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RESERVATION ON AN ECONOMIC BASIS: SOME ISSUES AND CHALLENGES

Arpita Sarkar*

*An increasing number of judicial decisions have emphasized the absence of 'really backward' people among the notified backward classes in reservation schemes. Economic backwardness is an important aspect of the determination of backward classes for reservation. However, unnecessary emphasis on this dimension may result in the delegitimization of other indicators for identifying backward classes. The constitutional amendment of 2019 which introduced reservation for economically weaker sections ('EWS') of the society further reduces the importance of social backwardness as an indicator for backward classes. This paper revisits the legal history of reservation to highlight that economic backwardness as a ground for reservation was deliberated upon and rejected by the Constituent Assembly. The paper further argues that the 'creamy layer' is a judicially developed test introduced through judicial surmises. Also, it is argued, based on historical and legal grounds, that reservation for EWS is likely to be declared unconstitutional because of its incompatibility and contradictory nature vis-a-vis the rest of the equality clauses. It may fail the width and identity tests as laid down in *M. Nagaraj v. Union of India* (2006) (hereinafter 'M. Nagaraj') to assess the violation of the basic structure through constitutional amendments.*

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INTRODUCTION

*“The social origin of our higher judiciary and most of our senior counsel has affected the quality of the decision handed down by the courts. A critic has observed that the “gross effect of the litigation” on the policy of preferential treatment or compensatory discrimination has been to “curtail and confine it”.*¹

-Madhu Limaye

¹ MADHU LIMAYE, CONTEMPORARY INDIAN POLITICS, 208 (Sangam Books, 1987).

The rights to equality guaranteed under Articles 14-18 are fundamental rights. The Constitution of India provides for the reservation of seats in educational institutions aided by the state and in employment in government services, to the backward classes.² Reservation, as affirmative action is called in India, has been mired with controversies since the founding years of the Constitution.³ Jurisprudence on this issue has developed since 1950 through reactions between the judiciary and legislature in the form of court decisions and constitutional amendments respectively.⁴ The court in multiple cases in the past has declared that Article 15(4) and Article 16(4) are not instances of poverty alleviation programs.⁵ Yet, the concept of the 'creamy layer' was introduced into judicial decisions initially through surmises which was premised on opinion without evidence. Later, the concept transformed into an established position of law.⁶

Initially, the 'creamy layer' test was applied for reservation of Backward Classes (BCs) only. Since 2018, two major developments in reservation jurisprudence have taken place in India. Firstly, the Supreme Court explicitly decided in *Jarnail Singh v. Lachhmi Narain Gupta (Jarnail Singh)*⁷ that the 'creamy layer' test applies to Scheduled Castes (SCs) and Scheduled Tribes (STs) as well. Secondly, a constitutional amendment was made in January 2019 to introduce reservation for economically weaker sections of the society other than SCs, STs, and Other Backward Classes (OBCs), based on family income.⁸ The amendment has been

² INDIA CONST. art. 15, art. 16.

³ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

⁴ The first amendment introducing Article 15(4) was introduced after *Champakam Dorairajan*. Article 16(4-A), 16(4-B) and the very recent Article 16(5) was introduced to undo the 9-judge bench decision in *Indra Sawhney*. Article 335(2) to undo *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580

⁵ *Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420, *State of U.P. v. Pradip Tandon*, (1975) 1 SCC 267.

⁶ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

⁷ *Jarnail Singh v. Lachhmi Narain Gupta*, (2018) 10 SCC 396.

⁸ India Const. amend. 103, art. 15(6) & art. 16(6).

"Article 15 (6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making, — (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category. Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage."

Article 16(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

challenged before the Supreme Court in *Janhit Abhiyan v. Union of India*.⁹ The matter is pending the consideration of the Court.

A similar constitution bench of five judges had earlier held that the SCs and STs are homogenous constitutional classes which cannot be further classified into more and less backward groups based on the individual status of members of the community.¹⁰ However, from the decision in *Jarnail Singh*, one may infer that there has been a subsequent shift in the perception of the judiciary wherein reservation is construed as an individual-oriented right based dominantly on economic capacity. Identification of community through an economic lens and individual-oriented entitlement is contradictory to the visions of the drafters of the Constitution of India.

It is important therefore, to revisit our history to recall the primary characteristics of reservation as was envisioned by the constitution-makers for independent India. Although bound by the common law principle of precedence, reservation jurisprudence in India has shifted from the historical struggle of the depressed classes to addressing economic difficulties, based on massive obiter dicta in various judgments. Judicial apprehension regarding predatory availing of reservation by the economically well-off among the notified communities initially appeared in the obiters of judicial decisions and has subsequently shifted to the ratio. This paper examines, thus, whether the important constitutional principles under Articles 15 and 16 are re-written through judicial interpretations and constitutional amendments.

The paper is divided into three sections. The first section deals with the historical struggle of depressed and backward classes for reservation from the time of drafting of the Government of India Act, 1919, to the drafting of the Constitution of India, 1950, and its subsequent interpretation by the judiciary. The second section deals with the emergence of the economic criterion for identification of reserved categories by the judiciary and its culmination into the concept of the 'creamy layer' test. The third section deals with the possible erosion of the core principles behind reservation through the Constitution (One Hundred and Third Amendment) Act, 2019. The research infers that unlike the previous amendments to Articles 15 and 16 which were reactions to court decisions, the present amendment made by the parliament was not a consequence of immediate provocation caused by judicial decision(s). Rather, it is meant to entrench an office memorandum which was invalidated by the court in

⁹ *Janhit Abhiyan v. Union of India*, W.P. (Civil) no. 55 of 2019.

¹⁰ *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394.

Indra Sawhney v. Union of India (**Indra Sawhney**) on the grounds of violation of Article 16(1). This amendment contradicts the salient features of reservation jurisprudence. The court may therefore be required to revert to the established position of law through non-application of the ‘creamy layer’ test on the SCs and STs as was laid down in *Indra Sawhney*. A petition to this effect is pending before the Supreme Court.¹¹ Additionally, the Court may declare reservation for economically weaker sections as unconstitutional since it may alter the identity of reservation clauses and consequently violate the basic structure of the constitution. This issue is also pending consideration before the Supreme Court.¹²

I. HISTORY OF RESERVATION IN THE INDIAN CONSTITUTION

The SCs, STs and the backward classes of India have been described by the courts as the downtrodden sections of the society.¹³ However, the downtrodden-ness of these communities has been primarily examined through an economic lens.¹⁴ A careful study of the history of the Constitution building process and the Constituent Assembly Debates (CAD) will reveal that reservation was not meant to be a poverty alleviation program. A significant portion of the CAD has been assigned for reservation in the legislature.¹⁵ It was evident from the discussion in the Constituent Assembly that reservation in legislature was meant to secure representation of the oppressed communities in governance. Therefore, it is absurd to believe that the reservation of seats in the legislature was meant for alleviation of poverty. Similarly, reservation in employment was guaranteed by the constitution keeping in mind the distribution of powers among the organs of the State.¹⁶ Hence, it cannot be called a poverty alleviation scheme. The history of the Government of India Act, 1919, explores the objectives with which reservation was demanded and how the depressed classes negotiated with the Constitution building process during that time.

¹¹ *The State of Punjab v. Davinder Singh* (2020) 8 SCC 65. A three-judge bench in this case has referred the issue to a seven judge bench to revisit the decision of *E.V. Chinnaiah v. State of Andhra Pradesh* which declared SCs and STs as homogenous constitutional classes which cannot be categorized further.

¹² *Janhit Abhiyan v. Union of India*, Writ Petition (C)No. 55 of 2019.

¹³ See *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

¹⁴ See *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495, *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

¹⁵ Representation of the SCs and STs in the legislature was an important issue discussed at different points in time over the three years of debate in the Constituent Assembly. See, generally for example, CONSTITUENT ASSEMBLY DEBATES, Volume VII, November 30, 1948; CONSTITUENT ASSEMBLY DEBATES, Volume IX, August 25, 1949 & 14th October 1949 to mention a few.

¹⁶ LIMAYE, *supra* note, 1 at 207-208.

A. Conditions of Support Placed on Behalf of Dalits to be Governed by Majority Rule During the Drafting of Government of India Act, 1919

The untouchables were treated as statutory minorities under the Government of India Act, 1919. The Montague Chelmsford Report which preceded the drafting of the Act of 1919 recognized that special protection should be made for the depressed classes. However, during the drafting of the Act, it could not take a conclusive stand on this issue other than providing them some token representation in the legislature.¹⁷

When the plan for drafting the Government of India Act, 1919, began, Dr. Ambedkar placed a few conditions on the fulfilment of which the depressed classes would agree to be governed by majority rule. Among these, particularly worth mentioning was the demand for the free enjoyment of equal rights under Part XI of the Government of India Act, 1919.¹⁸ It was suspected, and rightly so, by Ambedkar that obstruction by orthodox Hindus is not the only obstacle for depressed classes. According to Ambedkar, there were certain practices by high caste Hindus which were far more dangerous than even violence. One such practice was social boycott. The depressed classes suffered both from a lack of social strength and economic independence against the upper-caste Hindus. Whenever depressed classes attempted to exercise their rights, they were ostracized and evicted from their property. This was followed by stalling of employment or any other village services which they were provided and also the prohibition of the use of public properties such as common-well, public paths, etc.¹⁹ One may note that the demand for access to public services without discrimination was upheld ultimately through Article 15 of the Constitution of India, 1950.

But the mere guarantee of non-discrimination was not enough. Therefore, another important condition laid down by Ambedkar was the representation of depressed classes in the

¹⁷ 17 B.R. AMBEDKAR, DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES (pt. 1) 80 (photo. reprint 2014) (2003).

¹⁸ AMBEDKAR, *Id* at 82 which stated “Whoever denies to any person except for reasons by law applicable to persons of all classes and regardless of any previous condition of Untouchability the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells and other watering places, public conveyances on lands, air or water, theatres or other places of public amusement, resort or convenience whether they are dedicated to or maintained or licensed for the use of the public shall be punished with the imprisonment of either description for a term which may extend to five years and shall also be liable to fine.”

¹⁹ AMBEDKAR, *supra* note 17, at 83. This apprehension also found mention in the Constituent Assembly by Muniswamy Pillai who sought notification of the SCs and STs through central government instead of local government. He claimed that at local level, the vengeance of politically dominant upper caste may lead to non-notification of communities who raise their voice against oppression and claim equal rights. See, Shri Muniswamy Pillai’s statement in the Constituent Assembly, see, CONSTITUENT ASSEMBLY DEBATES, Volume IX, September 17, 1949 1641.

public services.²⁰ He observed that the upper caste Hindus have largely monopolized the public services by abusing the law or misusing the discretion vested in them while administering the law. He recommended that recruitment in public services may not be merely regulated in the interest of depressed classes but for all other communities as well.

Ambedkar's proposal in this regard appeared like this:

“(1) There shall be established in India in each Province a Public Service Commission to undertake the recruitment and control of the Public Services.

(2) No member of the Public Service Commission shall be removed except by a resolution passed by the Legislature nor shall he be appointed to any office under the Crown after his retirement.

(3) It shall be the duty of the Public Service Commission subject to the tests of efficiency as may be prescribed,

(a) to recruit the Services in such a manner as will secure due and adequate representation of all communities, and

(b) to regulate from time to time priority in employment in accordance with the existing extent of the representation of the various communities in any particular service concerned.”²¹

While clause (2) of this condition appears in modified forms in the Constitution of India, 1950,²² for recruitment and termination of civil services, clause (3) of the condition has been adopted in modified form in Article 16 and Article 335 of the Constitution of India, 1950.

There were two more conditions placed by Ambedkar which are significant to understand the objective of reservation from his perspective. Firstly, he believed that the depressed classes should not only be given special representation in public services but also have the means to redress non-implementation of this promise under the Constitution itself.²³

²⁰ AMBEDKAR, *supra* note 17, at 87-88.

²¹ Memorandum titled “A Scheme of Political Safeguards for the Protection of the Depressed Classes in the Future Constitution of a self-governing India” from Dr. Ambedkar at the Indian Round Table Conference to the Minorities Committee 48; see *supra* note 17, at 88.

²² INDIA CONSTI art. 316, art. 317.

²³ AMBEDKAR, *supra* note 17, at 89 reads as: “In and for each Province and in and for India it shall be the duty and obligation of the Legislature and the Executive or any other Authority established by Law to make adequate provisions for the education, sanitation, recruitment in Public Services and other matters of social and political advancement of the Depressed Classes and to do nothing that will prejudicially affect them.

(2) Where in any Province or in India the provisions of this section are violated an appeal shall lie to the Governor-General in Council from any act or decision of any Provincial Authority and to the Secretary of State from any act or decision of the Central Authority affecting the matter.

(3) In every such case where it appears to the Governor-general in Council or to the Secretary of State that the Provincial Authority or Central Authority does not take steps requisite for the sue execution of the provisions of

Secondly, Ambedkar cautioned in clear terms to not delineate depressed classes merely based on their economic conditions, although economic deprivation most often coincides with social deprivation. He claimed that the poverty of the depressed classes is largely due to social prejudice, and this is what differentiates ordinary caste labour from depressed caste labour. Although the economic deprivation of both the classes may appear similar, the social resources available to depressed class labour are extremely limited.²⁴

Another founding father of the Dalit social movement, Jyotiba Phule had also concluded that the Brahmans could maintain their power and position of oppression by maintaining control over state power including revenue collections, taxes, and state takeover of peasant lands even during colonial rule. Therefore, one of the ways of challenging caste oppression was through the representation of oppressed castes in government positions.²⁵ Phule's opinion has been subsequently iterated by Indian socialist activist and essayist Madhu Limaye. According to Limaye, although the executive has the various ministries as its apex, the real executive powers are exercised by bureaucrats. Therefore, although reservation in the legislature is necessary, it is inadequate. To ensure substantive equality of opportunity in governance, reservation for the SCs and STs was necessary in recruitment and in promotions to government services.²⁶

B. Backwardness – Not Economic, but Social and Educational as per the Constituent Assembly Debates

In the Constituent Assembly, the scope of the term 'backward' which appears in Articles 15 and 16 came up for deliberation and debate. Initially, only the term 'Scheduled Caste' was mentioned in the statutes. The term 'backward' was introduced at a national level in the draft Constitution. By this time, only some provincial statutes had attempted to define the scope of backward classes. This caused some speculation and apprehension among the members of the Assembly. The qualifier 'backward' was not only meant to identify the communities who would be eligible for reservation but the scope of this term was also meant to indicate the objectives behind reservation to be guaranteed by the Constitution. Was the term

this Section then and in every such case, and as for only as the circumstances of each case require the Governor-General in Council or the Secretary of State acting as an appellate authority may prescribe, for such period as they may deem fit, take remedial measures for the due execution of the provisions of this section and of any of its decisions under this Section and which shall be binding upon the authority appealed against.”

²⁴ AMBEDKAR, *supra* note 17, at 89-90.

²⁵ GAIL OMVEDT, UNDERSTANDING CASTE: FROM BUDDHA TO AMBEDKAR AND BEYOND, 26 (Orient Blackswan, New Delhi, 2011)

²⁶ *Supra* note 1, at 207.

backward to be defined from a communal perspective? Was it meant to dilute the category of SCs or was it meant to describe communities apart from, and in addition to, the SCs? This issue was discussed in the Assembly on November 30th, 1948. Harijans, who were enlisted in the list of SCs, were most definitely considered for reservation. Further, the scope of backward communities was deliberated upon since there was also consensus regarding the need for upward social mobility of the middle castes who were deprived of social and educational advancements. Mr. Aziz Ahmad Khan of the United Provinces suggested the removal of the term ‘backward’ from the Article²⁷ so that the government may from time to time provide reservation for any group which is underrepresented in public services. The qualifier ‘backward’, according to him, would mean that the government would be forced to guarantee reservation only for those communities shackled by backwardness under this Article. That is, the government would not be free in the future to consider other communities for reservation on the basis of religion or from upper-caste but less-represented groups.²⁸ This amendment was not moved. This shows that though the scope of the term ‘backward’ appeared vague, there was clarity regarding the objective behind reservation. It was not meant to ensure proportional representation of communities. The vagueness associated with the term was refuted by Shri T. Channiah from Mysore. He argued that there has never been any ambiguity with the term ‘backward classes’ in the Southern states. The term unambiguously refers to those communities which are socially and educationally backward. Economically backward communities are not included within this term.²⁹

Regarding the objective behind the constitutional guarantee of reservation, Shri Chandrika Ram of Bihar added that besides the SCs, the backward classes comprising the middle castes also deserve to be considered for reservation. Though they are not considered untouchables, communities deprived of political rights cannot attain prosperity.³⁰ Shri Kakkan from Madras argued that the Harijans were not appointed in government services primarily

²⁷ THE CONSTITUENT ASSEMBLY, THE DRAFT CONSTITUTION Article 10 reads as:

10(1) There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them. Be ineligible for any office under the State.

(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the service under the State.

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

²⁸ CONSTITUENT ASSEMBLY DEBATES, Volume VII, November 30, 1948.

²⁹ *Id.*

³⁰ *Id.*

because the higher officers appointed and promoted people of their own communities.³¹ There was strong opposition for reservation from Seth Damodar Swarup from the United Province). He claimed that the Public Service Commission was impartial and would guarantee against any discrimination. However, Shri Santanu Kumar Dass from Orissa refuted this claim stating that due to existing inequality, even the most impartial institutions cannot be impartial. Also, people from different vulnerable communities could be elected to the Constituent Assembly only because of reservation.³² Ambedkar, while clarifying the objective behind reservation, claimed that the provision aims at breaking the monopoly of a few communities in public administration to provide opportunities to deprived communities. Further, according to Ambedkar, the term 'backward' guarantees a balance between the principle of equality of opportunity and special protection to deprived communities. Without the qualifier 'backward', such balance will be destroyed.³³

Considering that historically, upper-caste people were employed in the public services, the administration was filled with people from only a few communities. Reservation therefore aimed at breaking this monopoly³⁴ to ensure allocation of decision-making authority among all communities including the vulnerable and depressed classes. It was not meant for the economic upliftment of people.

C. Interpretation of 'Backward Classes' by the Judiciary Post-1950

The Supreme Court of India has settled the position of law on the term 'backwardness' through a series of cases.³⁵ The *Indra Sawhney* case attempted to examine different aspects of reservation to finally put to rest all possible controversies related to the issue.³⁶ This included the introduction of the 'creamy layer' test among the OBCs in employment³⁷ and in admission in higher educational institutions aided by the state.³⁸ The 'creamy layer' test excludes those

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ JYOTIRAO PHULE, GULAMGIRI (1873); Also see, Nandini Gooptu, *Caste and Labour: Untouchable Social Movement in Upper Uttar Pradesh in the Early Twentieth Century*, in 2 *CASTE IN MODERN INDIA* 110 (Sumit Sarkar and Tanika Sarkar eds, 2015).

³⁵ This question has been brought before the Supreme Court since a long time. One of the earlier cases is *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649. However, this issue has gained better shape in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 and *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 cases in later years.

³⁶ See the majority opinion delivered by Justice B.P. Jeevan Reddy in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217.

³⁷ *Id.*

³⁸ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.

members from the OBC communities who have crossed the economic threshold which made them 'backward'. 'Creamy layer' is thus a judicially developed test. It is not mentioned in the constitutional text. Until the release of Mandal Commission Report, there was no consensus as to who constituted the Socially and Educationally Backward Classes (**SEBCs**) under Article 15(4) and more generally, the backward classes under Article 16(4). The failed Kaka Kalelkar Commission Report³⁹ which remained unimplemented due to the lack of a unanimous decision on the composition of backward classes also reflects the uneasiness and lack of consensus in identifying backward classes for reservation.

SCs and STs are defined in the Constitution of India.⁴⁰ Hence, until recently, the courts have been cautious not to interfere with the SCs and STs which were notified under Articles 341 and 342 of the Constitution by further categorization of these communities.⁴¹ In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*⁴² as well as *State of Kerala v. N.M. Thomas (N.M Thomas)*⁴³, the SCs and STs have been deemed as classes that stand on a substantially different footing as compared to the rest of the communities in India. Backward classes, as per the court, would comprise of those dismally depressed communities who are economically and educationally comparable with the SCs and STs. Such was the state of distinction between the SCs and STs on the one hand and other weaker sections on the other, that it was decided in *N.M. Thomas* that the classification of the SCs and the STs as special categories could be justified even under Articles 15(1) and 16(1) of the constitution, whereas, for other weaker sections, the classification has to conform with Articles 15(4) and 16(4) based on the case at hand. That no further classification of the SCs and STs is permissible⁴⁴ and that the 'creamy layer' test does not apply to the SCs and the STs⁴⁵ were also settled positions of law until the Supreme Court changed its opinion.⁴⁶ The 'creamy layer' test was introduced for the SC and the ST categories at promotion levels in services tacitly, through a 5 judge bench decision.⁴⁷ A different nomenclature in the form of three-prong tests of backwardness, inadequate representation, and efficiency of administration was used by the court. In *Jarnail*

³⁹ BACKWARD CLASSES COMMISSION, KAKA KALELKAR COMMISSION REPORT (1955).

⁴⁰ INDIA CONSTI. art. 341, art. 342. Also, see Art. 366(24) and (25) for definitions of Scheduled Castes and Scheduled Tribes.

⁴¹ For example, *supra* note 6, at para 803, *supra* note 38 at para 182.

⁴² *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246.

⁴³ *Supra* note 13.

⁴⁴ *Supra* note 10.

⁴⁵ *Supra* note 6.

⁴⁶ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

⁴⁷ *Id.*

Singh,⁴⁸ the Supreme Court struck down the backdoor application of the ‘creamy layer’ test to the SCs and STs. Instead, it held that the ‘creamy layer’ test shall be applied to the SCs and STs in the same way as it is applied to the OBCs. The blanket application of the ‘creamy layer’ test to all the reserved categories for the purposes of reservation was thus brought by the *Jarnail Singh* decision.⁴⁹

II. THE ROLE OF THE JUDICIARY IN DEVELOPING THE CRITERION OF ECONOMIC BACKWARDNESS

The judiciary has played a significant role in introducing the ‘creamy layer’ test to the Indian reservation system. The apprehensions presented by judges through obiters about misuse and the appropriation of the benefits of reservation by the economically well off among the backward classes first injected the concept of the ‘creamy layer’ into reservation discourse. Warning about the dangers of reservation, Justice V.R. Krishna Iyer in *N.M. Thomas* opined that:

“In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its benefits, by and large, are snatched away by the top creamy 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. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is

⁴⁸ *Supra* note 7.

⁴⁹ For more detail on this case, see “*Jarnail Singh and Others v. Lachhmi Narrain Gupta and Others: Supreme Court of India declares application of creamy layer test on the Scheduled Castes and Scheduled Tribes*”, [52 VRU:WCL, 383-395 (2019)].

calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism.”⁵⁰

Though Iyer J. clarified subsequently that only social science research and not judicial impressionism would lead one to the truth behind these apprehensions,⁵¹ this suspicion sowed through *N.M. Thomas* found momentum in *K.C. Vasanth Kumar v. State of Karnataka*⁵² in which the warnings of Iyer J. were reiterated by Chinappa Reddy J. Subsequently, the ‘creamy layer’ test was validated by the Court in the *Indra Sawhney* decision.

While classifying the poorer section of the backward classes from the non-poor backward classes for the apportionment of seats, the Court in *Indra Sawhney* intended to clarify that the poorer section among OBCs has to be determined in the context of social backwardness. The Court cautioned that there is a requirement for the equitable apportionment of seats among the poorer sections of OBCs and other OBCs.⁵³ Yet, in the same decision, the Court upheld the ‘creamy layer’ test as an economic test meant for a social purpose. The Court refrained from laying the attributes of the ‘creamy layer’ test. However, it acknowledged that both the legislature and the executive are equipped to lay down the criteria.⁵⁴ Through office memorandums, income and occupational positions had been laid down as criteria to exclude the ‘creamy layer’ among OBCs post-*Indra Sawhney*.⁵⁵

A. The Apprehension of the Judiciary Against the ‘Misuse’ of Reservation

Courts have often apprehended that reservation schemes are usurped by the economically well off among the backward classes. This suspicion has two major consequences. Reservation has been validated by the court as an individual-oriented policy wherein the economic hardship of individual members has played an important role in convincing the court about the need for reservation.⁵⁶ Secondly, stigma, or the lack of it, faced by a person is evaluated based on wealth possessed by the person.⁵⁷ The economic assessment of this stigma gave rise to the ‘creamy layer’ test. On what basis exceeding importance is given

⁵⁰ *Supra* note 13, at para 124.

⁵¹ *Id.*

⁵² AIR 1985 SC 1495.

⁵³ *Supra* note 6, at para 843.

⁵⁴ *Supra* note 6, at para 859.

⁵⁵ Office memorandum from the Ministry of Personnel, Public Grievances and Pension Department of Personnel and Training (May 27, 2013), https://documents.doptcirculars.nic.in/D2/D02adm/36033_1_2013-Estt-Res.pdf. This Office Memorandum was struck down in *Indra Sawhney* decision.

⁵⁶ *Supra* note 38, at para 386.

⁵⁷ *Supra* note 38, at para 388.