

# THE CREAMY LAYER OF SOCIAL JUSTICE

Relevant for: Government Policies & Welfare Schemes | Topic: Welfare of SCs - Schemes & their performance; Mechanisms, Laws, Institutions & Bodies

As citizens, we expect two certainties from any verdict on public policy by a constitution bench of the Supreme Court. One, it must hold whether the underlying principle(s) is/are consistent with the Constitution of India. Two, such a verdict must end governance paralysis. Unfortunately, the court has accomplished neither objective in its recent verdict in *Jarnail Singh v. Lachhmi Narain Gupta*, wherein it held that the government need not collect quantifiable data to demonstrate backwardness of public employees belonging to the Scheduled Castes and the Scheduled Tribes (SC/STs) to provide reservations for them in promotions.

The core issue here was whether the 'creamy layer' among SC/STs should be barred from obtaining promotions through reservations. The court set aside the requirement to collect quantifiable data that was stipulated by its 2006 verdict in *M. Nagaraj v. Union of India* as it ignored the reasoning of a nine-judge bench in *Indra Sawhney* (1992) that any discussion on creamy layer "has no relevance" in the context of SC/STs.

The court has taken more than a decade to correct an anomaly in the Nagaraj case which brought in a creamy layer filter for promotions for SC/ST employees. This resulted in thousands of employees being denied their due promotions.

Can one now treat the matter as settled, that the creamy layer is a non-issue with regard to job reservations for SC/STs? Not so. A two-judge bench of the top court is considering a public interest litigation (PIL) filed by the Samta Andolan Samiti that seeks the removal of creamy layer among the SC/STs in job reservations — a matter settled by a nine-judge Constitution Bench long ago and also a matter that has just been settled by a five-judge Constitution Bench.

In the verdict in *Jarnail Singh*, the court cites an 'admonition' to itself by a Constitution Bench in the Keshav Mills case in 1965: "It must be the constant endeavour and concern of this court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country." The court followed its own admonition more in breach insofar as it concerns litigation related to reservation.

The court merely removed the government's responsibility to collect quantifiable data on backwardness but reasoned that the creamy layer test would be consistent with the equality principle. The challenge it faced is of a secular nature. It did not question reservations in promotions for SC/ST employees, but grappled with a different question: Which section or class among the SC/STs is more entitled?

Some of the confusion in the debates over reservations since 1990 emanates in the context of reservations for the Other Backward Classes (OBCs). Sadly, the Supreme Court too relies on using arguments pertinent only in the case of OBCs to decide litigation on SC/ST quotas.

But a close reading of relevant constitutional provisions and the verdict in *Indra Sawhney* make it clear that the SC/STs are given job reservations not because they are poor but because they are excluded. The first part of Article 335 stipulates job reservations for SC/STs as a right of representation, not as a welfare measure. However, the creamy layer among SC/ST employees helps fulfil the second part of Article 335 that requires maintaining the "efficiency of administration".

One can in fact argue for public employment having welfare objectives to plead the case of those less privileged among SC/STs. But such logic would require the removal of the creamy layer also while recruiting employees in the open category.

The court could have addressed an often ignored aspect of the matter — the right of the creamy layer among the community to opt out of reservations. At present, an SC/ST candidate does not have the right to reject reservations. She is merely required to state whether she belongs to the SC or the ST category and a response in affirmation automatically puts her in the queue for reservations. It is also a punishable offence to withhold one's caste status while seeking government employment. A simple administrative decision to allow SC/ST candidates to compete in the general category would have helped thousands to leave the space for the less privileged among them.

What is also not appreciated while debating the matter is that the presence of the creamy layer works as a safety valve. The rationale behind the demand to prohibit elite or privileged sections from accessing quota posts is that these sections are as well qualified as general candidates, if not more, and numerous enough to warrant their removal.

Herein lies the catch. A well-qualified and large SC/ST group having to compete as non-reserved candidates would corner a substantial number of open posts. At the same time, their less privileged cousins would fill the quota. Theoretically, SC/STs would end up garnering more posts than their proportion in population. This begs the question on the rationale behind the litigation.

The Indian state must be proud that its policies have created a creamy layer among the most disadvantaged that gel well with those in the general category. They also help projecting the community as normal Indians, which is a revolutionary ideal. The whole enterprise of seeking to introduce obstacles before them in employment and promotions will have pernicious consequences. Will it do any good that the government recruits general candidates from the elite sections and reserved candidates from the poorer strata?

Given the uneven educational opportunities across the divides of rich-poor and urban-rural, the poor or underprivileged access substandard education. We want our public servants to be well educated and smart. The point must not be treated as an affront to the less privileged. It is mere recognition of the fact that socio-economic progress moves by generations. Today's creamy layer is yesterday's underprivileged.

In a 1970 memorandum to U.S. President Richard Nixon, Daniel P. Moynihan suggested that "the time may have come when the issue of race could benefit from a period of 'benign neglect'."

India badly needs such a period of 'benign neglect' in matters related to caste as well as the constitutional provisions aimed at getting rid of the rough edges of caste discrimination. The least one expects of the highest level in the judiciary is to accord "an element of certainty and continuity" on the subject.

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