer, and the Reservation Debate”, *SSRN* (December, 2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3755254](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3755254)

<sup>73</sup> I call this the “dual approach to avoid reservations”.

<sup>74</sup> (2016) 11 SCC 113

The Court added that issuing a mandamus to collect the data “will be in a way, entering into the domain of legislation, for it is a step towards commanding to frame a legislation or a delegated legislation for reservation.” The Court further observed that while it asked the State on several occasions<sup>75</sup> to issue certain guidelines for “for sustaining certain rights of women, children or prisoners or under-trial prisoners”, but this “category of cases falls in a different compartment” and “sphere than what is envisaged in Article 16(4-A) and 16(4-B)”. This is because, as the Court attempted to clarify, the constitutional validity of Articles 16(4A) and 16(4B) was upheld with “certain qualifiers”, as they were enabling provisions.<sup>76</sup>

Another two-judge bench in *Mukesh Kumar v. State of Uttarakhand*<sup>77</sup> (hereinafter “*Mukesh Kumar*”) heard the challenge against the Uttarakhand government’s refusal to provide reservation in promotions, despite a committee, constituted by the government to collect quantifiable data as per the *Nagaraj* criteria, noting that there is inadequate representation of SC/STs in government services in Uttarakhand. The two-judge bench dealt with the questions “whether the State Government is bound to make reservations in public posts and whether the decision by the State Government not to provide reservations can be only on the basis of quantifiable data relating to adequacy of representation of persons belonging to Scheduled Castes and Scheduled Tribes.” Relying upon the decisions in *Rajendran*, *Indra Sawhney*, *Ajit Singh (II)*, *Nagaraj*, *Jarnail*, and *Suresh Chand Gautam*, the bench in *Mukesh Kumar* reiterated that “Article 16(4) and 16(4-A) do not confer fundamental right to claim reservations”, as they are enabling provisions.

The dual approach to avoid the right to reservation is quite visible in *Mukesh Kumar*, as it was held that the “collection of data regarding the inadequate representation of [SC/STs] is a pre-requisite for providing reservations, and is not required when the State Government decided not to provide reservations”. That is to say that the State is not required to justify its decision through data of adequate representation of SCs and STs, if it decides not to provide reservation.

It must be repeated here that the majority of judges in *Indra Sawhney* overturned the effect of *Rajendran*, and that *Ajit Singh II*, *Nagaraj*, and *Jarnail* are contrary to *Indra Sawhney*.

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<sup>75</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241; *D.K. Basu v. State of West Bengal*, (2015) 8 SCC 744.

<sup>76</sup> *Suresh Chand Gautam* also relied upon the minority view in *Indra Sawhney*.

<sup>77</sup> (2020) 3 SCC 1



But, *Suresh Chand Gautam* and *Mukesh Kumar* only followed the cases of *Rajendran*, *Ajit Singh II*, *Nagaraj* and *Jarnail Singh* in holding that Article 16(4) is merely enabling.

### 5. Enforceability of a Fundamental Right to Reservation

As I have narrated, the right to claim reservation under Article 16(4) has been recognised as a part of the larger fundamental right of equal opportunity under Article 16(1). Both *NM Thomas* and *Indra Sawhney* have held this. The language of Article 16(1) is that of positive right, of which Article 16(4) carves out a right for backward classes, in particular for SCs and STs. A right has a corresponding obligation/duty, which cannot be neglected.<sup>78</sup> Therefore, Article 16(4) also imposes a positive obligation on the State. It does not remain mere enabling. Furthermore, there would be a right of reservation for backward classes under Article 16(1), even if there was no Article 16(4). To reiterate, Article 16(4) expresses what is implicit in Article 16(1). After *Indra Sawhney*, reservation for backward classes no longer remain a discretion for the State. Now, the question arises regarding the extent of this right.

While Articles 330 and 332 provide for reservation of seats for SCs and STs in Lok Sabha and State Legislative Assemblies in proportion of their population, such an explicit criterion is missing from the text of Articles 15 and 16. However, Justice Mathew in his concurring opinion in *NM Thomas* had invoked the idea of proportional equality even in services.<sup>79</sup> After referring to certain American decisions<sup>80</sup>, Justice Mathew emphasized on this idea, while noting: “The concept of equality of opportunity in matters of employment is wide enough to include within it compensatory measures to put the members of the SCs and STs on par with the members of other communities which would enable them to get their *share of representation* in public service.” He added that compensatory measures ensure SCs and STs “their due share of representation in public services”.

<sup>78</sup> For an insightful discussion on rights and corresponding duties, see Justice DY Chandrachud’s opinion in *Justice Puttaswamy (Retd.) v. Union of India*, (2018) 12 SCALE 1 (Aadhaar judgment).

<sup>79</sup> In *NM Thomas*, Justice Mathew’s concurring opinion noted: “There is no reason why this Court should not also require the state to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.”

<sup>80</sup> *Griffin v. Illinois*, (1955) 351 US 12; *Douglas v. California*, (1963) 372 US 353; *Harper v. Virginia Board of Elections*, (1966) 383 US 663.

However, *Indra Sawhney* held that Article 16(4) “speaks of adequate representation and not proportionate representation”. It was though noted that “the proportion of population of backward classes to the total population would certainly be relevant”.<sup>81</sup> It was said that the reservation limit should generally not exceed 50%, except for “extraordinary situation”. While Justice Mathew’s view was in context of SC/ST reservation, it can be deduced from *Indra Sawhney* that its view on adequate representation was applicable to OBCs, as the percentage of reservation provided to SCs and STs in services was already same as what is proportionally provided to them in Lok Sabha and State Legislative Assemblies. As the plurality opinion in *Indra Sawhney* held, “From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. *Together with reservation in favour of Scheduled Castes and Scheduled Tribes*, it comes to a total of 49.5%.”

Furthermore, to undo the effect of *Indra Sawhney* on promotions, the Parliament had restored its power (by 77<sup>th</sup>, 81<sup>st</sup>, and 85<sup>th</sup> constitutional amendments) to provide reservation in promotions, which can be done taken into consideration total strength. The *Nagaraj* judgment which upheld these amendments, though with problematic restrictions, had also noted: “In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. *Egalitarian equality is proportional equality.*” Based on this line of reasoning, *BK Pavitra II v. Union of India*<sup>82</sup> held, “Social justice, in other words, is a matter involving the distribution of benefits and burdens”. Accordingly, it was held that “it is open to the State to make reservation in promotion for SCs and STs proportionate to their representation in the general population.”

The above discussion indicates that there has been no restriction on giving, at least, proportional representation to SCs and STs in matters of reservation in services. While there is a general limit of 50% (though flexible) set on overall reservation, yet the proportion of OBCs to the population would be relevant to determining the percentage of reservation to be given to them. The percentage of reservation would thus depend on the circumstances of each case. In

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<sup>81</sup> In some circumstances where the representation is very less, ‘adequate representation’ may even be greater than ‘proportional representation’. I am grateful to Advocate Disha Wadekar for sharing this point with me. In fact, during a meeting (22 April 1947) of the Advisory Committee to the Constituent Assembly, it was clarified that under the reservation clause, the State may give a greater representation than the proportion of the population. See B. Shiva Rao, *The Framing of India’s Population: A Study*, Indian Institute of Public Administration (1968), page 194.

<sup>82</sup> (2019) 16 SCC 129

special circumstances, reservation may exceed 50% as per *Indra Sawhney* mandate.

## 6. Conclusion

This article makes it clear that the decisions in *NM Thomas* and *Indra Sawhney* gave effect to Article 16(4) as a fundamental right. It is also clear that the judgements after *Indra Sawhney* have erroneously misinterpreted and misquoted it. That Article 16(4) is an enabling provision was a minority view in *Indra Sawhney*, and yet the decisions in *Ajit Singh II*, *Nagaraj*, and *Mukesh Kumar* treated it as a majority opinion to restrict the provisions on reservations under Article 16(4). These judgments have smuggled in the constitutional jurisprudence what was denied in the larger bench decision of *Indra Sawhney*. It can be a possibility that the *Indra Sawhney* judgment was not read and understood properly in later decisions is also evident from a recent Constitution bench reference order in *State of Punjab v. Davinder Singh*<sup>83</sup>, where the reference order (authored by Justice Arun Mishra), noted that “Six out of nine Judges in *Indra Sawhney* held that Article 16(4) is not an exception to Article 16(1)”, even though there were eight judges who held so.

It must also be noted that while the Supreme Court of India read various rights within Article 21 and expanded its scope, the same Court has used different methods, and even indiscipline, in restricting the provisions on reservations.

While on one hand, it has struck down government policies on reservations, on the other, it has refused to interfere when the governments have decided not to provide reservations in promotions by relying upon the minority view in *Indra Sawhney*. In *Mukesh Kumar*, the two-judge bench went to the extent of saying that, “Even if the under-representation of SCs and STs in public services is brought to the notice of this Court, no mandamus can be issued by this Court to the State Government to provide reservation”. If the judgments after *Indra Sawhney* made a habit to rely upon the minority view in *Indra Sawhney*, then the following view from the minority opinion of Justice Sahai should also have been followed: “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 potential of

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<sup>83</sup> (2020) 8 SCC 1

constitutional repercussions.” Reservation is a matter of rights, which should have been enforced by the Court.

The legendary scholar, Marc Galanter, had foreseen this approach of the Supreme Court. After the *NM Thomas* decision, Galanter had noted, “It would not be surprising if the courts would shrink from affirmative enforcement of these reconceptualized rights to equality (reservation)”.<sup>84</sup> Not only the Supreme Court evaded from accepting the settled position on the enforceability of reservation, but it also reduced reservation, as scholar K.G. Kannabiran observed, “from a philosophical premise to a matter of quantification”<sup>85</sup>.

In *Puttaswamy* judgment, a nine-judge bench explicitly overturned the decision of *ADM Jabalpur v. Shivakant Shukla*<sup>86</sup>, even though its effect was taken away by the 44<sup>th</sup> constitutional amendment. The *ADM Jabalpur* decision was a dark chapter in the history of the right to life under Article 21. Similarly, it is high time that the Supreme Court explicitly overturns *Champakam Doraijan*, which had laid down the foundation against reservations.

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<sup>84</sup> Marc Galanter, *Law and Society in Modern India*, Oxford India Paperbacks (1992), page 277

<sup>85</sup> Kalpana Kannabiran, *Tools of Justice: Non-discrimination and the Indian Constitution*, Routledge Paperbacks (2015), page 193

<sup>86</sup> AIR 1976 SC 1207