Promotions, Creamy Layer, and the Reservation Debate

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Abstract

The 77th Constitutional amendment was passed to undo the effect of the judgment of a nine-judge Bench of the Supreme Court in Indra Sawhney v. Union of India (1992), wherein it was held that the reservation in promotions is not permissible. However, the subsequent court decisions have diluted the amendment's effect and have also introduced other restrictions on reservations. This article highlights the flaws, irregularities, constitutional misinterpretation, and inconsistencies in these judgments.

Introduction

June 2020 marked twenty-five years of the 77th amendment to the Constitution of India. The amendment inserted clause (4A)[1] after clause 4 of Article 16 of the Constitution. It was enacted to protect the reservation in promotion in government services for the Scheduled Castes and the Scheduled Tribes ("SC/STs"). This article reflects on the jurisprudence on reservations that have developed after the 77th constitutional amendment and scrutinizes the Supreme Court's approach on reservation in promotions, and the related issues of creamy layer and backwardness. However, the discussion necessitates a critical look at the ***Indra Sawhney v. Union of India*** (1992) judgment, which has been treated as *holy grail* by the subsequent court decisions, even though its effect was diluted by the 77th amendment. More than that, the judgment has been understudied by the legal fraternity.

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The ‘Omnibus’ Indra Sawhney judgment

In 1990, Prime Minister Vishwanath Pratap (VP) Singh fulfilled his election promise by implementing the Report of the Mandal Commission (Singh, 2020) which had been not acted upon for almost a decade.[2] Among its several recommendations for improving the conditions of the backward classes who constituted 52% of the population, the Commission recommended 27% reservation in government services in favour of Other Backward Classes or the OBCs (in addition to 22.5 % already existing in favour of SCs and STs). To this effect, Office Memorandum dated 13 August 1990 was issued by VP Singh’s Government which provided for 27% reservation for OBCs in the vacancies in posts and services under the Government of India which were to be filled by direct recruitment. Prime Minister VP Singh made a statement in the Parliament that even though the strength of government employees will be just around 1 percent of the total population, giving reservation in the government services to OBCs would be a conscious step to give them “*a position in the decision-making of the country, a share in the power structure*” (quoted in ***Indra Sawhney*** judgment).

The moment VP Singh announced the reservation for backward classes, an avalanche of caste prejudices and violent protests, upper-caste unity, and anti-reservation indecency came out (Balagopal, 1990: 2231). As Balagopal noted at that time, “*Fundamentalist and secular, Marxist and Gandhian, urban and rural, have all been united as nothing else would ever have united them*” (Ibid). Writ petitions were filed challenging the Memorandum. A Constitution Bench of the Supreme Court stayed the Memorandum while appealing to the protestors to maintain peace. After the Government changed at the Centre following the general elections held in the first half of 1991, another Office Memorandum dated 25 September 1991 was issued to modify the earlier Memorandum to provide that within the 27% reservation for OBCs, “preference shall be given to candidates belonging to the poorer sections of the [socially and economically backward classes]”. The Memorandum also provided for income-based reservation: 10% reserved vacancies in civil posts and services under the Government of India for other economically backward sections of the people who are not covered by any of the existing reservation schemes. While the Office Memorandums were clearly related to OBC reservation and economically backward reservation at the appointment stage, the Constitution Bench referred a number of issues to a special bench of nine judges “to finally settle the legal position relating to reservations” in an “authoritative way”.

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By a 6-3 majority opinion, the Court upheld the constitutional validity of the 27% reservation provided to the OBCs, provided that the socially advanced persons/sections ("creamy layer") are excluded from the benefits of this reservation. The Court further upheld the preference given to the "more backward" sections among OBCs within the 27% reserved vacancies, while ordering the Government to notify which are the more backward classes among the OBCs and their fixed apportionment. However, the 10% reservation of posts in favour of other economically backward sections was held unconstitutional by majority of judges.

In arriving at this decision, the majority of judges held that Article 16(4) was not an exception to Article 16(1), but "an instance and an illustration of the classification inherent in clause (1)". This implies that the very idea of reservation is a part of the larger equality principle (also known as "substantive equality"), which considers the lack of equality of opportunity. The Indian Constitution enshrines substantive equality through a combined reading of Articles 14, 15, 16 and 17. The majority of judges further ruled that the sole economic criterion cannot be a yardstick for determining backwardness for reservation. The lead judgment of Justice BP Jeevan Reddy, speaking on behalf of himself and three other judges, stated that when Article 16(4) refers to a backward class of citizens, it refers primarily to "social backwardness". However, the question of determining the backwardness of SC/STs was kept out of the scope of the judgment. The judgment of Justice Jeevan Reddy noted[3] that the SC/STs are "admittedly included within the backward classes" under the Constitution. In addition to this, the judgment stated the "creamy layer" principle would apply only to OBCs and not to SC/STs.[4] Thus, the Court foreclosed any further question on determining the backwardness of the SC/STs within the reservation's constitutional framework. It maintained the unique constitutional location of SC/STs in getting the benefits of reservation, as it distinguished them from the application of criterion applied for determining backwardness of the OBCs.

However, while the Court settled the question of determining backwardness for availing reservation benefits at the initial appointment stage, concerns have persisted due to its approach on the issue of reservation in promotions. It was argued by the Union Government that since the Memorandums only provided for reservations at the initial appointment stage, the question of reservation in promotions did not arise in the ***Indra Sahwney*** case. The lawyers of the Union Government had argued that the well-established principle of Constitutional Law requires that the

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constitutional questions should not be decided in vacuum and that they must be decided only if and when they arise properly on the pleadings of a given case and where it is found necessary to decide them for a proper decision of the case. Justice Ahmadi, who had agreed with and signed Justice Jeevan Reddy's lead judgment, chose to express no opinion on the issue of reservation in promotions, thus upholding the Union Government's objection. The other eight judges on the Bench held that the reservation in promotions is constitutionally impermissible. This led to a restriction on the future reservation in promotion policies.

Before the ***Indra Sahwney*** case, the validity of reservation in promotion policies was covered and settled by a Constitution Bench judge in ***General Manager, Southern Railway v. Rangachari*** ("Rangachari case") of 1962. In that case, the validity of the circulars issued by the Railway administration providing for reservation in favour of SC/STs in promotions was questioned. By a majority of 3:2, the Court upheld the constitutional validity of the policy. It ruled that the phrase "matters relating to employment or appointment" in Article 16(1) covers all matters, both prior and subsequent to the employment, "which are incidental to the employment and form part of the terms and conditions of such employment". The Court noted that "the advancement of the socially and educationally backward classes requires not only that they should aspire to secure adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well". However, while upholding the validity of impugned circulars, the Court emphasized on the need to maintain a fine balance between the scope of reservation policy and the efficiency of administration. To quote the full extract:

> *"It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. 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 class of citizens must be*

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> *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 the efficiency of administration.*"

In this extract, the concern about the impairment of efficiency due to reservation was a mere possibility or at most an anxiety expressed by the judges. Any empirical evidence did not back it. Moreover, even then, the judges never disapproved of reservations regarding appointments or promotions *per se*. They accepted the mandate of Article 16(4) of providing "*adequate representation to backward communities"*. What they asked was looking for a balance among "competing interests". The Court in ***Indra Sawhney*** disagreed with the view in ***Rangachari*** that Article 16(4) contemplates reservation in promotions as well. It held that the scope of Article 16(4) could be understood only "on a combined reading of Article 16(4) and Article 335". It cherry-picked a sentence from a portion (quoted above) in **Rangachari** judgment to rule that reservation in promotions *per se* amounts to sacrifice of efficiency of administration.

Arpita Sarkar has argued that the Court's observations about reservations causing impairment of efficiency was a mere *obiter* (non-binding) remark. She raises the question 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" (2018: 217). Even if one were to accept that the observations were a part of the judgment's reasoning, it represents an incorrect understanding of the Constitution. The Constitution's mandate does not provide that the rights under Article 16 should be restricted by the ambit of Article 335. Otherwise, the Constitution would have been expressly provided so (Ibid: 227). Article 335 is located in Part XVI of the Constitution, which provides for "Special Provision Relating to Certain Classes". The emphasis of this Part is on providing for special rights for certain sections or classes. A scrutiny of the Constituent Assembly Debates (CAD) further suggests that the Constitutional Framers did not subject Article 16 (reservation) to Article 335 (Bhaskar, 2020). In fact, the term "efficiency of administration" was referred to in an inclusive way (Ibid). The mention of the claims and rights of SC/STs was made at more than one Article to emphasize on the importance of these claims. The Constitution makers were consciously aware of the existing inequalities that led to inadequacy in representation. Ambedkar had argued that efficiency would be enhanced by ensuring representation to underrepresented groups (Ibid). Both ***Rangachari*** and ***Indra Sawhney*** judgments are contrary to the intent of the Constitution Framers on this aspect.

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Moreover, while the ***Rangachari*** judgment made observations regarding maintaining a balance between competing interests, ***Indra Sawhney*** judgment went one step further to completely dismiss the idea of reservation in promotions. The Court did not discuss the scope of constitutional provisions or the Constituent Assembly Debates which clearly present Article 16(4) as a stand-alone provision. Instead, it applied the vague notions of "risk" and "heartburning" to rule against the issue of promotions.[5]

In the Constituent Assembly, the narrative among the members was that reservations are being introduced to provide "equal *opportunity"* to society's marginalised sections. The lead judgment in ***Indra Sawhney*** case referred to "reservation" as "handicap" and "crutches". The phraseology used by the judges showed ideological predispositions and stereotypes which were privileged over constitutional reasoning. This kind of language does not resemble sensitivity to even disability rights. The judges assumed that if reservation in promotions is provided, the benefitted members would have "no will to work, compete and excel" and this would create "despondence" and "heart-burning" among open category candidates. The judges considered this as "leap-frogging" which would affect the "efficiency of administration". This kind of approach is symptomatic of a dominant stereotype wherein the persons belonging to reserved category were presumed to be inefficient. In reality, empirical studies have found that reservation in services do not dilute efficiency in any way (Deshpande and Weisskopf 2014; Bhavnani and Lee 2020). Economists have further suggested that "affirmative action in hiring might improve economic performance" (Deshpande and Weisskopf 2014: 177). Thus, the judgment's absolute rejection of reservation in promotions due to a perceived adverse effect on efficiency is adoption of a myth against reservation (Thorat, Tagade, and Naik, 2016). As Ajantha Subramanian (2019: 357) pithily puts it, the judges adopted the "process of transforming prejudice into discernment, exclusion into selectivity".

Furthermore, a simple contradiction of judges' assumption is that if promotions are made just based on seniority, it is not necessary that the senior-most employee would be the most efficient employee. If the logic of judges is applied similarly, a person confident of his/her promotion on the sole factor of seniority may not have the incentive or will to compete or excel. While the Court made a generalized observation that "crutches cannot be provided throughout one's career", it failed to record or even consider the existing policies from 1955, which did not provide for

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reservation in promotions in the elite Group 'A' services.[6]. The reservation in promotions policy applied only till the "lowest rung" of Group 'A' services. The Court passed a remark on the promotions even without scrutinizing the policy.

The Court, however, held that its decision on the question of promotions would operate "only prospectively" and would "not affect promotions already made, whether on temporary, officiating or regular/permanent basis". It further ordered that reservation in promotions policies "already provided" would "continue in operation for a period of five years" from the day of the judgment. The Court gave the governments a time of five years to end the reservations policies in promotions so that a status quo is maintained for a limited time. Otherwise, it may have caused chaos in the services, which were being filled or already filled. Additionally, the Court ruled that the governments may ensure the adequate representation of backward classes of SCs, STs, and OBCs by way of "direct recruitment", where a reasonably lesser qualifying criteria of evaluation -- "consistent with the efficiency of administration and the nature of duties attaching to the office concerned" -- can be adopted for recruitment. This was made an exception to the general holding that reservation in promotions are not constitutionally permissible.

The 77th & the allied Amendments to the Constitution

Before the five-year deadline provided by the Supreme Court could end, the Parliament passed the 77th amendment to the Constitution in June 1995. The Statement of Objects and Reasons of the Amendment noted that the holding of ***Indra Sawhney*** judgment "adversely" affected SC/STs' interests, as their representation in public services has not reached the "required level". To overcome the obstruction created by the judgment and in its "commitment" to "protect the interest of the Scheduled Castes and the Scheduled Tribes", the Union Government inserted a new clause (4A) after Article 16(4), which restored the constitutional power of the State to provide "reservation in matters of promotion to any class or classes of posts" in public services to SC/STs, which "in the opinion of the State, are not adequately represented in the services under the State". Thereby, the previous arrangement under which the SC/STs availed the benefit of reservation in promotion since 1955 was restored.

After the 77th amendment, there were many judicial developments related to promotions. ***Union of India v. Virpal Singh Chauhan*** (1995) and ***Ajit Singh v. State of Punjab*** (1996) introduced the

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concept of a "catch up rule", according to which the senior general candidates who were promoted after SC/ST candidates would regain their seniority over such SC/ST candidates promoted earlier. In ***S Vinod Kumar v Union of India*** (1996), it was held that relaxations in qualifying marks in matters of reservation in promotion was not permissible under Article 16(4) in view of the mandate contained in Article 335 (administrative efficiency) of the Constitution. A Constitution Bench in the subsequent case of ***Ajit Singh (II)* v. *State of Punjab*** (1999) gave firm stamp to "catch up rule".

The Parliament responded by enacting a series of constitutional amendments. The Constitution (Eighty First Amendment) Act, 2000 which added Article 16(4B), allowed the States to carry forward the unfulfilled/backlog vacancies from previous years beyond 50% judicial ceiling imposed by ***Indra Sawhney*** judgment. This was called the "carry forward rule". The 82nd amendment was also passed in 2000 to undo the effect of ***S. Vinod Kumar*** judgment. The amendment added a proviso to Article 335 providing for relaxation in qualifying marks or lowering the standard of evaluation for reservation in promotion to SCs and STs. By way of 85th Constitutional Amendment, the Parliament negated the "catch-up rule" by amending Article 16(4A) to mean "matters of promotion, with consequential seniority."[7]

The 'Per Incuriam' Judgment in M. Nagaraj

The constitutional amendments regarding reservation in promotion with retrospective effect were challenged in 2002. A Constitution Bench in ***M. Nagaraj v. Union of India*** (2006) heard the challenge. The Court was called to decide whether the Parliament had fulfilled the implied "constitutional limitations and requirements" in passing those amendments. In simple words, the issue was whether the amendments reflected the philosophy of the Constitution or not. The Court unanimously upheld the validity of these constitutional amendments, but not before subjecting them to certain conditions which effectively rewrote the Constitution and upended ***Indra Sawhney***'s settlement of issues. The unanimous judgment, authored by Justice SH Kapadia, laid down that any law under the said constitutional amendments can be made only if the State collects "quantifiable data" showing backwardness of SC/STs, their inadequacy of representation in services, efficiency of administration, exclusion of creamy layer, and that the 50% ceiling limit in reservations is not breached.

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In ***Nagaraj*** judgment, the Court noted that it would go "by what the Constitution-framers intended originally and not by general concepts or principles". A perusal of Constituent Assembly Debates (CAD) reveals that the Constitution-framers were committed to eliminating the group-based discrimination inflicted particularly upon the SCs, STs, and other affected backward classes. Article 16(1) envisages "equality of opportunity" not only for individuals but also among different social groups. An individual can get equal opportunities only if the group or class, to which she belongs, has not been systematically deprived of opportunities. Otherwise, that individual would be deprived of opportunities because of the stigma of belonging to a particular group of class. Therefore, Article 16(1) envisions creating an "equal level-playing field" for individuals as well as groups. That is why the plural term "citizens" has been used in Article 16(1) instead of just 'citizen' or 'individual'. Article 16(4) makes this vision even more evident, as it empowers the State to make reservations in favour of any "backward *class of citizens*" which is not "adequately represented in the services". Therefore, the balance of claims has to be first between groups and then between individuals belonging to different groups. Group equality in Article 16(4) is an implicit classification under Article 16(1), as held in ***Indra Sawhney*** judgment. Before group inequality is not eliminated, the question of equality among individuals would not arise. But, the judges in ***Nagaraj*** case stated that they were "concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a backward class". The Court further noted that "the concept of "equality of opportunity" in public employment concerns an individual, whether that individual belongs to the general category or backward class. It considered "equality" in Article 16(1) as "individual centric". That the Court adopted a view contrary to Constitution-framers' intention can be explained from the fact that despite its claim, the Court did not make any reference to the CAD. As the Court noted that "public employment is a scarce commodity in economic terms", it should have learnt from KM Munshi's words (30 November 1948) in the Constituent Assembly, that the "*State services give a status and an opportunity to serve the country, and this opportunity should be extended to every community*".

The majority of judges in ***Indra Sawhney*** case and a previous seven-judge bench decision in ***NM Thomas v. State of Kerala*** (1976) had categorically held that Article 16(4), which provides for reservations, is a part of the equality principle enshrined in Article 16(1). Contrary to these authoritative holding of larger benches, the Constitution Bench in ***Nagaraj*** case ruled that Article 16(1) and Article 16(4) "operate in different fields". Even if Article 16(4) was to be considered

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"as an application of Article 16(1)", then, the Court stated, the "two Articles have to be harmonised keeping in view the interests of certain sections of the society as against the interest of the individual citizens of the society". Furthermore, reservation in Articles 16(4) and 16(4A) was held to be merely "enabling" and "discretionary". That discretion, it was held, was further subjected to "backwardness" and "inadequacy of representation". In support of this proposition, the Court referred to the language of Article 16. It stated that Article 16(4A) "follows the pattern specified in clauses (3) and (4) of Article 16" and therefore would be "governed by the two compelling reasons -- "backwardness" and "inadequacy of representation", as mentioned in Article 16(4)". The judgment in ***Indra Sawhney*** had adopted the test of "backwardness" for determination of status of other "backward classes". In endorsing the intent of Constitution Framers, the judgment considered SCs and STs to be "admittedly included within the backward classes" under the Constitution.[8] Therefore, by subjecting the SCs and STs to the "backwardness" criteria, Justice Kapadia in **Nagaraj** went against the larger Bench ruling in **Indra Sawhney** and Constitution Framers. Moreover, **Nagaraj**'s reasoning on applying the "backwardness" criteria on Article 16(4A) goes against even the plain text of the Constitution. The text of Article 16(4A) mentions only "Scheduled Castes and Scheduled Tribes" and hence the test "backwardness" could not have been applied to this Article, as these communities have been assumed to be most backward in the constitutional jurisprudence.

The decision in ***Nagaraj*** is contrary to ***Indra Sawhney*** on one more count that it imports the concept of "creamy layer" upon the SCs and STs and that too even without providing any reasoning or discussion. ***Indra Sawhney*** decision had applied the "creamy layer" test only on the other backward classes. It had specified that the judgment would not cover SCs and STs. Ironically, in applying all these criteria contrary to ***Indra Sawhney***, the judges in ***Nagaraj*** noted that they were "bound by the decision in ***Indra Sawhney***". Beyond lip service, Justice Kapadia, speaking for five-judge Bench, undid what was settled by nine-Judge Bench in ***Indra Sawhney***.

The ***Nagaraj*** judgment had further noted that "the debate before" the Court on the issue of merit had "taken place in an empirical vacuum". Yet the Court decided to do the same, as it subjected the challenged amendments to a vague notion of "efficiency of administration". The Court read "merit" and "efficiency" as interchangeable terms. In the Constituent Assembly, the perception among the members was Article 335, which employs the term "efficiency of administration", was

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a mere directive, which would be subject to the fundamental right in Article 16. Members such as Dharanidhar Basu Matari had effectively bulldozed the exclusionary myth of "efficiency" being used to stereotype Scheduled Tribes and Scheduled Castes and consequently deny their inclusion in services. Moreover, Dr Ambedkar had made a strong case to refer to "efficiency of administration" as inclusive and representative (Bhaskar, 2020). This was an aspect where even the *obiter* in ***Rangachari*** and the judgment in ***Indra Sawhney*** adopted propositions in "empirical vacuum" and held that Article 335 would be a constitutional limitation on the power of the State under Article 16(4). By holding that Articles 16(4) and 16(4A) would be limited by Article 335, the ***Nagaraj*** judgment repeated ***Indra Sawhney****'s mistake.*

It was to undo this mistake in constitutional interpretation in a series of judgments (including ***S. Vinod Kumar***) that the Parliament had inserted a proviso to Article 335 by way of 82nd constitutional amendment for relaxation in standard of evaluation for the SCs and STs. The amendment did not take away the evaluation criteria altogether. It was evident that in matters of promotion, the SCs and STs would still be subjected to certain criteria. A reading of amended Article 335 (with proviso) clarified that the State perceives that the "efficiency of administration" would be maintained if certain minimum criteria is followed in recruitment for government services. The ***Nagaraj*** judgment made a passing observation that Article 335 is to be read with Article 46, which provides that the State shall protect the SCs and STs from "social injustice and all forms of exploitation", and therefore the State may relax the qualifying criteria for SCs and STs. However, the Court adopted a conclusion contrary to its own reasoning by imposing the additional test of efficiency. The Court held that the Eighty-Second amendment only "relaxed" and "not obliterated" the constitutional limitation on the State's discretion to provide reservation in promotions. It did not discuss what "maintenance of efficiency in administration" implies, and yet imposed it as an additional requirement, even as the State had provided a subjective criterion for maintaining overall efficiency in the Eighty-Second amendment.

The Court declared that concepts of "catch-up" rule and "consequential seniority" were "judicially evolved concepts", whose source lies in "service jurisprudence" and not constitutional principles. The judgment held that such concepts do not form the *basic structure* of "equality code" under Articles 14,15, and 16. Thus, the challenged amendments dealing with these concepts did not

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violate the basic structure, and their validity was upheld, subject to the same limitations applied to the 77th and the 85th constitutional amendments.

The Court had noted that "whether a reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned" in Articles 16(4), 16(4A), and 335 are maintained. As demonstrated in this article, the parameters of "backwardness" and "creamy layer" imposed by the Court and its supportive reasoning are in direct contravention with the judgment of a larger Bench in ***Indra Sawhney.*** The judgment in ***Nagaraj*** is *per incuriam* (passed in contravention of established position of law) on all these counts. Furthermore, the holding on "creamy layer" is adoption of another myth against reservation. Data shows "that the relatively economically weak among the SCs in rural area have benefited from reservation in employment on a significant scale" (Thorat, Tagade, and Naik, 2016: 63). The strict abstract parameter of "efficiency of administration" also suffers from unsound reasoning and devoid of reality (Deshpande). The Court held that the constitutional amendments did not obliterate the *basic structure,* but it qualified the reservation in promotions for SCs and STs in such a manner that it obliterated the effect of the amendments itself.

As the ***Nagaraj*** judgment came out, the 93rd constitutional amendment was challenged. The amendment had inserted Article 15(5) into the Constitution, which empowered the State to make special provisions for "socially and educationally backward classes" or the SCs or STs for their admission to educational institutions. The Central Educational Institutions (Reservation in Admission) Act, 2006 giving 27 percent to Other Backward Classes in central educational institutions, enacted under Article 15(5) was also challenged. However, 15 percent and 7.5 percent reservation made in favour of SCs and STs respectively provided under the Act was "not opposed by the petitioners". A Constitution Bench in ***Ashoka Kumar Thakur v. Union of India*** (2008) upheld the validity of the amendment and the 27 percent reservation made in favour of the Other Backward Classes, subject to the exclusion of the "creamy layer". Relying upon the ***Indra Sawhney*** judgment, Chief Justice KG Balakrishnan declared "creamy layer" to be a parameter applied for the identification of the backward classes, and not a principle of equality. The Chief Justice thus clarified that the "creamy layer" principle is not applicable for the SCs and STs, whose identification as a "special category" has never been disputed under the Constitution. Justice Dalveer Bhandari in his concurrence also clarified that since the ***Indra Sawhney*** judgment as well

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as challenge in ***Ashoka Thakur*** was "confined only to Other Backward Classes", he would "express no opinion" regarding exclusion of "creamy layer" from the SC/STs. Justices Pasayat and Thakker, in their concurring opinion, noted that though "some observations of general nature" have been made in ***Nagaraj*** judgment regarding the applicability of "creamy layer" principle to the SC/STS, even though the ruling in ***Indra Sawhney*** did not concern these communities. In concurring with Chief Justice Balakrishnan's judgment, Justice Raveendran discussed the application of the "creamy layer" in the context of principles of "determination of backwardness" as held in ***Indra Sawhney***. He did not rule that the "creamy layer" principle would also apply to SC/STs or that it is a facet of the larger "equality" principle. Therefore, though the **Ashoka Thakur** judgment was concerned only with 27 percent reservation given to OBCs in central educational institutions, the judges unanimously reiterated that the principle of "creamy layer" laid down in ***Indra Sawhney*** judgment applied only to the OBCs. Chief Justice Balakrishnan, and Justices Pasayat, Thakker, and Bhandari specifically noted this. While only Chief Justice Balakrishnan was open to note that "creamy layer" would not be excluded from SC/STs, the proposition upheld by ***Ashoka Thakur*** judgment, that ***Indra Sawhney*** applied "creamy layer" only for determination of backward classes, comes in direct contravention with ***Nagaraj*** decision, which had interpreted ***Indra Sawhney*** to apply "creamy layer" on SCs and STs. This was a strong ground for reconsidering the correctness of ***Nagaraj***, as the ***Ashoka Thakur*** judgment was passed by a Constitution Bench of equal strength.

However, the *per incuriam* parameters laid down in ***Nagaraj*** were followed and applied in a series of judgments[9] to strike down laws providing for reservation in promotions in different states respectively. In an attempt to nullify the effect of *per incuriam* and flawed parameters laid down in ***Nagaraj***, the Constitution (One Hundred Seventeenth Amendment) Bill, 2012 was tabled in the Parliament. In its Statement of Objects and Reasons, the Bill noted that "there is uncertainty on the methodology" and "difficulty" in fulfilling the exercise imposed by ***Nagaraj*** judgment. Therefore, the Union Government "decided to move the constitutional amendment to substitute clause (4A) of article 16, with a view to provide impediment-free reservation in promotion to the Scheduled Castes and the Scheduled Tribes and to bring certainty and clarity in the matter" with a retrospective effect "from the date of coming into force of that clause as originally introduced, that is, from the 17th day of June, 1995". The Bill proposed to substitute Article 16(4A) to specifically provide that that the "Scheduled Castes and the Scheduled Tribes notified under Article 341 and

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Article 342" would be deemed to be backward, and that the State would be empowered to make "provision for reservation in matters of promotions, with consequential seniority" in State services for the Scheduled Castes and Scheduled Tribes "to the extent of the percentage of reservation provided" to them in the State services. The first part of the Bill would have set aside the parameters of proving "backwardness" and excluding "creamy layer", while the second part would have taken away the requirement of each state government to prove "inadequacy of representation". The Bill was passed by the Rajya Sabha, but got lapsed on the dissolution of Lok Sabha.

The '*Misinterpretation*' in Jarnail

It took 12 years for the Supreme Court to finally adjudicate whether ***Nagaraj*** judgment should be reopened by referring it to a seven-judge Bench. The task was assigned to a Constitution Bench in ***Jarnail Singh v. Lachhmi Narain Gupta*** (2018). The unanimous judgment, authored by Justice RF Nariman, concluded that ***Nagaraj*** does not need to be referred to a seven-Judge Bench. However, despite being a coordinate Bench of equal strength, Justice Nariman's judgment decided that the holding in ***Nagaraj*** that "the State has to collect quantifiable data showing backwardness of the Scheduled Castes and Scheduled Tribes" was contrary to the nine-Judge Bench in ***Indra Sawhney*** and therefore invalid to that extent. That a Constitution Bench overruled a decision passed by a coordinate Bench of equal strength only resembles a sense of judicial indiscipline and inconsistency. Ideally, the ***Jarnail*** judgment should have referred the ***Nagaraj*** decision to a seven-Judge which could have decided all aspects of that decision. Instead, the ***Jarnail*** decision whitewashed some of the incorrect reasoning and parameters given in ***Nagaraj*** with another thick layer of inconsistency and misinterpretation of ***Indra Sawhney.***

In ***Nagaraj*** case, the Constitution Bench had not discussed the principle of "creamy layer" and had suddenly imposed it on reservation in promotion policies for SCs and STs in its conclusions. To save this act done in haste, the ***Jarnail*** judgment declared that eight of the nine learned judges in ***Indra Sawhney*** applied the creamy principle as "a facet of the larger equality principle". To come to this conclusion, the decision in ***Jarnail*** did not discuss or rely upon the original nine-Judge Bench decision in ***Indra Sawhney***. Instead, the judgment relied and quoted from a later three-Judge Bench in ***Indra Sawhney(2) v. Union of India*** (1999), which, in the admission of Justice Nariman, "neatly summarised the judgments in ***Indra Sawhney*** on the aspect of creamy layer".

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Jarnail decision then noted that the ***Indra Sawhney(2)*** judgment of the three-Judge Bench "clearly held that the creamy layer principle sounds in Article 14 and 16(1)". It must be noted that while ***Indra Sawhney(2)*** judgment discussed the "creamy layer" criteria exhaustively, but the discussion of the "creamy layer" was confined to the "backward classes" as defined under the Kerala State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995. Evident from the facts of the case, the Kerala Act defined "backward classes" under Section 2 (c) as "such backward classes of citizens *(other than Scheduled Castes and Scheduled Tribes)*, as specified by the Government from time to time". Thus, the question of creamy layer for SC/STs never arose in the first place ***Indra Sawhney(2)*** case. Therefore, ***Jarnail*** judgment misinterpreted even the smaller bench decision in ***Indra Sawhney(2),*** and thus shows a concocted effort to save ***Nagaraj*** judgment which is erroneous in law and fact.

Furthermore, as stated before, the lead judgment in ***Indra Sawhney*** had noted that its discussion on "creamy layer" would not be applicable on the SCs and STs. The Constitution Bench in ***Ashoka Thakur*** (which was of equal strength as to both ***Nagaraj*** and ***Jarnail***) had solidified this understanding that ***Indra Sawhney*** had made a limited application of "creamy layer" principle only to OBCs. But, the judgment in ***Jarnail*** misinterpreted a smaller three-Judge Bench decision ***(Indra Sawhney(2))*** to rule a proposition, contrary to a larger Bench in ***Indra Sawhney*** and coordinate Bench in ***Ashoka Thakur.*** This is a matter of judicial indiscipline of a high order, inconsistency, and bad faith. It is a violation of the basic principle of *stare decisis* and precedents on which our judicial system rests. Legal questions settled by a larger Bench cannot be reopened and unsettled by a smaller Bench. Like ***Nagaraj,*** the decision in ***Jarnail*** to uphold "creamy layer" exclusion in reservation in promotions for SCs and STs also stands with contravention of ***Indra Sawhney.***

Justice Nariman's authored judgment in ***Jarnail*** also held that the genesis of the "creamy layer" is to be found in the concurring opinion of Justice Krishna Iyer in the seven-Judge Bench decision in ***State of Kerala v. NM Thomas*** (1976), which dealt with a test-relaxation rule in promotions from lower division clerks to upper clerks. The said rule was upheld by a 5–2 majority of the Court. Before commenting on the merits of the case and the legality of the said rule, Justice Krishna Iyer, in his concurring opinion, chose to put down "a word of sociological caution". One of the concerns, he noted, is that the benefits of reservation "by and large, are snatched away by the top creamy

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layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake". "The core conclusion", Justice Krishna Iyer sought to emphasise was, "every step needed to achieve in action, actual, equal, partnership for the [Scheduled Castes] alone amounts to social justice" and not mere "enshrinement of great rights in Part III and good goals in Part IV". The remarks made by Justice Krishna Iyer were prefatory and did not concern the merits or facts of the case. The remarks caused a judicial dialogue across time. Justice O. Chinnappa Reddy in his opinion in the Constitution Bench decision in ***KC Vasanth Kumar v. State of Karnataka*** (1985) responded to Justice Krishna Iyer's prefatory comments. The opinion penned down by Justice Chinnappa Reddy warned everyone against a "superior", "elitist", "patronising", and "paternalist" approach which treated reservations as a "token" or "generosity" being taken to "undo an evil [of caste discrimination] which had been perpetrated through the generations". Justice Chinnappa Reddy noted that Justice Iyer "too fell into the elitist trap" by making some general "purported caution about the evils of reservation". According to Justice Chinnappa Reddy, "*One must enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste*". He explained by adding the following question: "*How can it be bad if reserved scats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?*" Justice Chinnappa Reddy stated that the problem can be solved by creation of "developmental facility" which could enable the "really backward to take full advantage of reservations". While Justice Chinnappa Reddy made a moral and jurisprudential claim against exclusion of creamy layer from the SCs and STs, both he and Justice Krishna Iyer emphasised on the need to promote supportive facilities beyond reservation. The ***Indra Sawhney*** judgment, which was deciding all aspects related to reservations authoritatively, chose not to apply "creamy layer" criteria on the SCs and STs. In that way, ***Indra Sawhney*** can be said to have endorsed Justice Chinnappa Reddy's proposition in ***KC Vasanth Kumar*** and not that of Justice Krishna Iyer in ***NM Thomas***.

The cherry picking of Justice Krishna Iyer's non-binding prefatory remarks in ***Jarnail*** judgment, without mentioning the response by Justice Chinappa Reddy, resembles another inconsistency and unsound legal reasoning. More than that, ***Indra Sawhney*** judgment had applied "creamy layer" as one of the parameters to identify "backward classes". This was done because who would constitute "backward class" was left by the Constituent Assembly to the exercise of future governments.

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Unlike the uncertainty in the determination of "backward classes", the draftspersons of the Constitution had provided clarity that the Scheduled Castes and Scheduled Tribes would be deemed "backward" and that there would be no question of determining their backwardness. This special status of Scheduled Castes and Scheduled Tribes under the Constitution has been accepted in both ***NM Thomas*** and ***Indra Sawhney.*** Contrarily, both ***Nagaraj*** and ***Jarnail*** treated the status of SCs and STs to be similar to the OBCs, as these judgments read the application of the parameter of "creamy layer", limited to determination of the backward classes, on the SCs and STs.

The ***Jarnail*** judgment also missed one crucial understanding of the Indian society and caste. It read "backwardness" and "untouchability" interchangeably.[10] A person may be economically or socially backward due to suffering from untouchability. However, she may still suffer from untouchability and discrimination, even if she progresses economically. There have been reported cases of discrimination faced by SCs or STs employees who have progressed economically, as noted by Justice Pandian's concurring opinion in ***Indra Sawhney*** case. The majority of judges in ***Indra Sawhney*** had also acknowledged that social backwardness and economic backwardness are not cogently linked. Therefore, the statement in ***Jarnail*** that a person can come out of "untouchability by virtue of belonging to the creamy layer" is sociologically incorrect[11], and cannot be a ground for the exclusion of the "creamy layer" from the SCs and STs. The Constitution Bench did not cite any study of sociology in its support and came to its conclusion only on the basis of the views of Justice Nariman writing for the Constitution Bench. Thus, Justice Nariman's judgment is also *per incuriam* to the extent that it upholds "creamy layer" application on the SCs and STs in matters of reservation in promotion.

A Fresh Look in BK Pavitra II?

In 2017, two-Judge Bench, comprising Justices AK Goel and UU Lalit, in the case of ***BK Pavitra (I) v. Union of India*** had struck down the validity of a 2002 Karnataka law[12] providing for reservation in promotions, on the ground that it did not comply with the parameters laid down by ***Nagaraj***. To make the compliance with ***Nagaraj*** parameters, the State of Karnataka constituted Ratna Prabha Committee to submit a report on the backwardness and inadequacy of representation of the SCs and STs in the State Civil Services and the impact of representation on overall administrative efficiency in the State. On the basis of the Report submitted by the Committee, the Government of Karnataka introduced a new legislation[13] in 2018 which protects the consequential

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seniority of SC/STs employees promoted under the State's reservation policy. The validity of this new law was again challenged on the ground that it did not comply with the principles enunciated in both ***Nagaraj*** and ***Jarnail***, and that the Ratna Prabha Committee Report had several flaws. The challenge was adjudicated in 2019 by a two-Judge Bench of Justices UU Lalit and DY Chandrachud, now known as, ***BK Pavitra II v. Union of India***. Before the Bench, the seminal issue was to what extent a data collection exercise by the Government, which precedes the enactment of the law, may be reviewed by the Court. The judgment, authored by Justice Chandrachud, upheld the validity of the 2018 legislation on ground that it cured the defects in the 2002 law following the parameters laid down in ***Nagaraj*** and ***Jarnail.***

BK Pavitra II was being decided after the decision in ***Jarnail****,* which had taken away the condition of proving "backwardness" of SCs and STs. The Bench in ***BK Pavitra II*** thus had to scrutinize only if the parameters of inadequacy of representation, creamy layer, and overall efficiency of administration were fulfilled in the enactment of the 2018 law. Referring to the judgment in ***Indra Sawhney*** and ***Jarnail***, the judgment in ***BK Pavitra II*** emphasised on the "element of discretion vested in the state governments to determine the adequacy of representation in promotional posts". The judgment noted that it would be open to the State to make reservation in promotion for SCs and STs *"proportionate to their representation in the general population*".

The Bench further dismantled the arguments of having a strict, exclusionary, and elite standard of "efficiency of administration" by noting that the element of efficiency under Article 335 cannot be construed based on a "stereotypical assumption that roster point promotees drawn from the Scheduled Castes and Scheduled Tribes are not efficient or that efficiency is reduced by appointing them". The judgment described it as "stereotypical" as it "masks deep rooted social prejudice". Justice Chandrachud held that "efficiency of administration" in the affairs of the Union or a State must be defined in "an *inclusive sense,* where diverse segments of society find representation as a true aspiration of governance by or for the people". In any case, the judgment noted, "a candidate has to serve a statutory period of officiation before being confirmed", and this requirement ensures that the "efficiency of administration is, in any event, not adversely affected". Since both ***Nagaraj*** and ***Jarnail*** were silent on the scope of adequacy of representation and overall efficiency of administration, it was a forward step in ***BK Pavitra II*** that the question of adequacy of representation and overall efficiency would depend upon the subjective satisfaction of the State

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government. Referring to ***Jarnail***, the Bench in ***BK Pavitra II*** held that "the concept of creamy layer has no relevance to the grant of consequential seniority" and a "progression in a cadre based on promotion cannot be treated as the acquisition of creamy layer status". Based on the above reasoning, the Bench held the criteria adopted, and the findings in the Ratna Prabha Committee Report fulfil the necessary parameters. The 2018 law was thus upheld.

In an era, where the previous judgments including those in ***Nagaraj*** and ***Jarnail*** had adopted a strict, uncontextualized, and constitutionally slippery approach towards the reservation in promotion policies, it was a giant leap taken in ***BK Pavitra II*** which adopted a due deference approach towards the discretion of the State. ***BK Pavitra II*** is a testament to the transformative vision of the Constitution which reads efficiency as an inclusive phenomenon. Unfortunately, a couple of later judgments.[14] have still followed the *per incuriam* and incorrect line of reasoning as adopted by ***Nagaraj*** and ***Jarnail***.

Conclusion

The Constitution Framers had envisaged that an administration must be representative and inclusive, and thus provided for Article 16 as a standalone provision. Contrary to this, the ***Indra Sawhney*** judgment held that reservations made under Article 16 would be subject to the strict test of efficiency under Article 335. Mere stereotypical assumptions of SCs and STs being inefficient were accepted as facts and endorsed as judicial holding to rule against reservation in promotions. The 77th amendment undid this stereotype. Apart from that, the ***Indra Sawhney*** authoritatively ruled that Scheduled Castes and Scheduled Tribes, by default, would be deemed backward for all purposes of Article 16, and that "creamy layer" criterion would only apply to other backward classes. The main crux of ***Indra Sawhney*** was that the conditions of backwardness of OBCs are qualitatively different than those for SCs/STs. ***Nagaraj*** and ***Jarnail*** judgments, in contravention of ***Indra Sawhney***, departed from this crucial constitutional mandate. The issues settled by ***Indra Sawhney*** were reopened by ***Nagaraj*** and ***Jarnail*** judgments, despite the latter (being of smaller benches) not having the judicial authority to do so. An analysis of the jurisprudence on reservations reflects so many empirical, intellectual, and constitutional slippages and wanton disregard for precedent. It is time that the potential of ***BK Pavitra II*** judgment is realized which gives due regard to reservation policy.

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

[2] The Commission was constituted in late 1970s to determine the criteria for defining the socially and economically backward classes of citizens and to recommend steps to be taken for their advancement, including the desirability of providing reservation for their adequate representation in government services.

[3] Justice Jeevan Reddy's lead judgment, in *Indra Sawhney* case, stated: "*At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Article 16(4) do comprise some castes — for it cannot be denied that Scheduled Castes include quite a few castes*". It was written in conclusion: "*the test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression 'backward class of citizens'.*"

[4] The lead judgment in *Indra Sawhney* case stated: "*This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes*."

[5] Justice Sawant, for instance, wrote in his opinion in *Indra Sawhney* case: "Men are not saints… When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration".

[6] Details can be seen here: https://dopt.gov.in/sites/default/files/FAQ_SCST.pdf

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

[8] In the Constituent Assembly Debates, it was emphasized consistently that the Scheduled Castes would be automatically considered within "backward classes", as they are the most backward group.

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

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[10] Justice Nariman formulated: "*persons within that group or sub-group, who have come out of untouchability or backwardness by virtue of belonging to the creamy layer, who are excluded from the benefit of reservation*".

[11] A study by Amit Thorat and Omkar Joshi shows that almost one third of Indian population across religious groups still practice "untouchability". See Amit Thorat & Omkar Joshi, "The Continuing Practice of Untouchability in India: Patterns and Mitigating Influences", *Economic & Political Weekly* (11 January, 2020), Vol. 55, Issue No, 2, available at https://www.epw.in/journal/2020/2/special-articles/continuing-practice-untouchability-india.html

[12] Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act, 2002

[13] Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018

[14] Chebrolu Leela Prasad v. State of Andhra Pradesh (Constitution Bench judgment dated 22 April, 2020), Davinder Singh v. State of Punjab (5-judge bench reference order dated 27 August, 2020)

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