Constitutionality of Article 16(3) and its Wrongful Usage by Political Leaders of the Country

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Abstract

India, a nation where notion of unity and integrity are paramount, has encountered with social conundrums in form of policies and promises extended by unscrupulous politicians in the name of 'sons of the soil policy'. The idea of parochialism which has been glorified is strictly prohibited by the magna carta of the constitution of India which is imbued thereof in article 14. It is of much surprise that framers of the constitution did leave a loophole for such unscrupulous elements to play over and malign the ideas and notion which the constitution of this nation promises. Albeit, Indian constitution provides a clause for equal opportunity for every citizen but its framers lay down an exception for residence as required qualification for job in public sector. Though, old times can speak for the justification of the said clause but in the contemporary situation, where the identity of an individual is of no less than a cosmopolitan, this clause offers stagnation and thus calls for its nullification. The author in this paper look up for every aspect calling for constitutionality of this clause and also tries to highlight its lack of requirement and rife misuse here and now.

Keywords: Political leaders, Equal opportunity, Cosmopolitan, Domicile Reservation

1. Introduction

Equality, being a true facet of humankind, enjoys very much protection under the constitution of India and thus tries to uphold every aspect of it whenever being tendered. Concept of affirmative action or reservation, whether it be domiciled based, community based or gender based, has come across in situations where there is requirement of bringing unequal forth and thus par with the equals.

Domicile reservation in its true meaning does not, in whatever sense, can be attributed as an affirmative action because two similarly situated person cannot be treated as different only on the basis of their residence, especially in a country where the real idea of residence and domicile lies with the whole nation and not its fragments. The state must resort to compensatory state actions for the purpose of making people who are factually inequal in their wealth, education or social development, equal in specified area.

Affirmative actions are more of compensatory nature and are never formulated for arbitrary preferential treatment on the grounds which are very intrinsic to a person. If domicile reservation is clubbed under the category of affirmative action's then it would go against the mentioned proposition and will thus violate the sheer spirit of constitution of India which has been manifested by the framers through article 16(2).

For an affirmative action to be legally and constitutionally sound, there exist two-pronged test which entails i) intelligible differentia and ii) rational nexus of the act with the objective sought to be achieved. In the present case of domicile reservation credentials for both of the required test are at lacunae due to the following reasons:

1.1 Intelligible Differentia: It is an established law that for an affirmative action to be constitutionally sound there must exist intelligible differentia between the groups which are dichotomized by the virtue of the said affirmative action. Also, the grounds owing for such dichotomization must be reasonable and should not amount to intrinsic traits of an individual. It is also pertinent to note that classification on the place of birth has been explicitly rejected by the Hon'ble court.

Though, one can argue that place of birth is not equivalent to place of residence but one must not forget that taboo for classification mentioned in article 16(2) is not only limited to the place of birth but also includes place of residence. Moreover, in some states the requirements to achieve the status of a residence are no less than an onerous task. In some states the required residential period before granting domicile lasts till 15 years which apparently covers the pinnacle period of an individual's life, making this difference between place of birth and place of residence redundant.

1.2 Rational Nexus: After covering the first requirement, now let us examine if domicile reservation fulfils the requirement enshrined in the second division of the test of reasonable classification. Though it can be said that there lies a rational nexus with the objective sought

to be achieved, which can be regarded as promoting welfare of the residents of a particular state but it is noteworthy that while examining the constitutionality of an action for its rational nexus with an objective, one must not forget that the objective here cannot be contrary to the law.

Promoting welfare of the residents of a particular state at the cost of other citizen of the nation is prima facie against the very integrity and ideas of this pluralistic country as the constitution of this country does not seek to cater opportunities of welfare to its citizens while disregarding merit of others and thus such an objective cannot be termed as reasonable . Moreover, since it is not the only way in which welfare of the residents can be promoted and there lies plethora of course which the author does not intend to cover under this research paper.

2. If Proposition 1 is Answered Negatively then, Whether Article 16(3) is an Exception to Article 16(1) of Indian Constitution or is an Aggrandized Form of thereof?

Article 16(1) of the Indian constitution states that "there shall be equality of opportunity for all citizen in matter relating to employment or appointment to any office under the state". It is the general theme which flows from the ideas imbued in language of our constitution. But constitution does not limit its interpretation and scope till this and also lays down certain provisos in order to precisely define and manifest the intent of the framers.

Constitution of India also provides for reservation in certain exceptional cases like that of mentioned in article 16(4) but it is pertinent to note here that this proviso is not an exception to idea enshrined in article 16(1) rather it is an extended form of equality and thus a part of article 16(1). To further say, in Thomas Justice Krishnan Iyer concurring with Justice Subbarao pronounced that "to my mind, this sub-article serves not as an exception but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to''.

But regarding article 16(3) of the constitution the opinions of justices are always been antithetical to the idea of equality. Since, as explained by the form of proposition 1, domicile reservation is not a part of affirmative action and is a mere practice of preferential treatment on the grounds which are explicitly put under taboo by article 16(2) of the constitution, article 16(3) cannot be attributed as facet of equality and thus it can be safely

argued that article 16(3) is not an emphasized proviso coming out of ideas incorporated in article 16(1) and rather is an exception to article 16(1) which talks about equality of opportunity.

3. If Article 16(3) is Antithetical to Idea of Equality then Why it Prevails in Constitution of Country Like India?

India is country which sets example of a pluralistic society which gives equal consideration, weightage and respect to every individual's culture which finds its root in the place of upbringing. Framers of the Indian constitution, mindful of this fact, incorporated a proviso regarding domicile requirement as a necessary condition for appointment to a government post.

Dr. B.R. Ambedkar justified the step by contending that "I shall explain the purpose of this amendment. It is the feeling of many persons in this House that, since we have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian States, it is only a concomitant thing that residence should not be required for holding a particular post in a particular State because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by this Constitution or which we propose to establish by this Constitution. Therefore, in my judgment, the argument that residence should not be a qualification to hold appointments under the State is a perfectly valid and a perfectly sound argument. At the same time, it must be realized that you cannot allow people who are flying from one province to another, from one State to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and, so to say, take the plums and walk away. Therefore, some limitation is necessary".

But it is also important to highlight that this scheme of idea was only apposite when the individuals were pretty much limited, territorially, to their place of birth. Such a proviso does not entail appreciation in the present time where an individual is no less than a cosmopolitan. Here and now, situation is vastly different from what was anticipated while formulating the impugned proviso. It is also argued that the root of a person can not only be gauged and kept intact by catering them with state government jobs in their place of residence as roots and attachment with a place are not subject to opportunities of jobs in

the said place and rather such an attempt will hinder the growth led by migration and will thus glorify stagnation of individuals.

Moreover, the constitutional experts have justified this for the sake of administrative efficiency as it has largely to do with the familiarity of local language but familiarity with local language can be added as a precursor without any constitutional hinderance but this provision has been used in an unchecked way by the politicians for their political influence. The only legitimate way of extending such reservation in states was The Public Employment (Requirement as to Residence) Act, 1957. By this act, the parliament empowered the central government to make rules having force for a temporary period of time, prescribing for a residential requirement only for appointment to non-gazetted posts in the states like Tripura, Manipur, HP and Andhra Pradesh. However, this act was repealed in 1974 and now nobody can be denied of employment in any state on the ground of being a non-resident in a state other than the state of Andhra Pradesh where it still prevails under the name of Mulki rules and later it later came up in the form of article 371-D.

4. How Domicile Reservation in Educational Institution is Different from Domicile Reservation in Jobs?

4.1 Both are dealt under different articles of constitution

Domicile reservation in educational institutions and domicile reservation in job opportunities are comparatively different as they both are dealt with different articles of the constitution. Article 16 of the constitution deals only with the equality in opportunity in the matter of public employment and thus prohibits discrimination of the subjects on the grounds of religion, race, sex, caste, descent, place of birth, residence or any of them only in matter of public employment whereas article 15 of the constitution prohibits discrimination on the grounds of religion race, caste, sex, place of birth or any of them in general thereby covering the aspect of the educational institution.

It is important to note here that the grounds on which discrimination is prohibited are not same in Article 15 and article 16 of the constitution. Article 15(1) does not prohibit discrimination on the ground viz. residence which is a ground prohibited under article 16(2). By the virtue of this disparity, educational institutions are able to disregard the meritorious students and allow domiciled candidates to take admission in lieu.

4.2 Underlying purpose of domiciled reservation in educational institution does not vouch domiciled reservation in jobs

In one of the landmark decisions delivered by the Hon'ble court the two claims which came in for the departure from the principle of merit-based selection, in case of admission to educational institutions, were propounded. The two claims were:

i. The claim of state interest in providing adequate medical services to people of state by imparting medical education to the students who by the reason of their residence in state would be likely to settle down and serve the people of state.

- The basic aim of the state interest was to improve medical facility of state and since outsiders tend to leave the state after their graduation and practice in different states, it deprives state of required medical services. But the said purpose cannot vouch for the domicile reservation in jobs since the if an individual is applying for an opportunity or job under the state, he is intending to work for the development of the state and thus ensuring the basic workforce required to run a state.

ii. The region's claim of backwardness.

- Formulation of reservation policy on the very ground of region's claim for backwardness is a true facet of setting equating and thus should not be interpreted through the exception clause of article 16(3). While recognizing the possibility of preference on the basis of rural backwardness for the purpose of admission to the medical colleges , the Hon'ble Supreme court observed that " the observation regarding region's claim for backwardness, in our view, cannot be legitimately pressed into service for the purpose of justifying reservation or weightage in favour of a rural candidates on the ground of nativity/residence for the purpose of public employment. The difference in approach regarding article 15 and article 16 was indicated by J. Bhagwati in Pradeep Jain where it was made clear that in the matter of admission to professional colleges the consideration was different. As far as the public employment is concerned, the classification on the basis of residence in a region or locality was broadly held to be impermissible".

5. Whether Domiciled Reservation, especially in the Name of Article 16(3), Becomes threat to Integrity of India and if Yes, then how?

Reservation, albeit a paramount facet of concept of equality, is being pegged now a days as fiendish method to develop sense of parochialism in the name of 'sons of soil' policy.

The meaning of reservation travelled fast from doing right the wrong of early society to a fruitful method to woo voters by appealing their interest. Though India is a quasi-federal country, one must not forget that its constitution speaks only for a single domicile which is domicile or citizenship of India and not if any particular state. The idea of providing domicile reservation to residents do not only violate the clause for equal opportunity, but also will divide the country on the basis of states and the concept of a single nation, where free movement of its citizens are observed, will come to an end.

The theory of relative deprivation of sociology also speaks that reservation of such kind will lead to the fragmentation of entire land as it develops feeling of deprivation and thus animosity among the residents of different states, which is no less than a threat to the integrity of India.

6. Misuse of Power in the Name of Article 16(3).

Article 16(3) is a weapon used by the politicians of the present times to gain influence in their locality by extending promise of domiciled reservation. The story does not end at false promise but it then aggravates to protests which are manifestation of grievance by aggrieved populous of the state.

6.1 Position in contemporary situation

Author, to provide a clear image, seeks to cite an example from contemporary times wherein Chief Minister of Madhya Pradesh announced to promulgate a law to provide domicile residents of Madhya Pradesh with 100% reservation in all state government jobs, to quote

> *"The Madhya Pradesh government has made an important decision today. All state government jobs in Madhya Pradesh will be given only to children of Madhya Pradesh now. We're framing necessary legal provisions for it. Madhya Pradesh ke sansadhan Madhya Pradesh ke bachchon ke liye (MP's resources only for MP's children)"*

The chief ministers of state are at their wills to make such statement for the very purpose of wooing the voter without even worrying about the repercussion associated with such statements. Though it is clear from the language of the proviso that the power to promulgate such laws lies with the center but when the party at center and a state are same, how certainly one can say that the former will not favour the latter for political stability?

6.2 Courts have proscribed such activity

The law over this particular issue is not res integra and has been addressed by Hon'ble court of this nation. The court has held that the sweeping argument for classification on the basis of residence in a district or rural areas thereof which has the overtones of parochialism is liable to be rejected on the plain terms of article 16(2) and article 16(3). An argument of this nature flies in the face of the peremptory language of article 16(2) and runs counter to the constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local areas in the state were nipped in the bud by the Supreme court since long past. Residence by itself- be it within a state, region, district or lesser area within a district cannot be a ground for reservation or preferential treatment. Besides a great deal of emotive value, the said statement does not hold any legal stand, as it flickers away from the value of constitutionalism. The idea of providing 100% reservation do not only assails the ideas enshrined in article 14, article 15(1) and article 16(1) of the constitution but also jitters down the values contained in article 19(1)(g) and article 21. The said idea of extending 100% reservation, though particularly domicile reservation, is not res integra. In Dr. Pradeep Jain v. UOI, it was iterated by J P.N. Bhagwati that "the entire country is taken as one nation with one citizenship and effort of constitutional makers is directed towards emphasizing, maintaining and preserving the unity and integrity of nation" and "described residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the state".

There have been various attempts made by the government in Madhya Pradesh in past few years, where many of them were struck down because they suffered from the vice of unconstitutionality. To cite an instance, in Mukesh Kumar Umar v. State of Madhya Pradesh in 2018, a government notification was challenged which by its authority sought to extend the upper age limit of domiciled candidate appearing for assistance professor recruitment up to forty years old, in contrast to set upper limit between twenty one-twenty eight years for rest of the applicants. In the mentioned case, the court held that there cannot be different age limits based only on place of birth or place of residence. 'The court found that the state government's rational that candidate of state of Madhya Pradesh were in disadvantageous position did not warrant consideration', and if then it hadn't there are seemingly impossible chances of government bestowing its domiciled residence with 100% reservation.

6.3 International jurisprudence on this issue

In the U.S., where authority and power of a federation is far more than that in India, the apex court there also seems to be disappointed by the concept of reserving positions in state institutions for only domiciled candidates. Prevailing on very similar ideas of rights of citizens in India, U.S. has a clause called 'Interstate privileges and immunity clause' which seeks to ensure its citizens intra-state rights and privileges. State of Alaska had issued an act, Alaska Local Hire Act, which seeks to hire only domiciled candidate in jobs arising out of state oil and gas leases. When brought to the court of Law, the Hicklin plaintiffs asserted that the Alaska local hiring policy infringed upon their right to work, in a similar fashion as proposed by the Chief Minister of MP.

Needless to mention, the Supreme Court in the said matter, Hicklin v. Orbeck, unanimously held that this sort of reservation is sheer violation of principle of constitutionalism ,and therefore the right to work and not be discriminated on the basis of place of residence or birth enshrined in constitution of U.S., similar to that of values embodied in the constitution of India .

6.4 No charges are liable to be invoked for such misleading statements

It is not at all a new practice to observe that the government promising unreasonable things to its populous without even deliberating over the issue just in order to gain influence and woo them. But what if these promises turn into massive protests and setting off of law and order?

Ministers, aspiring for the position of CM are generally seen to promise its masses that they will be provided with employment and in order to provide employment they even promise them of domicile reservation in jobs. Speeches of these politicians are so hideous that it can be placed at the pinnacle in terms of hate speech but none are charges with penal provisions until the application of Model Code of Conduct (MCC) To quote certain instance, Gurjar protest in Rajasthan took place because government in its initial days promised the community of reservation when asked upon . Moreover, in Haryana Jat community were promised of reservation before the election and when the party came to power, it realized that the promise was beyond their legitimate authority and thus failed to fulfil one, thereby causing massive protests by Jat community. At the outset, Section 153(A) and section 153(B) of IPC must come here in play as these promises are antithetical

to the integrity of India and seeks to spread hate in the name of residence creating two groups involved which is the requirement for punitive punishment. Moreover, in Babu Rao Patel v. state of Delhi it was held that for the attraction of penal provisions under section 153(A)(1) of Indian penal code, 1860, grounds for promotion of enmity is not confined to the religious grounds but also takes into consideration grounds such as residence.

But in all these events there lies one common thing, that is lack of accountability. These promises are liable to develop legitimate expectation among the subjects of the state and when not fulfilled, can have severe repercussion as can be seen by precedents.

7. Conclusion

After all the research undertook the author has come to the conclusion that article 16(3) of the Indian constitution requires great deal of ponderance here and now before it gets too late for such scrutiny. The enactment of this proviso can be traced back to long time ago where the social circumstances entailed such feature but the time has come where this proviso tender scrutiny and if not nullification, then checked usage. Moreover, its usage by the politicians for the gain of influence. The only purpose which can deduced from the debates of constituent assembly and rulings of found in judicial pronouncements is that this proviso is not aggrandized form of article 16(1) and thus is not a facet of equality, and therefore is an exception to article 16(1) which must finds its usage only in exception circumstance asking for Politicians must be made beware of its repercussions and thereof must be penalized.