

# JUDICIAL REVIEW OF RESERVATION IN PROMOTION: A FADING PROMISE OF EQUALITY IN SERVICES GUARANTEED BY THE INDIAN CONSTITUTION

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*This paper argues that the Supreme Court of India has been sceptical about reservation in promotion since the State began making promotion policies in employment. The reasoning provided by the Court during the period from 1960s leading to the Indra Sawhney decision will reflect that the opinions of judges were premised on 'what would be' the effect of reservation in promotion or 'what ought to be' the contours of reservation as opposed to what is provided for in the Constitution. Subsequently, with introduction of more explicit amendments in the Constitution regarding promotion, the Supreme Court has only expanded its scope of judicial review. Invoking a rigorous form of judicial review akin to the strict scrutiny principle, the Supreme Court has since, struck down reservation policies for promotion on the ground of non-fulfilment of 'objective' prerequisites including proof of backwardness, under-representation of communities in services and administrative efficiencies. These prerequisites were actually and only meant to be for the subjective satisfaction of the State. However, the aggravated level of judicial review on this issue has resulted in the turning of Article 16(4-A) into a hollow promise, which merely exists in the text of the Constitution of India.*

## I. INTRODUCTION

Benjamin Cardozo, a famous American jurist and judge of the Supreme Court of United States, claimed that judges, like any other mortals, are guided by streams of tendencies, be it their inherited instincts, acquired convictions or traditional beliefs which guide their judicial decisions.<sup>1</sup> This paper asserts the strength of this conviction through rigorous examination of the decisions of the Supreme Court of India on reservation in promotion guaranteed under Article 16(4A) of the Constitution. It is argued in this paper that sometimes the convictions of judges replace constitutional visions, thereby substantively narrowing the ambit of guaranteed rights and on rare occasions extinguishing them altogether.

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<sup>1</sup> BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS 12-13 (2011).

Reservation in employment under the State is guaranteed under Article 16 of the Constitution of India. Reservation at the appointment stage in public services is covered under Article 16(1),<sup>2</sup> 16(2),<sup>3</sup> and 16(4).<sup>4</sup> In 1962, the Supreme Court of India upheld the constitutionality of reservation at promotional level in the case of *General Manager, Southern Rly. v. Rangachari*<sup>5</sup> ('Rangachari') under Articles 16(1), 16(2), and 16(4). However, this interpretation was declared unconstitutional in *Indra Sawhney v. Union of India*<sup>6</sup> ('Indra Sawhney'), popularly known as the Mandal Commission case. To nullify the effect of this judgment, the Constitution (Seventy-Seventh Amendment) Act, 1995, was passed which introduced Article 16(4A).<sup>7</sup>

To avoid ambiguity, Article 16(4A) explicitly provides for reservation at promotional level in services for Scheduled Castes<sup>8</sup> ('SCs') and Scheduled Tribes<sup>9</sup> ('STs'). As per Article 16(4-A), reservation in promotion can be availed by only those among SCs and STs who, according to the State, are not adequately represented in the services. The provision is similar to Article 16(4) which also states that reservation in appointment can be made for only those backward classes of citizens who in the opinion of the State are not adequately represented in services. The constitutionality of Article 16(4A) was upheld by a 5 judge bench in *M. Nagaraj v. Union of India*<sup>10</sup> ('M. Nagaraj'). It is however, argued that this decision has negated the original vision of equality under the Constitution. Even though the Court upheld Article 16(4A), the threefold conditions of quantifiable data to prove backwardness, inadequacy of representation and efficiency of administration,<sup>11</sup> resulted in turning Article 16(4A) into a toothless provision.

This paper intends to highlight the bias nurtured by the Supreme Court about reservation in promotion since the beginning, arguing that the bias held by the Court has only changed its form with time. The paper is divided into three parts. The first part covers the time frame between 1962 till 1995. During this period, reservation in promotion was not explicitly mentioned in the Constitution and the implementation of the same was done through clauses (1), (2) and (4) of Article 16. Even though reservation schemes in promotion were continuously upheld by the Supreme Court from Rangachari through *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*,<sup>12</sup> this paper argues that all of these

<sup>2</sup> The Constitution of India, 1950, Art. 16(1).

<sup>3</sup> The Constitution of India, 1950, Art. 16(2).

<sup>4</sup> The Constitution of India, 1950, Art. 16(4).

<sup>5</sup> *General Manager, Southern Rly. v. Rangachari*, AIR 1962 SC 36.

<sup>6</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

<sup>7</sup> The Constitution of India, 1950, Art. 16(4-A).

<sup>8</sup> Scheduled Caste is a homogenous constitutional class notified under Article 341 of the Indian Constitution.

<sup>9</sup> Scheduled Tribe is a homogenous constitutional category notified under Article 342 of the Indian Constitution.

<sup>10</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>11</sup> *Id.*, ¶¶102, 107 and 117.

<sup>12</sup> *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

cases highlighted their disagreement and scepticism through *obiters* until it was held to be unconstitutional in *Indra Sawhney*. This part of the paper cites directly from the Supreme Court decisions to demonstrate the role played by some of the prejudicial opinions of judges which led to the declaration of its unconstitutionality in *Indra Sawhney*. It is argued that judicial review on reservation in promotion throughout this time period was devoid of constitutional reasoning.

The second part of the paper discusses the shift in reasoning of the Supreme Court after the insertion of Article 16(4A) in the Constitution, in *M. Nagaraj*.<sup>13</sup> The various grounds on the basis of which the constitutionality of Article 16(4A) was upheld in *M. Nagaraj* shall be discussed in this part. It is argued that even though the court upheld reservation in promotion through this case, the grounds for upholding the same were not based on sound constitutional principles. This decision has adversely affected government schemes and has essentially resulted in non-implementation of Article 16(4A).

The third part of the paper highlights the adverse impact of *M. Nagaraj* on subsequent reservation schemes. This part of the paper argues that the bias of the Court that found explicit mention in decisions since *Rangachari*, has only changed its form. Earlier, the Court focused on the general ill-effects of reservation and the damage it causes to the efficiency of administration which is required to be maintained under Article 335 of the Constitution.<sup>14</sup> With the insertion of Article 16(4A), the Court has begun to invoke strict scrutiny to analyse the veracity of statistical data provided by the State. It is argued that the focus on quantifiable data, which has been established as a prerequisite evidence of backwardness, is an attempt by the Court to disguise its otherwise subjective opinion as objective reasoning. The result has been the continuous striking down of reservation schemes in promotional posts on the ground that the government has failed to provide reliable data to prove inadequacy of representation and backwardness of communities.<sup>15</sup>

The final part of the paper makes concluding remarks on the reasoning offered by the Court on this issue. It concludes that insertion of Article 16(4A) and its interpretation by the Supreme Court in *M. Nagaraj* has been detrimental to reservation. Although Article 16(4) provided for reservation in promotion, because of the continuous negation of reservation schemes by the judiciary, the paranoid Parliament made hasty amendments in the Constitution which, instead of clarifying the position on reservation, paved way for complicated judicial review. It appears from the decisions of the Court that it expressed its helplessness about non-implementation of Article 16(4A) on the construction of the provision which requires quantifiable data as prerequisite evidence. This in turn has helped the

<sup>13</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

<sup>14</sup> The Constitution of India, 1950, Art. 335.

<sup>15</sup> *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467; *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1.

judiciary in disguising its otherwise subjective opinion through apparently objective requirements of proof.

## II. CONSTITUTIONALITY OF RESERVATION UNDER ARTICLE 16: 1962-1995

### *A. THE SUPREME COURT UPHELD THE CONSTITUTIONALITY OF RESERVATION IN PROMOTION WITH VOLUMINOUS OBITER*

Reservation in promotion was formally acknowledged in the constitutional text through Article 16(4A) in 1995.<sup>16</sup> However, its constitutionality had been challenged as early as 1962. In the Rangachari case,<sup>17</sup> the main issue of dispute was whether Articles 16(1), (2) and (4) of the Constitution provide for reservation only at the stage of appointment or if it extends to promotions as well.<sup>18</sup> By a marginal majority of 3:2, the Supreme Court upheld the constitutionality of reservation in promotion by emphasising on the expressions “matters relating to employment” in Article 16(1)<sup>19</sup> and “in respect of any employment” used in Article 16(2).<sup>20</sup>

The Court in its majority decision explained that “advancement of the socially and educationally backward classes require representation not only at the lowest rung of the services but also representation in the selection posts”.<sup>21</sup> ‘Adequate representation’ as mentioned in Article 16(4) therefore, according to the Court, “includes consideration for both size as well as values”.<sup>22</sup> Therefore, not only quantitative representations but also qualitative representations are sought under Article 16 of the Constitution.

The Court also opined that this construction of Article 16 “would serve to give effect to the intention of the Constitution-makers to make adequate safeguard for the advancement of backward classes and to secure for their adequate representation in the services”.<sup>23</sup> Interpretation of Article 16 by the Court according to the ‘original intent’ of the Constitution makers, as subsequently acknowledged by Iyer J. in Karamchari Sangh, indicated empathy on the part of the judiciary for reservation.<sup>24</sup> However, the concluding statement of the majority de-

<sup>16</sup> The Constitution of India, 1950, Art. 16(4-A) was inserted into the Constitution under the Constitution (Seventy-Seventh Amendment) Act, 1995.

<sup>17</sup> General Manager, Southern Rly. v. Rangachari, AIR 1962 SC 36.

<sup>18</sup> *Id.*, 38-39.

<sup>19</sup> *Id.*, 41.

<sup>20</sup> *Id.*, 41-42.

<sup>21</sup> *Id.*, 45.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, ¶297.

cision negates this hope. The last paragraph of the majority decision in Rangachari reads,

“Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but 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. It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Article 16(4) the problem of adequate representation of the backward classes of citizens must be fairly and objectively considered and 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 efficiency of administration...”<sup>25</sup>

This opinion of the court compels deliberation on whether it was actually necessary to add this *caveat* while upholding the circular providing for reservation in promotion or whether any assurance was sought by the respondents while appealing against the implementation of the circular. It is not clear if this statement made by the Court was a mere *obiter* or if it was an integral part of its reasoning. If it is a part of the reasoning, then the question lies as to whether it defines the contours of Article 16(4). Further question then arises that if the Court had to uphold the circular for reservation in promotion, then why was there a necessity of this caution by the Court.

In fact, though the two dissenting judges in Rangachari differed from the majority on the scope of Article 16(4), one of the dissenting judges concurred with the majority on one issue. Wanchoo, J. wrote,

“...it seems to me that reservation of posts in various grades in the same service is bound to result, for obvious reasons, in deterioration in the efficiency of administration; and reading Article 335 along with Article 16(4) which to my mind is permissible on the principle of harmonious construction, it could not be the intention of Constitution makers that reservation in Article 16(4), for at any rate a part of those comprised therein, should result in the impairment of efficiency of administration.”<sup>26</sup>

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<sup>25</sup> *Id.*, 46.

<sup>26</sup> *Id.*, 49.

Thus, even though the dissenting judges disagreed with the scope of reservation in promotion, they concurred in presuming that reservation obviously causes inefficiency in administration. While the last paragraph of the majority decision in *Rangachari* may be construed as a mere observation, the harm such statements make was reflected subsequently in *Indra Sawhney*. Jeevan Reddy, J., writing for himself cited the last paragraph of the majority decision in *Rangachari* which mentioned the risk involved in sacrificing efficiency of administration. He concluded that there is “no justification to multiply ‘the risk’ which would be the consequence of holding that reservation can be provided in the matter of promotion”.<sup>27</sup> The Court went further to call reservation in promotion a handicap at every stage of employment. While the heart-burns of the general population because of reservation has been recognised by the Court since the first year after the coming into force of the Constitution,<sup>28</sup> Reddy, J. in *Indra Sawhney* made presumptions on the impact of reservation in promotions for persons belonging to reserved categories as well. He wrote, “There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured.”<sup>29</sup> Reddy, J. therefore, in this case, based his decision on consequential presumptions as opposed to the rule of law.

It is also interesting to note that the impugned memorandum in the *Indra Sawhney* decision did not provide for reservation in promotion. Consequently, it was pleaded by the State that this issue need not be decided in this case. However, most of the judges sitting in the bench justified their intervention on this issue on the ground that the very purpose of referring this case to a larger bench was to “finally settle the legal position relating to reservations”.<sup>30</sup>

Before reservation in promotion was declared unconstitutional in the *Indra Sawhney* case, the Supreme Court had upheld its constitutionality in two other cases post *Rangachari*. These are the cases of *State of Punjab v. Hira Lal*<sup>31</sup> (‘Hira Lal’) and *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*<sup>32</sup> (‘Karamchhari Sangh’).

Supreme Court’s deference to reservation in promotion during post-*Rangachari* phase

Some aggrieved Forest Service Officers moved the Supreme Court in *Hira Lal* against a memorandum. This memorandum provided for reservation to all promotional posts lying vacant as on September 12, 1963, or falling vacant thereafter.<sup>33</sup> The Court relied upon *Rangachari* to uphold the memorandum on the

<sup>27</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, 746.

<sup>28</sup> *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

<sup>29</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, 746.

<sup>30</sup> *Id.*, 742.

<sup>31</sup> *State of Punjab v. Hira Lal*, (1970) 3 SCC 567.

<sup>32</sup> *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

<sup>33</sup> *State of Punjab v. Hira Lal*, (1970) 3 SCC 567, 569.

ground that a qualitative interpretation of Article 16(4) has been the intention of the Constitution makers, as has been acknowledged in Rangachari and confirmed that this position established by law shall not be disturbed.<sup>34</sup>

However, similar to Rangachari, the Court made statements in *obiter* against reservation in this case as well. It was stated by the Court in Hira Lal that

“It is true that reservation under Article 16(4) does introduce an element of discrimination particularly when the question of promotion arises. It is an inevitable consequence of any reservation of posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but the Constitution makers thought it fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection.”<sup>35</sup>

Similarly, in Karamchari Sangh,<sup>36</sup> Krishna Iyer, J. upheld reservation in promotion with a remarkable observation, stating that

“...as between the socially, even economically, depressed and the economically backward, the Constitution has emphatically cast its preference for the former. Who are we, as judges to question the wisdom of provisions made by government within the parameters of Article 16(4)? The answer is obvious that the writ of the court cannot quash what is not contrary to the Constitution however tearful the consequences for those who may be adversely affected.”<sup>37</sup>

However, in this case too, Iyer, J. opined that “the proponent majority coming from the unreserved communities are presumably efficient and the dilutions of efficiency caused by the minimal induction of small percentage of ‘reserved’ candidates cannot affect the overall administrative efficiency significantly.”<sup>38</sup>

It appears that the Court had been apologetic about reservation guaranteed under the Constitution that causes adverse effect against the non-reserved candidates while at the same time, it upheld reservation schemes. Iyer, J. in this case, intended to clarify that judges shall not interfere with rights guaranteed by the Constitution merely because they feel that such rights were unnecessary or

<sup>34</sup> *Id.*, 32, 571-572.

<sup>35</sup> *Id.*, 572.

<sup>36</sup> Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246.

<sup>37</sup> *Id.*, 297.

<sup>38</sup> *Id.*

should have been guaranteed to some other groups.<sup>39</sup> Iyer, J. further clarified in the subsequent paragraph that

“...our examination system makes memory the master of merit and banishes creativity into exile...The colonial hangover still clings to our selection processes with superstitious tenacity and narrower concepts of efficiency and merit...”<sup>40</sup>

Even though it may appear that Iyer, J. agreed with reservation in promotion, the overall discomfort of the Court is visible in the judgments delivered during this period. This uneasiness of the Court, as has been seen through a number of cases, is premised on presumptions of consequences as opposed to adhering to the rule of law.

The original Article 16 was more generally drafted to include reservation in promotion within its clauses.<sup>41</sup> However, the Supreme Court continued to strike down reservation schemes for promotion except for a few exceptional cases. Consequently, the Court overruled Hira Lal and Karamchari case, through a nine-judge bench decision in *Indra Sawhney v. Union of India*.

### III. INDRA SAWHNEY DECISION WAS BASED ON THE MASSIVE OBITER OF JUDGES ON RESERVATION IN PROMOTION

Eight out of nine judges in the Indra Sawhney bench presented their opinions on reservation in promotion. Ahmadi, J. was the only judge to refrain from making any comment on the point. The judges unanimously opined that reservation in promotion is unconstitutional, though they arrived at the concurring conclusion through different reasons.

Jeevan Reddy, J.’s concern was with the efficiency of administration. He opined,

“...efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their “birth-mark”, as one of the learned Judges of this Court has said in another connection.....Crutches cannot be provided

<sup>39</sup> *Id.*

<sup>40</sup> Akhil Bharatiya Shosht Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246, 298-299.

<sup>41</sup> See the concurring opinion of Justice O. Chinappa Reddy in Akhil Bharatiya Shosht Karamchari Sangh at ¶124 wherein the learned judge held that reservation of posts in public services at all levels are necessary consequences flowing from fundamental right guaranteed under Article 16(1). Article 16(4) merely emphasises this point.



throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation.<sup>742</sup>

It was held by the majority in Rangachari that Article 335 may be read harmoniously with Article 16 of the Constitution since such construction is permissible. However, from Reddy, J.'s judgment in Indra Sawhney, it is evident that Article 335 subsequently gained prominence to emerge as the sole guiding principle in declaring reservation in promotion unconstitutional.

Thommen, J. commented that "affirmative action can function only during appointment to a service. Once appointment is made, any further discrimination with respect to salary, increment, service conditions, promotion or retirement benefits etc., amounts to negation of equality, fairness and justice."<sup>43</sup> He claimed that reservation beyond strict confines of Article 16(4) in public employment does not have warrant in the law since then such practice becomes antithetical to equality.<sup>44</sup> Having said so, Thommen, J. suggests that the State, in order to maintain numerical and qualitative equality, may make direct appointments at various levels and grades.<sup>45</sup> However, according to him, reservation is not permitted in promotion once an appointment is made.<sup>46</sup> He further added that reservation is meant to correct the evil effects of past inequities arising out of historical discriminations. The constitutional mandate is to "rescue the victims of prior discrimination and not to punish the wrongdoers".<sup>47</sup>

What escapes explanation from Thommen, J.'s opinion is if reservation in appointment is constitutionally permissible for being within the confines of the equality provision, then how does reservation in promotion become punitive and 'wrongdoer' oriented? This approach by Thommen, J. raises several questions. For instance, did he want to classify reservation in appointment and reservation in promotion as two different categories? Is such categorisation permissible under Article 14 by applying the test of arbitrariness? Thommen, J.'s decision does not answer these questions.

Kuldip Singh, J. cited different reasons for declaring reservation in promotion unconstitutional. According to him, when reservation is on appointment to a post, every member of a class has the right to compete. However, the collective aspect of the backward class disappears during promotion. If reservation is applicable at the promotion stage, then only those individuals who have already been appointed in the services are considered. The cadre strength at the stage of promotion is significantly small and sometimes, even a single backward class candidate is considered for promotion. Therefore, reservation at promotion stage

<sup>42</sup> Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, 746.

<sup>43</sup> *Id.*, 458.

<sup>44</sup> *Id.*, 459.

<sup>45</sup> *Id.*, ¶310.

<sup>46</sup> *Id.*, 458-459.

<sup>47</sup> *Id.*, 460.

becomes a measure for individuals as compared to the backward community.<sup>48</sup> Also, describing promotion as a condition of service, Kuldip Singh, J. placed promotion within the phrase “matters related to employment” covered under Article 16(1) and asserted that promotion therefore, is not covered under Article 16(4). Further, he claimed that Article 16(4) makes a departure from Article 16(1) only to the extent that it provides for reservation for appointments and posts only at the initial stage of employment which excludes promotion.<sup>49</sup>

Interestingly, Kuldip Singh, J. did not conclude his opinion on the issue here. He added that

“A backward class entrant cannot be given less privileges because he has entered through easier ladder and similarly a general class candidate cannot claim better rights because he has come through a tougher ladder. After entering the service through their respective resources they are placed on equal footing and thereafter there cannot be any discrimination in the matter of promotion....Even otherwise when once a member of the backward class has entered service via reserve post it would not be fair to keep on providing him easier ladders to climb higher rungs of the State services in preference to the general category.”<sup>50</sup>

It thus meant that “instead of reserving the higher posts for in-service members of the backward classes the same should be filled by direct recruitment so that other members of backward classes may get an opportunity to enter the state services”.<sup>51</sup>

Here, Thommen J. and Kuldip Singh J. rejected reservation in promotion on similar grounds in that they were agreeable to reservation at different levels of posts at the appointment stage. However, they were against reservation in promotions.

Sawant, J. acknowledged that since the memorandum did not mention reservation in promotion, any opinion on the same shall be *obiter*. He also acknowledged that reservation in services under Article 16(4) which does not concern Scheduled Caste and Scheduled Tribe candidates is a matter of policy in which the Court is not supposed to interfere.<sup>52</sup> Nevertheless, he expressed his opinion, or *obiter*, on the issue.<sup>53</sup> Unfortunately, he emphasised upon the consequence of Article 16(4) rather than the scope and ambit of Article 16(4). According to him,

<sup>48</sup> *Id.*, 488-489.

<sup>49</sup> *Id.*, 489-490.

<sup>50</sup> *Id.*, 490.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, 561, ¶539.

<sup>53</sup> *Id.*, 563.

“When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in seniority list, stealing march over their seniors to the promotional post... It is naïve to expect that in such circumstances those who are superseded (and they are many) can work with equanimity and with the same devotion to and interest in the work as they did before. Men are not saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to duties, disrespect to superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined.”<sup>54</sup>

Sawant J. also brought to notice the ill effect of reservation in promotion on the superseding candidates. According to him, “since the superseding candidates are assured of their promotion, there will be no motivation to work hard. Also, their attitude towards their colleagues and towards their duties would be coloured with this assurance.”<sup>55</sup> However, he suggested alternative methods to instil “self- confidence” and “self- respect” for people so as to abstain from coming into services through reserved quotas so as not to face “hostile” and “disrespectful” atmosphere.<sup>56</sup> According to Sawant, J., “social backwardness of a person can be improved, once employed, by giving them exemptions, relaxations, concessions and other facilities to compete with other candidates for promotion, on merit.”<sup>57</sup> Again, Sawant J. in his opinion, made a complete departure from legal principles by opining on and suggesting policies for implementation of reservation schemes rather than adjudicating on its constitutionality.

The issue of reservation in promotion was not even a matter of dispute in Indra Sawhney. However, the judges expressed their opinions on the same. Unfortunately, these individual opinions by judges were based significantly on presumptions and had very limited basis on the rule of law. Hardly any emphasis was laid on the precedents laid down by the Court in Rangachari followed by Hira Lal and Karamchari Sangh. However, the *obiter* of Rangachari was taken into consideration by some judges in Indra Sawhney. The Indra Sawhney judgment declared reservation in promotion as unconstitutional, thereby overruling Rangachari.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, 564.

<sup>56</sup> *Id.*, 565.

<sup>57</sup> *Id.*

#### IV. INTRODUCTION OF ARTICLE 16(4A) IN THE CONSTITUTION AND ITS CONSEQUENCES

Article 16(4A) was introduced into the Constitution through the Constitution (Seventy-Seventh Amendment) Act, 1995 to undo the consequences of the *Indra Sawhney* judgment.<sup>58</sup> The Parliament was compelled to make an amendment to the Constitution to insert Article 16(4A) because the Supreme Court had been constantly striking down reservation schemes for promotions in services. While the *Indra Sawhney* decision declared reservation in promotion for Other Backward Classes (OBCs) as unconstitutional, Article 16(4A) unambiguously provides for reservation in promotion for Scheduled Castes and Scheduled Tribes in services under the State. However, when the constitutionality of Article 16(4A) was challenged before the Supreme Court, the distinction between OBCs on one hand and the SCs and STs on the other hand, became blurred.<sup>59</sup>

Even after the introduction of Article 16(4A), the Supreme Court in the case of *S. Vinod Kumar v. Union of India*<sup>60</sup> ('S. Vinod Kumar') struck down a memorandum providing for lower qualifying marks for persons from reserved categories in matters of promotions.<sup>61</sup> The Court declared the memorandum unconstitutional by relying on the opinions of judges in *Indra Sawhney*. However, it overlooked Article 16(4A) which had already come into force. *S. Vinod Kumar* was subsequently overruled in the case of *Rohtas Bhankhar v. Union of India*<sup>62</sup> on the ground that the *S. Vinod Kumar* was decided by overlooking Article 16(4A), which had already been inserted in the Constitution by the time the case came before the Court.

In spite of the opinion delivered by the judges in *S. Vinod Kumar* in complete disregard of a constitutional amendment, the aftermath of the decision

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<sup>58</sup> The Constitution (Seventy-Seventh Amendment) Act, 1995, Statement of Objects and Reasons reads

“The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *Indra Sawhney v. Union of India*, however, observed that reservation of appointments or posts under article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the Scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interest of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend article 16 of the Constitution by inserting a new clause (4A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes.”

<sup>59</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, 263.

<sup>60</sup> *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580.

<sup>61</sup> *Id.*, 582.

<sup>62</sup> *Rohtas Bhankhar v. Union of India*, (2014) 8 SCC 872.

was another significant amendment to the Constitution.<sup>63</sup> A proviso was added to Article 335, post *S. Vinod Kumar*, which states,

“Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”

Article 16(4A) underwent further amendment to provide for consequential seniority.<sup>64</sup> Further, Article 16(4B) was introduced in the Constitution subsequently through the Constitution (Eighty-First Amendment) Act, 2000. Both of these provisions were challenged in *M. Nagaraj v. Union of India*.<sup>65</sup>

## V. M. NAGARAJ V. UNION OF INDIA AND ITS ADVERSE EFFECT ON THE IMPLEMENTATION OF ARTICLE 16(4-A)

A five-judge bench of the Supreme Court in *M. Nagaraj v. Union of India* upheld the constitutionality of Article 16(4A) and Article 16(4B). However, the reasons based on which the constitutionality of the Articles were upheld are legally unsound on multiple aspects.

The justification for reservation in this case was premised on balancing the interests of the general category candidates against reserved category

<sup>63</sup> The Statement of Objects and Reasons of the Constitution (Eighty Second Amendment), 2000 reads

“The Scheduled Castes and the Scheduled Tribes had been enjoying the facility of relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion. The Supreme Court in its judgment dated 1-10-1996 in the case of *S. Vinod Kumar v. Union of India* held that such relaxations in matters of reservation in promotion were not permissible under Article 16(4) of the Constitution in view of the command contained in Article 335 of the Constitution. The Supreme Court also held that the law on the subject of relaxations of qualifying marks and standards of evaluation in matters of reservation in promotion is one laid down by the nine-judge Constitution Bench of the Supreme Court in the case of *Indra Sawhney v. Union of India*. Para 831 of *Indra Sawhney* judgment also held such relaxations as being not permissible under Article 16(4) in view of the command contained in Article 335 of the Constitution. In order to implement the judgments of the Supreme Court, such relaxations had to be withdrawn with effect from 22.07.1997.

2 In view of the adverse effect of the order dated 22.07.1997 on the interests of Scheduled Castes and Scheduled Tribes, representations had been received by the Government from several quarters including the Members of Parliament. Considering the various representations, the Government has reviewed the position and decided to move for constitutional amendment with a view to restore the relaxations which were withdrawn vide instructions issued by the Department of Personnel and Training on 22.07.1997.”

<sup>64</sup> The Constitution (Eighty Fifth Amendment) Act, 2001.

<sup>65</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

candidates. None of the clauses in Article 15 or Article 16 of the Constitution indicate a requirement of balancing. By making such an argument, the focal point of reservation shifts away from social discrimination, the issue that was sought to be addressed through Article 16. The focus changes instead to public employment which, as per the judge, is to be distributed among general and reserved candidates by maintaining balance.<sup>66</sup> The Court notes,

“...We are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to Backward Class in order to bring about an equal level playing field in the matter of public employment. .... Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is reality of life. The concept of “public employment” unlike the right to property is socialistic.”<sup>67</sup>

In *M. Nagaraj*, the Court established a connection between the ideas of equity, justice and merit for the first time. Before this case, the primary focus of adjudication on reservations was on the fundamental right of equal opportunity for oppressed communities. Though efficiency in administration also received the attention of the Court, it was not given the same weightage as the fundamental right of equal opportunity of marginalised communities.<sup>68</sup> For the first time, the Court opined that in public employment, these principles play their roles in the form of “quantifiable data in each case.”<sup>69</sup> When construing Article 16(4), it is the equality of facts as against the equality of law which plays the dominant role. Again, resorting to the idea of balancing, the Court opined that

“Backward classes seek justice. General class in public employment seek equity. The difficulty comes in when the third variable comes in, namely; efficiency in service. .... However, if you add efficiency to equity and justice, the problem arises in the context of the reservation.”<sup>70</sup>

The Court also held that Article 16(4) is an enabling provision unlike Article 16(1) and therefore, plays in completely different fields. The operation of Article 16(4) is dependent upon inadequacy of representation and backwardness of the Scheduled Castes and Scheduled Tribes which triggers action from the State government. Further, Article 16(4) must be construed in the light of Article 335 of the Constitution.<sup>71</sup> Therefore, differentiating the rule of law from the rule of facts,

<sup>66</sup> *Id.*, 248.

<sup>67</sup> *Id.*

<sup>68</sup> See *General Manager, Southern Rly. v. Rangachari*, AIR 1962 SC 36; *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

<sup>69</sup> *Id.*, 248-249.

<sup>70</sup> *Id.*

<sup>71</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, ¶¶49, 102 and 112.

the Court acknowledged that while the vesting of power on the State government enabling it to make reservation schemes is constitutionally valid, the exercise of such power in a given case by the State government can be arbitrary and therefore, has to be determined on case by case basis.<sup>72</sup> Therefore, Article 16(4) was read by the Court as an issue of equality of facts. It was also held that “it is the equality ‘in fact’ which has to be decided looking at the ground reality....Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.”<sup>73</sup>

## A. LEGAL FALLACIES WITH THE M. NAGARAJ DECISION

### 1. Incorrect interpretation of the Constitution

In *M. Nagaraj*, the Court construed the scope of Article 16(4) of the Constitution in light of Article 335. This interpretation by the Court is incorrect, particularly when seen through the lens of Article 320(4) of the Constitution. Article 320(4) of the Constitution reads,

“Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made ‘or’ as respects the manner in which effect may be given to the provision of Article 335.”<sup>74</sup>

Thus, one may argue that Article 320(4) of the Constitution distinguishes the scope of Article 16(4) from the scope of Article 335 and in either case, prevents the Public Service Commission from interfering on this issue. Even otherwise, whenever the Constitution requires a provision to be limited by or read together into the scope of another provision, the same has been explicitly provided for in the Constitution. There are numerous examples of the same.<sup>75</sup> Article 320(4) of the Constitution operates either in the context of Article 16(4) or alternatively, in the context of Article 335. The relation of Article 320(4) with Article 16(4) as well as with Article 335 has been explicitly mentioned in the Constitution. Clauses 3, 4, 4-A, 4-B and 5 of Article 16 operate within the scope of Article 16 itself. None of these clauses mention Article 335 for the purpose of defining their scopes. Therefore, limiting Article 16 by Article 335 is a forceful limitation on the former, without the intention in favour of the same being expressed in the Constitution by its framers.

<sup>72</sup> *Id.*, 249.

<sup>73</sup> *Id.*, 250.

<sup>74</sup> The Constitution of India, 1950, Art. 320(4).

<sup>75</sup> For example, Article 6 of the Constitution reads, “Notwithstanding anything in Article 5...”. Similarly, Article 7 reads “Notwithstanding anything in Articles 5 and 6...”.

Another reason against limiting the scope of Articles 16(4) and 16(4A) of the Constitution can be found in Article 16(4B). Article 16(4B) provides for unfilled vacancies under Articles 16(4) and 16(4A) to be filled as a separate class “for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.”<sup>76</sup> This fifty percent ceiling is a judicial principle developed in *Indra Sawhney* which was subsequently incorporated in the Constitution for the purpose of quantifying vacancies.<sup>77</sup> Thus, the limitation of Article 16(4-B) is provided within the provision. The same is not true for Articles 16(4) and 16(4A). In both of these provisions, no limitation has been provided for in the Constitution concerning their implementations. Therefore, this forceful interpretation of Article 16(4) and Article 16(4A) through the lens of Article 335 must be read with strict suspicion.

Also, while upholding the constitutionality of Article 16(4A), the court focused on the Statement of Objects and Reasons of the Constitution (Seventy-Seventh Amendment) Act, 1995.<sup>78</sup> As per the Statement, since the representation of Scheduled Castes and Scheduled Tribes has not reached the desired level in public services, it is imperative to continue providing reservation to them.<sup>79</sup> However, the Court opined that Clause (4A) follows the same specified pattern as clauses (3) and (4) of Article 16, which is premised upon the opinion of the State on inadequacy of representation. Inadequacy of representation, the Court held, has to be ascertained through quantifiable data in matters of promotion in turn.<sup>80</sup>

The constitutionality of Articles 16(4A) and 16(4B) was upheld by shifting from “equality in law” to “equality in fact”, to be decided on a case by case basis. It was held by the Court that

“...the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reasons that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment... There is a basic difference between “equality in law” and “equality in fact”. If Articles 16(4A) and 16(4B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Article 16(4A) and Article 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely,

<sup>76</sup> The Constitution of India, 1950, Art. 16(4-B).

<sup>77</sup> Article 16(4B) was introduced into the Constitution through the Constitution (Eighty-First Amendment) Act to introduce a fifty percent ceiling for fulfilment of vacancies in employment.

<sup>78</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, 261, ¶85.

<sup>79</sup> *Id.*, 261-262.

<sup>80</sup> *Id.*, 262-263.



backwardness, inadequacy and efficiency of administration are retained in Articles 16(4A) and 16(4B) as controlling factors, we cannot attribute constitutional invalidity of these enabling provisions.....In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law.”<sup>81</sup>

In this manner, the M. Nagaraj decision established equality of fact as a parameter to determine the constitutionality of reservation. Article 14 of the constitution provides for equality before the law and equal protection of the laws. Before M. Nagaraj, the equality of fact did not get much significance. Further, M. Nagaraj also established Article 335 as a significant parameter for implementation of reservation.

## 2. Sub-categorisation of homogenous classes of Scheduled Castes and Scheduled Tribes into more and less backward classes

The other worrying principle laid down by the Court in *M. Nagaraj* was the further categorisation of Scheduled Castes and Scheduled Tribes for the purpose of reservation in promotion. It was suggested by the Court that categorisation of ‘Other Backward Classes’ (OBCs) was declared to be constitutionally permissible in *Indra Sawhney*. This led to the establishment of the ‘creamy layer’, by sifting less backward communities from more backward communities. It was therefore, held in this case that the sub-classification between SCs and STs vis-à-vis OBCs had also been declared to be within the confines of egalitarian equality in *Indra Sawhney*.<sup>82</sup> The Court concluded that since Article 16(4A) follows the principles laid down by the Court in *Indra Sawhney* and further because Article 16(4A) is carved out of Article 16(4), the sub-classification of SCs and STs is also permissible under the Constitution.<sup>83</sup>

The decision in M. Nagaraj introduced three important trends in determining the constitutionality of reservation in promotion for SCs and STs. Firstly, it laid down that equality in promotion is a question of fact which is to be determined on a case by case basis.<sup>84</sup> Secondly, the Court on the one hand deduced the constitutionality of both Article 16(4A) and Article 16(4B) from *Indra Sawhney* and on the other hand, overlooked the fact that *Indra Sawhney* had permitted the sub-classification of only OBCs into creamy layer and not otherwise. This classification was prohibited for SCs and STs.<sup>85</sup> Finally, M. Nagaraj introduced the

<sup>81</sup> *Id.*, 270-271.

<sup>82</sup> *Id.*, 275, ¶115.

<sup>83</sup> *Id.*, 81.

<sup>84</sup> *Id.*, 271, ¶107.

<sup>85</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : AIR 1993 SC 477, 462, ¶323(4).

concept of ‘proof of compelling reasons for the State Government’ to provide for reservation in public employment.<sup>86</sup>

Proof of compelling reason to be provided by the State, as is required under Article 16(4A), is an element of strict scrutiny principle practiced in the United States. The U.S. Supreme Court derives its power of strict scrutiny from the ‘due process’ clause provided in the U.S. Constitution. The Indian Constitution framers explicitly rejected the idea of ‘due process’ in the Constituent Assembly in favour of “procedure established by law” which finds mention in Article 21.

The decision in *M. Nagaraj* sought to establish Article 16(4A) as an enabling provision which depends on equality of fact. This proposition establishes the State as an authority to assess the need for implementation of reservation schemes. Accordingly, the State may decide as to who are entitled to avail these schemes. Consequently the Court in effect, should withdraw from its power to review reservation schemes. Since reservation schemes are executive policies, they must remain outside the scope of judicial review.<sup>87</sup> This is an important separation of powers principle. It is only questions of law that the court of law has the jurisdiction to interpret.

The Supreme Court however, through the same decision upheld the jurisdiction of the Court to decide on reservation schemes under Article 16 of the Constitution.<sup>88</sup> Therefore, *M. Nagaraj* upholds both of the contradictory principles. These contradictions had a significant adverse effect on the implementation of Article 16(4-A).

### 3. Constitutional bench decision in *E.V. Chinnaiah v. State of A.P.* was ignored by constitution bench in *M. Nagaraj v. Union of India*

A year before the *M. Nagaraj* was decided by the Constitution bench, the same court with the same bench strength in *E.V. Chinnaiah v. State of A.P.*<sup>89</sup> (*E.V. Chinnaiah*) had laid down an important principle. The *E.V. Chinnaiah* case involved sub-categorisation of certain castes enumerated in the President’s Order into four different groups, for the purpose of categorising Scheduled Castes into backward and more backward classes. This categorisation was made so that a targeted effort could be made through schemes to benefit SCs on the basis of their backwardness.<sup>90</sup>

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<sup>86</sup> *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, 270, ¶107.

<sup>87</sup> *Id.*, 250, ¶49.

<sup>88</sup> *Id.*

<sup>89</sup> *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394.

<sup>90</sup> *Id.*, 406, ¶2.

The court rejected this sub-classification of Scheduled Castes and Scheduled Tribes and held that ‘Scheduled Caste’ refers only to the list prepared by the President under Article 341.<sup>91</sup> Even though the Scheduled Caste comprises of a conglomeration of castes, creeds and tribes, they are a homogenous unit for the purpose of the Constitution.<sup>92</sup> Even the President of the Republic, who prepares the list, cannot subdivide or sub-classify the castes in the list. The President only has the limited power to include and exclude communities from the list and that too, through an Act of Parliament.<sup>93</sup>

The Court further held that the Constitution intended that all the castes mentioned in the President’s List should be deemed to be one class of persons.<sup>94</sup> The Court also relied upon the decision in *State of Kerala v. N.M. Thomas*<sup>95</sup> which mentioned way back in 1976 that Scheduled Castes attain a new status by virtue of the Presidential notification and is one class for the purposes of the Constitution.

Sub-classification of Scheduled Castes and Scheduled Tribes, as per E.V. Chinnaiah, is also not permissible unlike the formulation of creamy layers of OBC because it was decided in *Indra Sawhney* itself that the Constitution insulates the President’s Lists for SCs and STs from being tampered by the State Governments, unlike the OBC list.<sup>96</sup> Therefore, the contradiction between the decisions in *M. Nagaraj* and *E.V. Chinnaiah* by benches of equal strength of the Supreme Court is indicative of judicial inconsistency.

## B. ADVERSE IMPACT OF THE M. NAGARAJ DECISION ON SUBSEQUENT CASES

Implementation of Article 16(4A) and Article 16(4B) post *M. Nagaraj* required the State to prove the three-pronged test of backwardness, inadequacy of representation of persons of that caste in government services and overall efficiency of administration under Article 335 of the Constitution.<sup>97</sup> However, the State argued in the case of *U.P. Power Corpn. Ltd. v. Rajesh Kumar*<sup>98</sup> (‘U.P. Power Corporation’) that the Court should refrain from factually scrutinising data to be presented by the State under the three-pronged test. It was urged on behalf of the State to construe every person belonging to Scheduled Castes or Scheduled Tribes as deemed backward without further tests.

<sup>91</sup> The Constitution of India, 1950, Art. 341.

<sup>92</sup> *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394, 411.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

<sup>96</sup> *E.V. Chinnaiah v. State of A.P.*, (2005) 1 SCC 394, 417.

<sup>97</sup> *See U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1, 38, ¶83.

<sup>98</sup> *Id.*

Reliance was placed by the State on Indra Sawhney to claim that the concept of creamy layer does not apply to Scheduled Caste and Scheduled Tribes.<sup>99</sup> It was also urged that the phrase “in the opinion of” in Article 16(4A) is subjective and not objective in nature and does not need strict scrutiny by the Court. However, the Court rejected these arguments. It relied extensively on M. Nagaraj to hold that it is imperative for the purpose of objective satisfaction of the State, to generate data to prove that there is backwardness of the community of the persons considered for promotion and inadequacy of representation in government services.<sup>100</sup> Mere notification of the community in the President’s List alone will not make members of SC and ST communities entitled to promotions. Since no such exercise was undertaken by the State, the Court held that the Act and the Rule providing for reservation in promotion of the SC/ST communities in U.P. Power Corporation, is *ultra vires* the decision in M. Nagaraj.<sup>101</sup> Apart from the extensive reliance on M. Nagaraj, the Court in this case also relied upon *Suraj Bhan Meena v. State of Rajasthan*<sup>102</sup> (‘Suraj Bhan Meena’) wherein the Supreme Court had quashed a notification by the State of Rajasthan due to similar reasons.

The interesting aspect of promotion related cases post M. Nagaraj is that *obiters* against reservation have disappeared.<sup>103</sup> Unlike the decisions from Rangachari to Indra Sawhney, it seems as if post M. Nagaraj, the Court took refuge in the phrase “inadequacy of representation” in Article 16(4A) of the Constitution to strike down promotion related reservation schemes. It is argued that the M. Nagaraj decision, with its deductive reasoning, provided a safe refuge to the Court to conceal its prejudice against reservation behind objective data requirements such that no necessity was felt to distinguish the judge’s opinions from the constitutional provisions anymore.

The threat on the practical implementation of Articles 16(4A) and 16(4B) was soon realised by the Parliament, at least on the basis of the outcomes in Suraj Bhan Meena and U.P. Power Corporation. Therefore, to undo the effect of M. Nagaraj, the Constitution (One Hundred and Seventeenth Amendment) Bill, 2012 was sought to be introduced in the Parliament.<sup>104</sup> The Bill failed to get tabled in the Parliament due to disruption and ultimately lapsed.<sup>105</sup> The Bill sought to amend Article 16(4A) of the Constitution to read,

<sup>99</sup> *Id.*, 23-24.

<sup>100</sup> *Id.*, 38-39, ¶83, ¶86.

<sup>101</sup> *Id.*, 33.

<sup>102</sup> *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467.

<sup>103</sup> See *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467; *U.P. Power Corpn. Ltd. v. Rajesh Kumar*, (2012) 7 SCC 1.

<sup>104</sup> The Constitution (One Hundred and Seventeenth Amendment) Bill 2012, Statement of Objects and Reasons.

<sup>105</sup> The Bill was introduced in Parliament on September 5, 2012 and was passed by Rajya Sabha on December 17, 2012. However, it could not be tabled before Lok Sabha due to immediate oppositions of some Members of Parliament and has not been subsequently taken up since the change of government in 2014.

“(4A). Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under Article 341 and Article 342, respectively, shall be deemed to be backward and nothing in this Article or Article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes to the services in the State.”<sup>106</sup>

Due to the lapse of the Bill, the M. Nagaraj dictum continues to govern reservation in promotion. Repeated attempts by the State to provide for reservation in promotion have been struck down by the Court on the ground of absence of objective proof as was seen in Suraj Bhan Meena and U.P. Power Corporation. Subsequently, State governments have also become reluctant about making schemes, which they believe are going to be declared *ultra vires* the Constitution by the Court.<sup>107</sup>

Recently, in *Suresh Chand Gautam v. State of U.P.*<sup>108</sup> (‘Suresh Chand Gautam’), Dipak Misra J., the same judge who decided U.P. Power Corporation, opined that the Court cannot issue a writ of *mandamus* to ensure that the State Government or its instrumentalities collect quantifiable data to implement Article 16(4-A) and Article 16(4B) of the Constitution.<sup>109</sup>

It was also held by Misra J. that Article 16(4A) and Article 16(4B) are enabling provisions. Hence, it cannot be said that it is the constitutional duty of the State government to implement these provisions.<sup>110</sup> Consequently, the Court cannot be expected to issue writs to the State Government if the task of collecting quantifiable data in relation to these provisions is not undertaken by it.<sup>111</sup> As per the Court therefore, it is the discretion of the State to undertake this initiative on the fulfilment of certain conditions while also keeping in view Article 335 of the Constitution.<sup>112</sup> The Court also relied upon *Census Commr. v. R. Krishnamurthy*<sup>113</sup> to conclude that it is not within the domain of the courts to legislate upon an issue. It can only interpret the Constitution and determine the constitutionality of laws.<sup>114</sup> Therefore, it was opined in *Suresh Chand Gautam* that no *mandamus* can be issued

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<sup>106</sup> *Id.*

<sup>107</sup> See *Suresh Chand Gautam v. State of U.P.*, (2016) 11 SCC 113.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*, 145-146.

<sup>110</sup> *Id.*, 144-145, ¶47.

<sup>111</sup> *Id.*, 146.

<sup>112</sup> *Id.*

<sup>113</sup> *Census Commr. v. R. Krishnamurthy*, (2015) 2 SCC 796.

<sup>114</sup> *Id.*, 806, ¶25.

to State Governments to direct it to collect quantifiable data for the purposes of framing rules and regulations for reservation in promotion.<sup>115</sup>

Failure in implementation of Articles 16(4A) and 16(4B) should arguably not be attributed to the judiciary alone. The voluminous *obiter* generated in the discussed cases show the nature of judicial review the issue was subjected to. This, combined with adversarial and paranoid reactions by the legislature and the judiciary towards each other's decisions have jointly contributed in reducing Article 16(4A) to a toothless provision. It is argued that the Supreme Court, post M. Nagaraj has introduced the principle of strict scrutiny through a backdoor.

Subsequently, the Court has used this principle to factually adjudicate upon equality. This has resulted in the striking down of promotion related regulations introduced by the State. The continuous interference by the Court led the sceptical States to not undertake collection of data and subsequently, to not introduce reservation related schemes since the State now could apprehend the inevitable outcomes of reservation policies if taken to court.<sup>116</sup> On a separate note, it is also worth an exercise to explore the efforts made by the State in generating the quantifiable data required for reservation in promotion, but this study remains outside the scope of this paper.

## VI. CONCLUSION

This paper attempted to draw attention towards the nature and extent of judicial review that the Supreme Court of India has exercised on reservation for promotional posts in services, in addition to the impact this has created on a fundamental right. Indra Sawhney is a landmark decision on reservation which has apparently settled many aspects on the issue. M. Nagaraj however, serves as an equally prominent cornerstone in reservation related jurisprudence. However, this decision has severely damaged the constitutional vision surrounding reservation as well.

Firstly, by declaring equality as a question of fact as opposed to a question of law, the Court opened the door to strict scrutiny for itself. As a consequence, the authority of determining 'backwardness', 'inadequacy of representation' and 'administrative efficiency' on a case-by-case basis has been shifted to the Court. As the law stands post M. Nagaraj, for the purposes of reservation in promotion, being notified as a Scheduled Caste or Scheduled Tribe individual is

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<sup>115</sup> Suresh Chand Gautam v. State of U.P., (2016) 11 SCC 113, 146.

<sup>116</sup> *Id.* In this case, the Supreme Court was approached to direct the states to undertake data collection for the purposes of implementation of Article 16(4A). Earlier, in cases like Suraj Bhan Meena and U.P. Power Corporation, it had been observed that the state had collected data for the purposes of implementation of Article 16(4A). However, the Supreme Court in both the cases had struck down reservation schemes based on those data on various grounds such as methodology, parameters etc. Hence, this inference is made.

not enough. *De facto* backwardness is required to be proved before the court of law using adequate data collected by the States on case-by-case basis. This model of implementation of affirmative action is practiced in South Africa.

In South Africa, various legislations provide for a very vague categorisation of individuals for preliminary eligibility for affirmative action. When disputes arise, the South African courts of law adjudicate on the claims of reservation based on the facts of each case. The same model is not practiced in India since the notification of eligible communities is specifically made by the Executive wherein modification of the list is permissible only through Acts of Parliament.

Prior to an amendment introducing Article 16(4A) in the Constitution, the Supreme Court judges distinguished their personal opinion from the existing law, while upholding reservation in promotions. It appeared from the *obiter* of judgments from Rangachari decision to Indra Sawhney that the judges personally disagreed with reservation in promotion but upheld the schemes since it was a part of the constitutional vision. A careful reading of the decisions of the Supreme Court on this issue post M. Nagaraj will reveal that voluminous *obiters* in judgments have disappeared. At present, the only tool applied by judges to decide on the constitutionality of reservation schemes, is the three-pronged test laid down in the M. Nagaraj decision. Therefore, in a manner, M. Nagaraj has absolved the Court from openly narrating their displeasure and scepticism against reservation in promotion.

The decision in M. Nagaraj has also lead to another legal development. It has classified reservation at appointment and promotion levels in government services into two different categories, with equality being more prominently declared as *de facto* on a case-by-case basis at promotional level. The Court is yet to specify the basis on which reservation in promotion and appointment levels have been classified into two categories and whether they can be really classified as two different categories under Article 14 on the basis of the test of arbitrariness. It is true that in Indra Sawhney, the bench through individual *obiters* indicated that there are differences between the reservations at the two stages. The bench indicated that reservation at appointment stage concerns a community while reservation at promotional stage concerns individuals.

Another judge in Indra Sawhney indicated that while reservation at appointment stage is permissible, reservation at promotional level amounts to discrimination. However, the opinion did not indicate the basis of this conclusion. Also, these aspects of differences were not addressed subsequently in M. Nagaraj or thereafter. Introduction of Article 16(4A) diverted the attention of the Court towards a more 'objective hurdle' restricting reservation in promotion. The opinion of the Court against reservation became subtle in the form of 'objective tests' laid down in the M. Nagaraj.

One may argue that a more reasonably framed Article 16(4A) which did not require the State to ascertain backwardness of SCs and STs during promotion would have served the constitutional vision. The hasty drafting of Article 16(4A) by the Parliament to undo the effect of Indra Sawhney has done more harm to the reservation jurisprudence than clarifying the constitutional vision which allowed reservation in promotion even through Articles 16(1), 16(2) and 16(4). This careless amendment of the Constitution by the Parliament has thus, equally contributed to the non-implementation of Article 16(4A).