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Jarnail Singh and Others v. Lachhmi Narain Gupta and Others: Supreme Court of India declares application of the creamy layer test on the Scheduled Castes and the Scheduled Tribes.

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Abstract: This case note discusses the *Jarnail Singh* case which presented a fresh opportunity before a constitution bench of the Supreme Court of India to undo the legal discrepancies created in *Nagaraj*. However, efforts to 'save' *Nagaraj* verdict led the court to introduce the creamy layer test for the Scheduled Castes and the Scheduled Tribes. In doing so, the court introduced for itself a new subject of judicial review. Post-*Indra Sawhney*, a decision by a nine-judge bench of Supreme Court, the creamy layer test was applied only to the 'Backward Classes' for reservation. Various judgments including *Indra Sawhney* have explicitly prohibited the application of this test on the SCs and the STs. Creamy layer among backward classes has been described by the executive organs of the State in appropriate circumstances. By describing the creamy layer test as a component of the equality principle, the court declared itself as the ultimate arbiter that may exclude members from SC and ST along with the procedure laid in Articles 341(2) and 342(2) of the constitution. Further, in reading the creamy layer test as a wider attribute of Article 16 generally, as opposed to Article 16(4-A) and 16(4-B) of the constitution, the decision left ambiguity on the application of this test at different stages of employment.

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A. Introduction

This note aims at highlighting the over-zealous steps taken by the Indian judiciary from time to time to ensure that reservation is availed by not the socially backward classes notified by the constitution through appropriate authorities, but only by the economically deprived among the socially backward classes. The paranoia of the judiciary reached its peak

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in *M. Nagaraj v. Union of India*[1] (hereinafter *Nagaraj*) when the court introduced the creamy layer test in disguise for the Scheduled Castes (SCs) and the Scheduled Tribes (STs) despite prohibition by the constitutional texts[2] and court precedents. Twelve years later, *Jarnail Singh and Others v. Lachhmi Narain Gupta and Others*[3] (hereinafter *Jarnail Singh*) presented an opportunity before the Supreme Court of India to undo the encroachment by the judiciary on the domain of the executive organ which has the exclusive constitutional authority to identify the SCs and the STs. To save the *Nagaraj* verdict however, the court attempted bold justification of the creamy layer test that *Nagaraj* introduced for the SCs and the STs through a different nomenclature and procedure.

But before proceeding further, it is imperative to understand the concept of reservation guaranteed as an element of substantive equality through Articles 15 and 16 of the Indian constitution. It is also imperative to understand the creamy layer test which was introduced in reservation jurisprudence by the Indian judiciary.

Equality before the law and equal protection of the laws are guaranteed to every person under Article 14 of the Indian constitution. At the same time, acknowledging the history of the Indian social structure and the continuing vulnerabilities faced by certain classes of people ensuing from such social structure, the constitution provides special protection to these classes. In one such endeavor, the constitution guarantees inclusion and participation of the marginalized communities within its democratic folds, by reserving seats in the form of quotas in state-aided educational institutions and employment in state services. These marginalized communities include the Scheduled Castes[4] (SCs), the Scheduled Tribes[5] (STs), the Socially and Educationally Backward Classes[6] (SEBCs) and the other backward classes[7] (OBCs). The records of the constituent assembly which drafted the Indian constitution, show that reservation was not meant to be poverty alleviation schemes.[8] Rather, it aimed at bringing social equality by providing special opportunities to those communities which faced discrimination based on their social identities. However, this constitutional guarantee of reservation resulted in continuous dialogues and disagreements between the judiciary and legislature through court decisions and constitutional amendments respectively since 1951[9]. Consequently, the clauses under Articles 15 and 16 continued to evolve over

1 (2006) 8 SCC 212.

2 Articles 341(2) and 342(2), The Constitution of India, 1950.

3 Special Leave Petition (Civil) No. 30621 of 2011.

4 Article 341, 366(24), the Constitution of India, 1950.

5 Article 342, 366(25), the Constitution of India, 1950.

6 The Constitution (102nd Amendment Act), 2018.

7 Article 16(4), the Constitution of India, 1950.

8 Constituent Assembly Debates, Vol. VII, 30th November 1948.

9 For example, *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226 led to the first amendment. Article 16(4-A), 16(4-B) and the very recent Article 16(5) was introduced to undo the decision in *Indra Sawhney v. Union of India* 1992 Supp (3) SCC 217. Article 335(2) to undo *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580.

the years through constitutional amendments, with more comprehensive details. Simultaneously, while discharging the role of ultimate arbiter between the reserved and general categories, the courts have increasingly accumulated decision-making authority on different aspects of reservation.[10] Among other aspects, the burden of proof regarding the identification of reserved categories has shifted from petitioners[11] to the State[12] through court decisions.

An attempt by the State to implement the Mandal Commission Report (the report) in 1992 prepared by the Backward Class Commission, left a lasting impact on the role of the Indian judiciary on reservation issues. The implementation of the report was challenged before a 9-judges bench in the Supreme Court of India.[13]

To reach an agreement between the status quo-ist forward classes violently opposing the Report and proponents of social equality seeking its implementation, the court, in this case, set an upper limit to reservation quotas at 49.5% of the total number of seats available at a given time. Of this 49.5%, the SCs were guaranteed 15% of the total number of available seats, the STs were guaranteed 7.5% and 27% quota was guaranteed to the backward classes. The backward classes mentioned in the constitution comprise of the SEBCs under Article 15 for admission in educational institutions and a wider category of OBCs under Article 16 for employment in state services. The rest of 50.5% of the seats have remained unreserved for open competition until January 2019 when a further reservation of up to 10% has been made for the economically weaker sections of the society not included in the existing reserved categories, through a constitutional amendment.[14]

On implementation of 49.5% quota in reservation schemes, the court has developed the opinion, although admittedly without evidence,[15] that with improved economic conditions, the socially oppressed classes become undeserving of constitutionally guaranteed special protection for equality. Accordingly, in *Indra Sawhney v. Union of India*[16] (hereinafter *Indra Sawhney*), the court held that the creamy layer test (alternatively also known as 'means

10 The 50% cap on reservation, introduction of creamy layer principles among Other Backward Classes in educational institutions and public employment, carry forward rule, seniority rules, quantifiable data requiring proof of backwardness and inadequacy of representation for Scheduled Castes and Scheduled Tribes etc. are judicially developed principles.

11 *P. Rajendran v. State of Madras* (1968) 2 SCR 786. Held it is for the petitioner challenging classification to prove that such classification violates equality. Otherwise, the decision of the state shall be treated by the court with deference.

12 (2006) 8 SCC 212.

13 *Indra Sawhney v. Union of India* 1992 Supp (3) SCC 217 (hereafter *Indra Sawhney v. Union of India*).

14 The Constitution (103rd Amendment) Act, 2019.

15 *State of Kerala v. N.M. Thomas* (1976) 2 SCC 310, para 124 (hereafter *State of Kerala v. N.M. Thomas*).

16 *Indra Sawhney v. Union of India,* note 13. Popularly known as Mandal Commission case and dealt majorly with reservation in employment for Other Backward Classes.

test') shall be applied to exclude economically and educationally privileged persons from the Backward Classes for reservation.

Fourteen years later, *Nagaraj* framed the conditions to determine if an SC or an ST candidate is still 'SC or ST enough' at the time of the promotion. For this purpose, the court directed the state to produce quantifiable data to prove the backwardness of a candidate from SC or ST category at the time of promotion in state services. In doing so, it failed to adhere to the precedents which included the decisions of a nine-judge bench in *Indra Sawhney* as well as a five-judge bench in *Ashoka Thakur v. Union of India*[17] (hereinafter *Ashoka Thakur*) which cautioned the court against interfering with reservation for the SCs and the STs by using the creamy layer test. At the same time, *Nagaraj* and subsequently, *Jarnail Singh* relied heavily on both the precedents in reaching its decision. It is therefore evident that the courts have relied upon bits and pieces from these precedents that suited their ideas, to be applied to a case at hand. Consequently, in this note, the precedents are relied upon only in the relevant context in suitable places. The main focus of this note remains on the transition from *Nagaraj* to *Jarnail Singh* in the context of the creamy layer test. This is because the correctness of Nagaraj was challenged only on this limited ground.

The remainder of this note is divided into four sections. The first section explores the concept of the creamy layer test and the context of its application in reservation schemes. The second section discusses the discrepancy created by *Nagaraj* which *Jarnail Singh* sought to assess. The third section draws attention to the uncanny resemblance between 'quantifiable data' required as per *Nagaraj* and the 'creamy layer' test in the present case. The final section discusses some significant legal contradictions and concerns which have developed through the present case.

B. The creamy layer test: Concept and its application

The 'creamy layer' test is not a novel concept. The idea appeared for the first time in *State of Kerala v. N.M. Thomas*[18] as early as in 1976. In this case, the court merely expressed its fear about the usurpation of reservation benefits by the economically well-off among the backward classes (termed as the creamy layer), although with a caution that this fear might be ill-conceived if such conclusions are not founded on research but mere speculation. However, this suspicion gained momentum in *K.C. Vasanth Kumar v. State of Karnataka*[19] where the precedent in *N.M. Thomas* was re-iterated. The creamy layer test subsequently received legal validation in *Indra Sawhney*.[20] According to this test, those individuals from backward classes (SEBCs and OBCs) who cross the economic threshold laid down by the

17 (2008) 6 SCC 1.

18 *State of Kerala v. N.M. Thomas,* note 15. The mention of this term in this case was unrelated to issue at hand in that case. However, the term was nurtured in the imagination of the judges which took shape in Indra Sawhney many years later.

19 AIR 1985 SC 1495.

20 *Indra Sawhney v. Union of India,* note 13 para 793.

appropriate government from time to time to a higher economic class, constitute the creamy layer of the backward classes. Accordingly, they become disentitled to reservation guaranteed under Articles 15 and 16 of the constitution. In pursuance of *Indra Sawhney*, the executive organ of the state laid down the criteria to exclude the creamy layer for reservation of backward classes.[21] Initially, the creamy layer test applied to reservations made in employment under Article 16(4). However, in a five-judge bench decision in *Ashoka Thakur*, it was held that this test applies to backward classes when reservation is made for admission in educational institutions under Article 15(4) and (5) of the constitution as well.

Determination of the 'creamy layer' among the backward classes is in the domain of the executive organ of the state even though the term is an invention of the judiciary. For the SCs and the STs, the constitution provides for a separate procedure in its text for inclusion and exclusion of communities.[22] Accordingly, the authority to include or exclude a whole community of caste or sub-caste from SCs and STs based on their progress or vulnerabilities rests with the executive with the aid of the Parliament. The application of the creamy layer test is prohibited on the SCs and STs under these provisions.[23] *Jarnail Singh* intends to alter this practice. The reason behind the application of the creamy layer test only on backward classes has been discussed by the court also in *Indra Sawhney* as well as *Ashoka Thakur*. Both of these precedents have been relied upon heavily by *Nagaraj* and *Jarnail Singh* to arrive at contrary conclusions.

Article 15(4) and (5) of the Constitution mention 'socially and educationally backward classes' for admission in educational institutions. Similarly, Article 16(4) mentions 'backward classes' for reservation in public employment. *Indra Sawhney* confirmed that 'socially and educationally backward classes' under Article 15(4) and 'backward classes' under Article 16(4) are not the same sets of people.[24] Article 16(4) covers a wider category of socially backward people (OBCs) though in the Indian context, socially backwardness leads to educational and economic backwardness which in turn leads into a vicious circle of social backwardness.[25] Disputes continued regarding the basis of determination of backward classes under Article 16(4), unlike SCs and STs who are notified by the President and are

21 http://www.bcmbcmw.tn.gov.in/obc/download.pdf (last accessed 7 April 2019). The Government of India, through its Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), issued an office memorandum on 8.9.1993 to implement 27% reservation for OBCs for civil posts. This memorandum through Column 3 of its Schedule, declared the economic and employment qualifications including that of parents and spouses which shall constitute the 'creamy layer' among OBCs.

22 Articles 341(2) And 342(2), The Constitution of India, 1950.

23 See *E.V. Chinnaiah v. State of Andhra Pradesh* (2005) 1 SCC 394.

24 *Indra Sawhney v. Union of India,* note 13 para 787.

25 Ibid.

defined clearly in the constitution.[26] Through a series of Supreme Court cases, it was agreed upon by the courts that caste cannot be the sole determinant factor to define backward classes for Articles 15(4), 15(5) and 16(4) of the constitution. Moreover, both Articles 15(1) and 16(1) prohibit discrimination based on caste alone. According to Justice K.G. Balakrishnan in *Ashoka Thakur*, if the creamy layer is not excluded from OBC, then backward classes are identified only based on castes.[27] When the creamy layer is excluded however, backward classes are identified based on castes who are socio-economically backward. Such classification is not prohibited under Articles 15(1) and 16(1) of the constitution. This rule is not required for the SCs and the STs.

Why did *Ashoka Thakur* deny the application of the 'creamy layer' test on SCs and STs? Do Articles 15(1) and 16(1) not require the application of this principle on SCs and STs? The answers to these questions can be found primarily in the descriptions of 'Scheduled Castes' and 'Scheduled Tribes' under Articles 341 and 342 of the Constitution respectively.

Article 341 describes Scheduled Castes to include:

> *'castes, races or tribes or parts of or groups within castes, races or tribes' notified by the President of India after consultation with the Governor of that particular state.*[28]

Similarly, Scheduled Tribes under Article 342 includes: 'tribes or tribal communities or parts of or groups within tribes or tribal communities', notified by the President of India after consultation with the Governor of that state.[29]

Thus, it was argued that the term 'caste' in 'Scheduled Caste' does not comprise of communities based on caste alone. Instead, it is a combination of castes, tribes, and races which according to the President are deemed backward.[30] The judiciary has refrained from exercising its power of judicial review on this authority conferred on the President of India.[31] Not all *Dalit* communities which are essentially established on caste identities, auto-

26 Articles 341, 342, 366(24) and 366(25), the Constitution of India, 1950. For example, deprivation can be associated with poor living because of social exclusion because of caste discrimination as oppose to consequence of low income. On this specific context, see, *Vani K. Borooah*, Social Exclusion and Job Reservation in India, Economic and Political Weekly 45 (52), 252.

27 (2008) 6 SCC 1,note 17, para 170.

28 Article 341, the Constitution of India, 1950.

29 Article 342, the Constitution of India, 1950.

30 See generally, *Vinay Sitapati*, Reservations, in: Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), The Oxford Handbook of The Indian Constitution, Oxford 2016, 721. See also, *Parmanand Singh,* Social Justice for the Harijans: Some Socio-Legal Problems of Identification, Conversion and Judicial Review 20 (3) JILI (1978) 355, 356.

31 The Supreme Court of India has once struck down the notification of *Jat* community from the Central List of Backward Classes in *Ram Singh v. Union of India* (2015) 4 SCC 697. However, the court confined its decision to the procedural irregularity by the Central Government in notifying *Jats* in the list by overriding the decision of the National Commission of Backward Classes which opposed the inclusion. The Supreme Court till date, has not exercised judicial review on the lists of

matically constitute Scheduled Castes. Only those communities which are notified by the President, within the boundaries of particular states and also after excluding the sub-castes which are not explicitly included through notification, comprise of the Scheduled Castes.[32]

Arguments regarding the application of the creamy layer test on the SCs and the STs appeared in *Ashoka Thakur*. However, the court relied upon *E.V. Chinnaiah* to hold that once notified in the President's list, the SCs and the STs form homogenous constitutional classes distinct from their caste identities although it is not denied that their caste identities play an important role in their notification in the President's list.[33]

In what perspective did *Jarnail Singh* differ from *Ashoka Thakur* on this issue?

Jarnail Singh disagreed with *Ashoka Thakur* which held that the creamy layer test merely deals with the identification of backward classes. On the contrary, *Jarnail Singh* established the creamy layer test within the principle of equality under Articles 14 and 16 of the Constitution.[34] According to the present case, the descriptions of SCs and STs under Articles 341 and 342 are irrelevant for the application of the creamy layer test on these classes for reservation.

The connection between the creamy layer test and Articles 14 and 16 is not unfounded. However, it is totally out of context. In *Indra Sawhney*, the court held that while Article 16(4) aims at group backwardness, it is only with the exclusion of the socially advanced among the backward classes that a class becomes a homogenous backward class thus, serving the purpose of Article 16(4).[35] This is not true for the SCs and the STs.[36] Subsequently, it was held in *Ashoka Thakur* that so far, the creamy layer test has been treated as a principle for identification of backward classes and not a general principle of equality for reservation. It is merely one of the parameters used for the identification of the backward classes. Therefore, this principle does not apply to the SCs and the STs since they constitute separate classes in themselves.[37] *Jarnail Singh* read the ratio of the two cases together very selectively to make a new formula. The present case indicates that the creamy layer test constitutes a general principle of equality for reservation. Only after the application of this principle, homogenous backward classes (including the SCs and the STs) can be identified for Article 16. The present case blatantly overlooks that both *Indra Sawhney* and *Ashoka Thakur* made explicit clarifications regarding the exclusion of SCs and STs from the application of the creamy layer test. Thus, with a broad stroke, the present case applies the creamy layer test to all reserved categories at all stages of reservation under Article 16. In

Scheduled Castes and Scheduled Tribes notified by the President under Articles 341 and 342 of the Constitution.

32 *Mahendra Pal Singh*, V.N. Shukla's Constitution of India, Eastern Book Company, 12th Edition, pp. 1002-1003.

33 (2008) 6 SCC 1,note 17, para 182.

34 Special Leave Petition (Civil) No. 30621 of 2011, note 3, para 16.

35 *Indra Sawhney v. Union of Indi,a* note 13, para 792.

36 *Indra Sawhney v. Union of India,* note 13, para 797.

37 (2008) 6 SCC 1,note 17, para 184.

doing so, *Jarnail Singh* does not address why should the explicit cautions in *Indra Sawhney* and *Ashoka Thakur* against the application of the creamy layer principle on SCs and STs, be not considered as binding on subsequent cases.

C. Discrepancies in Nagaraj which led to Jarnail Singh

Justice S.H. Kapadia delivered an unanimous decision in *Nagaraj. Nagaraj* upheld the validity of Articles 16(4-A) and 16(4-B) inserted through two amendments in the constitution in the years 1995 and 2000 respectively and dealt with reservation in promotion in public services for the SCs and the STs. These amendments were upheld based on some conditions. Every time the State makes reservation in promotion for the SCs and the STs, it is required to present quantifiable data before the court to prove backwardness and inadequacy of representation of the classes to which the candidates seeking promotion belong, and also the efficiency of administration required under Article 335 of the Constitution. These conditions introduced in *Nagaraj* were criticized on the ground that their implementation amount to the introduction of the creamy layer test on the SCs and the STs through backdoor which is otherwise explicitly prohibited by the constitution.[38] In the light of the conditions laid in *Nagaraj*, *Jarnail Singh* was required to decide if *Nagaraj* should be referred to a seven-judge bench to determine its correctness.

After twelve long years of de-facto suspension of Article 16(4-A), *Jarnail Singh* unanimously conceded that conditions imposed by the court in *Nagaraj* were unwarranted. It invalidated the conditions on the ground that they run contrary to *Indra Sawney* as well as *Chinnaiah*. This was a welcome step. However, the constitution bench did not stop here. While killing the ghost it created twelve years ago, the court introduced a new 'ghost' by introducing the creamy layer test directly for the SCs and the STs. The court took this step probably to ensure that reservation in any form and at any stage remains regulated under its supervision.

Jarnail Singh deemed it unnecessary to disturb the ratio of *Nagaraj* on the other aspect concerning the validity of constitutional amendments. The identity test and the width test, laid down in *Nagaraj* to determine whether a constitutional amendment violates basic structure, has found expressed approval by a nine-judge bench in a later case, *I.R. Coelho v. State of Tamil Nadu*[39]. Probably in *Jarnail Singh*, the court deemed the requirement of quantifiable data to be an obiter which could be corrected by another five-judge bench without referring it to a seven-judge bench. This is notwithstanding the harm *Nagaraj* has caused on subsequent implementation of Article 16(4-A). In any case, the requirement of quantifiable data is a thing of the past. The present case has gone at great length to justify *Nagaraj*. Besides *Indra Sawhney*, a five-judge bench in *Ashoka Thakur* which extensively discussed the application of the creamy layer test on the backward classes also clarified that

38 See Articles 341, 342, 366(24) and 366(25), The Constitution of India, 1950.

39 (2007) 2 SCC 1.

this test does not apply to the SCs and the STs. *Ashoka Thakur* was decided two years after *Nagaraj* and did not concern the SCs and the STs directly apart from its caution against the application of the creamy layer test on these communities. *Jarnail Singh* addressed *Ashoka Thakur* on the limited ground only to record its disagreement with this precedent. This aspect has been dealt with in the next section.

Jarnail Singh needs urgent attention from the court in the interest of judicial consistency as well as accurate constitutional interpretation. The court may have to declare the present case per incuriam and refer the matter to a new bench to untangle the legal mess created by it. In the otherwise, it has to declare that the application of the creamy layer test on the SCs and the STs is as unwarranted as the requirement of quantifiable data since both of the requirements are two different forms of the same substance.

In both cases, courts withhold the ultimate authority to review these data and criteria on various grounds. Mass exclusion through quantifiable data has merely changed into individual exclusion through the creamy layer test. It may also be argued that the introduction of the creamy layer test appears like an after-thought to 'save' *Nagaraj*. In doing so, *Jarnail Singh* relied on selective portions from relevant precedents to develop a disharmonious ratio.

D. The transition from 'quantifiable data' in Nagaraj to the 'creamy layer test' in Jarnail Singh

It appeared that in *Jarnail Singh*, the court confirmed the correctness of *Nagaraj* by merely correcting what the bench thought to be a non-essential proposition laid down by the court concerning the requirement of quantifiable data. In reality, the requirement of quantifiable data laid down in *Nagaraj* strikes at the heart of the restraint proposed by the court earlier for no further interference with the SC and the ST for reservation. The modification made in *Jarnail Singh* only maintains the status quo. The only difference between 'quantifiable data to prove backwardness' and the 'creamy layer' test is that while the former aims at categorization for exclusion based on the backwardness of the community of membership, the latter aims at individual categorization for exclusion. In both cases, it is the executive that determines the criteria that constitute the creamy layer. Contrary to the claim made in *Jarnail Singh*[40], the constitutional courts do not either determine or apply the creamy layer test. Next, it is important to recall the decisions on the implementation of Article 16(4-A) post-*Nagaraj*. As per *Nagaraj*, the State was required to present quantifiable data to prove the backwardness of a class for reservation in promotion in government services. There are several prominent instances where the court struck down reservation policies in promotion made by the state for the SCs and the STs under Article 16(4-A)[41]. The policies were invali-

40 Special Leave Petition (Civil) No. 30621 of 2011, note 3 para 16.

41 (2011) 1 SCC 467; (2012) 7 SCC 1.

dated on the ground that the state has failed to satisfy the court through quantifiable data to prove the backwardness of the communities to which the reserved candidates belonged.

In *Suraj Bhan Meena v. State of Rajasthan*[42], (hereinafter *Suraj Bhan*) the Supreme Court concerning a matter on reservation in promotion with consequential seniority, opined that:

> *'...the Court has to be satisfied that the State has exercised its power in making reservation for Scheduled Caste and Scheduled Tribe candidates in accordance with the mandate of Article 335 of the Constitution, for which the State concerned have to place before the Court the requisite quantifiable data in each case and to satisfy the Court that such reservation became necessary on account of inadequacy of representation of Scheduled Caste and Scheduled Tribe candidates in particular class or classes of posts, without affecting the general efficiency of service.'*[43]

Subsequently, in *Uttar Pradesh Power Corporation Ltd. v. Rajesh Kumar*[44], (hereinafter *Rajesh Kumar*) the court enunciated some conclusive principles on Article 16(4-A). Two of the relevant principles are:

(1) although the vesting of the constitutional power on the state by an enabling provision under Article 16(4-A) is constitutionally valid, the exercise of this power by the state may be arbitrary...[45]
(2) Most importantly, the court may exercise its power of judicial review to set aside and strike down such legislations made in pursuance of Article 16(4-A) which does not follow the parameters set in Articles 16(4) and 335 of the constitution.[46]

Thus, in both cases, the court retained for itself, the ultimate authority of judicial review of legislative as well as executive actions on implementation of Article 16(4-A).

Jarnail Singh did not reveal how does it intend to exercise the power of judicial review to exclude creamy layers among the SCs and the STs. If the old procedure used for the backward classes is applied, then the executive has to issue fresh order(s) defining the criteria to identify the creamy layers among the SCs and the STs. Whether the executive will use the same basis for identification of the creamy layers among the SCs and the STs as it has done for the backward classes, thereby blurring the distinction between the three categories, is not known. In such case, whether the court will exercise its power of judicial review similarly as it has, to invalidate quantifiable data presented by the state in past cases to prove the backwardness of communities?[47] Further, since it was decided that the court itself will apply the creamy layer test under Article 16(4-A), it is not known if the court will exer-

42 (2011) 1 SCC 467.
43 Ibid, para 61.
44 (2012) 7 SCC 1.
45 Ibid, para 81.
46 Ibid.
47 (2011) 1 SCC 467; (2012) 7 SCC 1, note 41.

cise its independent parameters along with or apart from the executive order defining the creamy layer. It is also not known if reservation in promotion for the SCs and the STs will be suspended till the executive organ issues orders determining the creamy layers among these constitutional classes. Considering that Article 16(4-A) is an enabling provision and attributes of the creamy layer has been historically decided by the executive organ, judicial review of quantifiable data as per *Nagaraj* has been merely transformed into the application of the creamy layer test in *Jarnail Singh*.

The cause of concern is also that the present case broadly locates the application of creamy layer test in Articles 14 and 16 as opposed to Article 16(4-A) and (4-B). This leaves one speculating if the court wishes to apply this test at different stages of employment that is, appointment and promotion stages while excluding its application under Article 15 for reservation in public educational institutions at the time of admission.

E. Other concerns and criticisms regarding blurring distinctions between SC, ST and OBC

It is not difficult to assess that the court in *Jarnail Singh*, managed to maintain the status quo of *Nagaraj* verdict. *Jarnail Singh* merely changed the form of the obstacle called quantifiable data to rename it as the creamy layer test. In doing so, the court retained for itself the ultimate authority of judicial review on what it has termed as an enabling provision. However, the court failed to address some broad issues which arise in the present case:

I. **Scheduled Castes, Scheduled Tribes and Backward Classes reduced to synonyms**- Placing different groups entitled to reservation in the same category dilutes the distinct provisions made in the constitution for each of these classes. For example, Article 15(3) of the Constitution authorizes the State to make special provisions for women and children. When making laws under this provision[48], the court does not classify women based on their castes, religions or classes. This is because, through this clause, the constitution intends to distinctly protect all women against the vulnerabilities which arise because of their gender irrespective of their parallel identities in terms of caste, religion, etc. In the same way, Articles 15(4), 15(5), 16(4), 16(4-A) and 16(4-B) separately mention SCs, STs and backward classes. Different forms of historical oppression and different circumstances of hardships resulted in their inclusion in these constitutional provisions.[49] *Indra Sawhney* clarified that the backwardness of SCs cannot be equated with the OBCs under Article 16. There is no similarity between the SCs and STs either.[50]

48 For example, see s. 125 of the Code of Criminal Procedure, 1973 provides maintenance to women.

49 See, *Parmanand Singh*, Social Justice for the Harijans: Some Socio-Legal Problems of Identification, Conversion and Judicial Review, JILI 20 (3) (1978), pp. 355, 365 wherein he writes: 'Since both the Articles 341(1) and 366(24) use the expression "castes", "races", "tribes" there is an indication that in ascertaining the scheduled caste, "caste", "race" or "tribe" may be the sole or dominant test.'.

50 *Indra Sawhney v. Union of India,* note 13, para 795.

There are separate quotas for each of these categories. Therefore, to say that the same test shall be applied for the exclusion of economically privileged members of each of these groups whereas the nature of their backwardness remains diverse is not permissible in law.

II. **Purpose of notifying Scheduled Castes and Scheduled Tribes in the Constitution**: *Jarnail Singh* justifies that exclusion of the creamy layer from the SCs and the STs does not mean that there is a loss of identity conferred through Articles 341 and 342 of the constitution. The SCs and the STs are defined by the constitution along with a proper procedure for addition to and removal of communities from the lists[51]. This justification compels us to explore as to why are castes, races and tribes notified as the SCs and the STs under the constitution? Do the notifications of communities as 'SCs' and 'STs' serve as ends in themselves or, are they means aimed at attaining the goal of social justice? The main objective behind these notifications has been to provide additional protections to the members of these communities because of the social, economic and educational backwardness which they have faced because of their social identities.[52] Therefore, conferring constitutional identities through notifications while at the same time depriving some members of the benefits which the identity confers, solely based on their economic conditions, is of no value. If backwardness cannot be determined based on economic conditions alone, then how can exclusion be justified on an economic basis?

III. **Declaring Article 16(4-A) to be enabling provision while at the same time interfering with its application:**

It was held in *Nagaraj* that Article 16(4-A) and Article (4-B) are enabling provisions and it is the discretion of the State to implement these provisions. The court cannot direct the State to exercise its discretion. However, once the State has generated the data, the courts can exercise its power of judicial review to determine the correctness of the data. Therefore, while on the one hand, the courts refuse to intervene when the State fails to implement enabling provisions within equality clauses, on the other hand, judicial review with the highest level of scrutiny may be exercised by the court if the state intends to implement these provisions. Unfortunately, the argument that reservation in employment is a fundamental right by its existence within equality clauses, was defeated and laid to rest in *Nagaraj*.[53] *Nagaraj* declared that reservation in promotion under Article 16(4-A) is an enabling provision by its derivation from Article 16(4). This aspect of *Nagaraj* was not even challenged before *Jarnail Singh*. The courts accordingly since *Nagaraj*, have placed themselves in a comfortable position of interfering only when approached with quantifiable data instead of ensuring enforcement of these provisions. But at the same time, such interference in the form of judicial review has always led to the invalidation of reservation schemes made un-

51 Article 341(2) and Article 342(2), The Constitution of India, 1950.

52 *Mahendra Pal Singh*, V.N. Shukla's Constitution of India, 12th, 13th Edition, Lucknow/Delhi 2017, 2019, p. 1002.

53 (2006) 8 SCC 212,note 1, para 123.

der Article 16(4-A). One may therefore rightly fear that the new test of creamy layer for the SCs and the STs might frustrate reservation in promotion because of the same endless struggle for final authority between the judiciary and the State.

The courts indeed remain the ultimate guardian of constitutional interpretations. On several occasions, the courts have successfully averted mass violence through their interim as well as final orders.[54] However, decisions regarding who constitute the backward classes and what are the parameters of its determination, are policy decisions that require expertise and the judiciary is not expected to interfere with these issues. Such decisions fall both within executive policies into which courts should refrain from encroaching and also legislative acts in which the presumption of constitutionality should be applied with equal fervor like other legislations.

Due to its counter-majoritarian nature, courts of law have attained the fame of being just and fair. The Indian judiciary is no exception. Every amendment made in the constitution especially on reservation issue has been challenged before the court. To some extent, allegations that reservation serves as 'vote bank politics', have been established as untrue with judicial decisions. However, in maintaining this upright image, the courts have been excessively strict regarding the implementation of reservation schemes. Courts may act as arbiters on some occasions. But it must not forget its primary function of upholding the rule of law and ensuring justice. In reaching the middle path to maintain law and order which is the duty of the state, it must not forget its role of accurate interpretation of the constitution. *Nagaraj* had succumbed to the paranoia of maintaining balance. It introduced obstacles in constitutional provisions in the name of cautious implementation where such caution was not warranted by the constitution. *Jarnail Singh* maintained the status quo by renaming the obstacle.

The vicious circle of judicial review with a high level of scrutiny which the court introduced in *Nagaraj*, was thus, re-established in the present case. At this stage, there are two options available to the court. The first option is to declare *Jarnail Singh per incuriam* and refer *Nagraj* afresh to a seven-judge bench to determine its correctness. The second option is to declare that neither requirement of quantifiable data is necessary, nor is the creamy layer test applicable to the SCs and the STs under Article 16(4-A). Application of creamy layer principle on the SCs and the STs is a clear case of judicial impropriety which requires urgent attention of the court.

54 See generally, *Mahendra P. Singh*, Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure, 1 NUJS L.Rev. (2008) 193.