# JARNAIL SINGH v. LACHHMI NARAIN GUPTA: THE CASE THAT MUDDLES THE LAW ON RESERVATION IN PROMOTIONS

*Aparna Singh*[*]

*Abstract*

*In contemporary times, the debate on reservation in promotions has once again gained momentum. This article analyses the recent judgment of Jarnail Singh v. Lachhmi Narain Gupta wherein the five-judge bench of the Supreme Court refused to refer the decision of M. Nagraj v. Union of India to a larger bench for a decision on its correctness. The article argues that the Court has incorrectly declined the reference of Nagraj to a bench of seven judges and further provides the grounds for reconsideration of Nagraj. In Nagraj, the Supreme Court imposed three conditions on the power of the State under Article 16(4A) to grant reservation in promotions in favour of SC/STs. These conditions have stirred controversy on the correctness of Nagraj. In Jarnail Singh, the five-judge bench has invalidated the condition of demonstrating backwardness of SC/STs as mandated by Nagraj. The decision of Jarnail Singh has raised critical questions of judicial propriety. The article has criticized the*

[*]Aparna Singh is a fifth-year student at National Law University, Jodhpur. The author may be reached at aparna.singh0001@gmail.com.

*finding of the Court on the issue of creamy layer as vague and unwarranted. The article also provides a detailed account of subsequent cases that interpreted Nagraj. In Suresh Chand Gautam v. Union of India, the Supreme Court held that the State has no constitutional duty under Article 16(4A) to collect quantifiable date to determine inadequacy of representation of SC/STs in the services. The article criticizes the aforementioned case and argues that Article 16(4A) confers a power on the State coupled with duty to collect quantifiable data. The article concludes that a larger bench of seven judges should reconsider Nagraj and clarify the law on reservation in promotions.*

## I. INTRODUCTION

The issue of reservation has always been a field of fierce disagreement between the judiciary and the Parliament. The development of Indian jurisprudence on reservations has been fraught with many political controversies that finally reach the Supreme Court. The usual response of the Parliament is to amend the Constitution in order to nullify the effect of any judicial decision which comes in the way of the State's policy on reservation. The provision for "reservation in promotions" follows the same pattern. Article 16(4A)[1] which allows the State to grant reservation in promotions in favour of Scheduled Castes (hereinafter, "**SC**") and Scheduled Tribes (hereinafter, "**ST**") was inserted by the Parliament by the Constitution (Seventy-Seventh Amendment) Act, 1995.

[1]INDIA CONST. art. 16, cl. 4A.

In 2006, a five-judge bench of the Supreme Court in *M. Nagraj v. Union of India* ("**Nagraj**")*,*[2] upheld the constitutional validity of Article 16(4A) with certain riders to the exercise of power under it. Following this decision, courts have struck down service rules of different Indian states on the ground that the State has failed to comply with the conditions mandated in *Nagraj*. Thus, a State approached the Supreme Court seeking a prayer for reconsideration of *Nagraj* by a larger bench of seven judges. Recently, a five-judge bench of the Supreme Court, in *Jarnail Singh v. Lachhmi Narain Gupta* ("**Jarnail Singh**")*,*[3] decided that *Nagraj* need not be reconsidered by a seven-judge bench. The Court struck down one of the requirements imposed by *Nagraj* as bad in law. This decision raises concerns about judicial propriety as the five-judge bench ruled that a coordinate bench incorrectly interpreted the law. Moreover, the Supreme Court has further muddled the law on reservation in promotions with its ambiguous ruling in *Jarnail Singh*.

This article argues that *Nagraj* requires reconsideration by a larger bench as it has created confusion regarding conditions to be fulfilled by the State while providing reservation in promotions to SC/STs. The article analyses the law enunciated by the Supreme Court in *Nagraj* and highlights the grounds for reconsideration of *Nagraj*. Further, it discusses the errors committed in *Jarnail Singh* and how it has 'unsettled' the law. The article is divided into three parts – Part I describes theoretical underpinnings of the policy of reservation, the historical background of reservation in promotions and finally discusses the ratio laid down in *Nagraj*. Part II identifies the grounds for reconsideration of *Nagraj* and how the courts have interpreted *Nagraj* in subsequent cases. Part III contains analysis of the recent decision in *Jarnail Singh*, and finally, the conclusion where the author has criticized the current position.

[2]M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[3]Jarnail Singh v. Union of India, (2018) 10 SCC 396.

## II. THEORETICAL UNDERPINNINGS OF RESERVATION

Article 16(1) guarantees equality of opportunity for all citizens in matters relating to employment to any office under the State.[4] To fortify this guarantee, Article 16(2) prohibits discrimination against citizens in public employment on grounds only of religion, race, caste, sex, descent, place of birth or any of them.[5] Article 16(1) speaks of formal equality, that is, equality under law. Equality in law, or formal equality, advocates that equality of opportunity only requires elimination of legal obstacles towards ensuring a level-playing field.[6] This is also called the colour-blind vision of equality.[7] This vision treats citizens as individuals and not as members of groups.[8] This theory is averse to any classification of citizens on the basis of their affiliation to any group. It argues that reservations to social groups will result in further permeating divisions in the society instead of eliminating them. Accordingly, the identification of any individual as member of a particular social group is totally irrelevant.

In contrast to the colour blind theory of equality, the anti-subordination theory recognizes historical injustice meted out to individuals by virtue of their membership to a particular group.[9] It considers groups as the target of historical discrimination and argues that equality can only be achieved by granting special rights to these

[4]INDIA CONST. art. 16, cl. 1.
[5]INDIA CONST. art. 16, cl. 2.
[6]Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687 (1986).
[7]Gautam Bhatia, *Reservations, Equality and the Constitution – I: Origins*, (Jan. 19, 2014), https://indconlawphil.wordpress.com/2014/01/19/reservations-equality-and-the-constitution-i-origins/.
[8]*Id.*
[9]*Id.*

historically disadvantaged groups.[10] This is called substantive equality or equality in fact.[11] Thus, Article 16(4), 16(4A) and 16(4B), that allow the State to make provision for reservation in public employment in favour of backward classes, spell out the anti-subordination vision of equality.

It is relevant to determine which conception of equality is espoused by the Indian Constitution. In *Indra Sawhney v. Union of India* (**"Indra Swahney**"),[12] the Supreme Court ruled that Article 16(4) is not an exception to Article 16(1). The provision under Article 16(4) is conceived in the interest of certain *sections* of society which should be balanced against the guarantee of equality held out to every *citizen* enshrined in Article 16(1).[13] This was reiterated in *Nagraj* where the Supreme Court held that the conflicting claims of individual right under Article 16(1) and preferential treatment in the matter of promotion to SC/STs under Article 16(4A) must be balanced. The Court achieved this balance by providing three conditions which the State must fulfil before providing reservation in promotions under Article 16(4A). Thus, the Supreme Court has interpreted Article 16 as subscribing to both visions of equality *viz.* colour blind and anti-subordination, which need to be balanced against each other.

### A. *Tracing the history of reservations in promotions*

The debate on reservation in promotions is not something that has come to the forefront of legal discourse in the contemporary times. The issue has been debated even before the addition of Article 16(4A) in 1995.[14] Initially, the question was whether Article 16(4) that allows

[10]Owen Fiss, *Groups and the Equal Protection Clause*, 5(2) PHILOS. PUBLIC AFF. 107 (1976).
[11]M. Nagaraj v. Union of India, (2006) 8 SCC 212.
[12]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[13]*Id.*
[14]Ira Chadha-Sridhar & Sachi Shah, *Caste and Justice in the Rawlsian Theoretical Framework: Dilemmas on the Creamy Layer and Reservations in Promotions*, 10 NUJS L. REV. 171 (2017).

the State to provide reservations in matter of employment extends to promotions as well. This was answered in affirmative in *General Manager, Southern Railway v. Rangachari*[15] where the Supreme Court held that the advancement of Socially and Educationally Backward Classes requires adequate representation in both lower as well as higher cadre of services. Thus, the Court allowed reservations in promotions in favour of Backward Classes under Article 16(4).[16]

In *State of Punjab v. Hira Lal*,[17] the Supreme Court rejected a plea for reconsideration of *Rangachari.* The Court emphasized that the efficiency of services under Article 335[18] shall not be compromised provided that reservation in promotions is allowed keeping in the mind the minimum efficiency required.[19] This position was overturned by *Indra Sawhney*.

In *Indra Sawhney*, the Court held that reservation under Article 16(4) is limited only to initial appointments and does not extend to reservation in promotions.[20] It held that reservation in promotions would have a deleterious effect on the efficiency of services for two reasons – *firstly*, it would kill the spirit to work among the reserved candidates and would amount to creation of a permanent separate category. *Secondly*, it would generate a feeling of despondence and heart burn among general category candidates. Finally, the Court held that allowing reservation in promotion would amount to violation of the rule of equality.[21]

In response to the decision of *Indra Sawhney*, the Parliament added Article 16(4A) to the Constitution. The constitutional validity of this

[15]General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36.
[16]*Id.*
[17]State of Punjab v. Hira Lal, (1970) 3 SCC 567.
[18]INDIA CONST. art. 335.
[19]*Id.*
[20]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[21]*Id.*

amendment was challenged in *Nagraj*, which is discussed in detail in the next section.

### B. *Analysis of M. Nagraj v. Union of India*

As discussed above, in *Indra Sawhney*, the Supreme Court extended reservation to only initial appointments and not to promotions. In response to this, the Parliament inserted Article 16(4A)[22] allowing the State to provide reservation in promotions in favour of SC/STs. Article 16(4B)[23] was also added enabling the State to carry forward the vacancies of previous years without violating the fifty percent ceiling limit on total reservations in a year. In addition, a proviso[24] was added to Article 335 which allows the State to relax qualifying marks in any examination for providing reservation in promotion in favour of SC/STs. In *Nagraj*, the petitioners challenged Article 16(4A), Article 16(4B) and Article 335 on the ground that these amendments violate the guarantee of equality which forms the part of the basic structure of the Constitution.

The Court began by recognizing that equality forms part of the basic structure of the Constitution. Thus, the issue was whether the impugned amendments destroy the basic structure of the Constitution. It was held that Article 16(4A) and Article 16(4B) are only enabling provisions. The exercise of power under both these articles is limited by parameters mentioned in Article 16(4). Thus, the Court held –

"*The object in enacting the enabling provisions like Articles 16(4), 16(4A) and 16(4B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency*

[22]Inserted by Constitution (Seventy-Seventh Amendment) Act, 1995.
[23]Inserted by Constitution (Eighty-First Amendment) Act, 2000.
[24]Inserted by Constitution (Eighty-Second Amendment) Act, 2000.

*which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335*."[25]

Therefore, the Court laid down three limitations on the power of the State to grant reservation in promotions under Article 16(4A). *Firstly*, the State has to satisfy on the basis of quantifiable data that the class is not adequately represented in the services. *Secondly*, the State has to show on the basis of quantifiable data that the class benefitting from reservation is backward. And *lastly*, the State has to ensure that the efficiency of services is not compromised. However, the Court did not clarify the nature and method of collection of this quantifiable data by the State.

The Court finally noted that Article 16(4A) has retained the controlling factors mentioned in Article 16(4) which put a check on the power of State to grant reservation. Thus, Article 16(4A) was upheld subject to the aforementioned three riders on the power of the State to provide reservation in promotions to SC/STs.

## III. GROUNDS FOR RECONSIDERATION OF *NAGRAJ*

In *Jarnail Singh*, the Supreme Court declined a plea for reconsideration of *Nagraj* by a larger bench. The Court however struck down one of the conditions mandated in *Nagraj* as being contrary to *Indra Sawhney*. The author is of the opinion that the decision of *Nagraj* suffers from ambiguity as the Court has left many critical questions unanswered and there is no clarity on the precise content of the conditions imposed by the Court. Thus, it requires reconsideration by a larger bench on two counts:

[25]M. Nagaraj v. Union of India, (2006) 8 SCC 212.

### A. *Quantifiable data showing backwardness of SC/STs*

The requirement of demonstrating backwardness of SC/STs by way of quantifiable data under Article 16(4A) has raised serious questions. Article 16(4A) speaks of reservation in promotions to only SC/ST and not Backward Classes. However, Article 16(4) deals with reservation in favour of Backward Classes. In *Indra Sawhney*, the Supreme Court held that there is no requirement of identifying backwardness of SC/STs as they are admittedly included within Backward Classes.[26]

Furthermore, in *E.V. Chinnaiah v. State of Andhra Pradesh*,[27] a five-judge bench of the Supreme Court ruled that SCs form a class by themselves and there cannot be any further sub-classification within SCs. The Court reasoned that by virtue of the presidential list released under Article 341(1), certain castes, races and tribes are classified as "Scheduled Caste".[28] Under Article 341(2), only the Parliament has the power to include or exclude a class from the list of SCs by enacting a law.[29] Thus, the Court held that any sub-classification within SCs would amount to tinkering with the presidential list which otherwise is not permitted under Article 341(2). It was further observed that SC/STs are presumed to be the most backward amongst the Backward Classes and thus they must be granted reservation as a class and not as a group within that class.[30] In *State of Kerala v. N.M. Thomas*,[31] Justice Krishna Iyer observed that SC/STs are not castes as understood under Hindu religion. They are an amalgamation of castes, races and tribes which acquire the status of SC/STs by way of presidential notifications as they are found to be the lowliest and in need of state aid.

[26]Indra Sawhney v. Union of India, AIR 1993 SC 477.
[27]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162.
[28]INDIA CONST. art. 341, cl. 1.
[29]INDIA CONST. art. 342, cl. 2.
[30]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162.
[31]State of Kerala v. N.M. Thomas, (1976) ILLJ 376 SC.

Therefore, the condition of proving backwardness of SC/STs under Article 16(4A) imposed in *Nagraj* deviates from the previous cases of the Supreme Court which held that SC/STs are presumed to be backward. The Court did not provide any justification for imposing this additional requirement of demonstrating backwardness of SC/STs while granting them reservation in promotions. Thus, *Nagraj* needs reconsideration by a larger bench to evaluate and justify this anomaly.

### B. *Nature of quantifiable data*

According to Article 16(4A), the State can grant reservation in promotion to any class or classes of posts in services in favour of SC/STs, if "in the opinion of the State", they are not adequately represented in services. Article 16(4A) flows from Article 16(4) under which provision also the State can provide reservation to Backward Classes if in its opinion they are not adequately represented in services. In *Indra Sawhney*, the Court while interpreting Article 16(4) held that the question of inadequacy of representation is a matter within the subjective satisfaction of the State. The Court further ruled that there must be "some material" on the basis of which the State must form its opinion and the courts are expected to show due deference to the opinion of the State.[32]

In *Nagraj*, the Court qualified the requirement of "some material" with "quantifiable data". Moreover, the Court has not specified the content and the methodology of collecting quantifiable data. It has not clarified the unit of determination of inadequacy, that is, whether inadequacy is to be judged on the basis of the entire population of SC/STs or it has to be seen cadre wise or with respect to entire services or groups of certain services under the State. The period over which inadequacy should be ascertained has also not been defined by the Court. The Court observed that there is no fixed yardstick to

[32]Indra Sawhney v. Union of India, AIR 1993 SC 477.

measure these factors and thus it has to be decided by the courts according to the facts of each case.[33]

Thus, the State is required to prove to the satisfaction of the Court that there was requisite quantifiable data demonstrating inadequacy of representation of SC/STs. This amounts to strict scrutiny by the Court of the opinion formed by the State which is against the law laid down in *Indra Sawhney*. The Courts have applied *Nagraj* and quashed the reservation policy of various states on the ground that the quantifiable data is not collected in terms of the law laid down in *Nagraj*. However, *Nagraj* itself does not speak of the terms and content of the quantifiable data leaving the State in uncertainty. This ambiguity regarding the terms and methodology of collection of data has left the reservation policies of states to the mercy of courts. This has led to a paralysis in governance as the uncertainty over reservation policies of the State is looming large with no specific guidelines to the State.

Therefore, *Nagraj* requires reconsideration by a larger bench so that the Court may prescribe standards on which the State has to form its opinion regarding inadequacy of representation of SC/STs in services.

### C. *The Aftermath of M. Nagraj*

The constitutionality of Article 16(4A) was for the first time upheld in *Nagraj* wherein the Court laid down the law on reservation in promotions. However, as argued above, the grounds on which it was allowed are vague and this leaves a room for interpretation of *Nagraj* by courts in subsequent cases. The courts have strictly construed the conditions of *Nagraj* by demanding quantifiable data with respect to the particular cadre in which the reservation is made.

[33]M. Nagaraj v. Union of India, (2006) 8 SCC 212.

### D. *Defining the nature of quantifiable data required to determine inadequacy of representation of SC/STs*

As discussed before, *Nagraj* did not specify the specific nature and content of the quantifiable data required by the State under Article 16(4A). Therefore, the Supreme Court sought to define the same in subsequent cases.

In *U.P. Power Corporation Ltd. v. Rajesh Kumar*,[34] the Supreme Court examined the constitutional validity of the U.P Public Services Rules that made a provision for reservation in promotions in favour of SC/STs. In this case, the government relied on a Social Justice Committee Report that examined the representation of SC/STs in all the services under the State or other corporations. The Court rejected the said report on the ground that it examined the entire population and vacancies in all the services under the State and not the particular cadre in which the promotion is proposed. The Court while applying the parameters of *Nagraj* held that "*the Government has to apply cadre strength as a unit in the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service.*"[35] This means that the State has to collect quantifiable data with respect to the particular cadre to which the promotion is proposed in order to determine inadequacy of representation of SC/STs. Thus, the Court struck down the Service Rules on the ground that they are *ultra vires* the dictum of *Nagraj*. It ordered a fresh exercise of collection of quantifiable data in the light of the decision in *Nagraj*.

This runs counter to the law laid down in *Indra Sawhney* where the Court ruled that as long as there is some material on the basis of which the State has formed its opinion, the courts will not interfere with the policy decisions of the State. Moreover, the Court did not

[34]U.P. Power Corporation Ltd. v. Rajesh Kumar, (2012) 7 SCC 1.
[35]*Id.*

provide any justification for using cadre as a unit for determining inadequacy of representation. In another decision, the Supreme Court applying *Nagraj* upheld the decision of the Rajasthan High Court that quashed notifications issued by the State granting reservation in promotions to SC/STs on the ground that the State has failed to collect quantifiable data.[36] *Nagraj* has been followed by the Supreme Court[37] and High Courts[38] in various cases to quash policy decisions of the State granting reservation in promotions to SC/STs. Aggrieved by these decisions, the State filed for reconsideration of *Nagraj* by a larger bench.

### E. *Article 16(4A) confers power on the State coupled with duty to take steps to form its opinion*

After the *Rajesh Kumar* case, the U.P. Government, instead of collecting quantifiable data as per the order of the Court, reverted SC/ST employees to the post they held previously before the promotions were made.[39] This led to filing of another batch of petitions in the Supreme Court wherein the petitioners prayed for issue of writ of mandamus directing the U.P Government to collect quantifiable data in terms of decision of *Nagraj*. In *Suresh Chand Gautam v. State of Uttar Pradesh*,[40] the Supreme Court relying on *Nagraj* ruled that Article 16(4A) is only an enabling provision, which means that the power to grant reservation is only discretionary. Thus, the Court held that a writ of mandamus cannot be issued to the State

[36]Suraj Bhan Meena v. State of Rajasthan, (2011) 1 SCC 467.
[37]B.K Pavitra v. Union of India, AIR 2017 SC 820.
[38]Jayanta Chakraborty v. The State of Tripura, AIR 2015 Tripura 43; Union of India v. Pal Singh, W.P. (C) No. 1303/2015; R.B. Rai vs. State of Madhya Pradesh, W.P. No.1942/2011; Lachhmi Narain Gupta v. Jarnail Singh, (2012) ILR 1 P&H 838.
[39]U.P. Power Corporation Ltd. v. Rajesh Kumar, Contempt Petition (C) No. 214/2013, 13.10.2015.
[40]Suresh Chand Gautam v. State of Uttar Pradesh, (2016) 11 SCC 113.

as there is no constitutional obligation on the State to provide reservation in promotion under Article 16(4A).[41]

The author is of the opinion that the Supreme Court incorrectly rejected the argument that Article 16(4A) confers a power coupled with duty on the State to take steps to form its "opinion" regarding the inadequacy of representation of SC/STs. Article 16(4A), though couched in a permissive language, confers a "power coupled with duty" on the State to take steps towards formation of its opinion. In *Ambica Quarry Works v. State of Gujarat*, the Supreme Court ruled that "*when a public authority is vested with power, the expression "may" has been construed as "shall" because power, if the conditions for the exercise are fulfilled, is coupled with duty. Though the language of the provision may be permissive but there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.*"[42] This principle was also applied in *Madhav Rao Jivaji Rao Scindia v. Union of India*,[43] where the Court held that the power of the President under Articles 341 and 342 to specify SC and STs is coupled with the constitutional duty upon them to act.

Article 16(4A) furthers the avowed objective of removing social disabilities suffered by marginalized groups. This is also reflected by Article 46 which casts a duty on the State to promote educational and economic interests of SCs and STs.[44] In *Indra Sawhney*, Justice Pandian in his concurring opinion observed that the power conferred

[41]*Id.*
[42]Ambica Quarry Works v. State of Gujarat, (1987) SCC 213.
[43]Madhav Rao Jivaji Rao Scindia v. Union of India, (1971) 1 SCC 85.
[44]INDIA CONST. art. 46.

on the State under Article 16(4) is coupled with duty.[45] Article 16(4A) uses similar language as that of Article 16(4) and therefore, considering its remedial purpose, must be interpreted as conferring power coupled with duty on the State.[46]

Thus, Article 16(4A) should be interpreted as imposing a positive duty on the State to collect quantifiable data and apply its mind to determine inadequacy of representation of SC/STs. After this exercise is undertaken, it is then the discretion of the State to determine whether any ameliorative measure is required in favour of SC/STs under Article 16(4A). The decision whether to grant reservation or not would fall within the discretion of the State. This interpretation would eliminate the choice of the State to turn a blind eye towards the plight of SC/STs by not acting at all. On the other hand, the interpretation proposed by the author would prevent Article 16(4A) from being rendered nugatory.

According to the author, the subsequent cases applying *Nagraj* have further obscured the interpretation of Article 16(4A) and left the aggrieved SC/STs helpless in the face of inaction on part of the State.

## IV. JARNAIL SINGH AND ITS DISCONTENTS

Recently, in *Jarnail Singh*, the five-judge bench of the Supreme Court, in a unanimous opinion authored by Justice Nariman, held that *Nagraj* need not be reconsidered by a larger bench of seven judges. The Court made certain observations that have further skewed the interpretation of Article 16(4A). The Court discussed the following two points –

[45]Indra Sawhney v. Union of India, AIR 1993 SC 477.

[46]Karan Lahiri, *Guest Post: Does Article 16 Impose a "Power Coupled with a Duty" upon the State? – I*, (Nov. 13, 2015), https://indconlawphil.wordpress.com/2015/11/13/guest-post-does-article-16-impose-a-power-coupled-with-a-duty-upon-the-state-i/.

### A. *Requirement of showing backwardness held to be invalid*

The Court relying on *Indra Sawhney* held that the condition imposed by *Nagraj* which requires proof of backwardness of SC/STs is invalid. The Court reasoned that the nine-judge bench of the Supreme Court in *Indra Sawhney* has held that the test of backwardness does not apply to SC/STs as they are presumed to be backward.[47] Thus, the requirement of proving backwardness of SC/STs was struck down being directly contrary to *Indra Sawhney*.

It must be noted that the five-judge bench of the Supreme Court in *Jarnail Singh* invalidated one of the conditions laid down by a coordinate bench in *Nagraj*. The basic rule of judicial propriety demands that where the Court does not agree with the findings of a bench of co-equal strength, it must refer the same to a larger bench.[48] Thus, the proper course would have been to refer *Nagraj* to a larger bench to decide upon its correctness.

### B. *Application of the test of creamy layer to SC/STs*

In *Jarnail Singh*, the Court proceeded on a premise that *Nagraj* has applied the test of creamy layer to SC/STs in the matter of reservation in promotions under Article 16(4A). Accordingly, the Court held that the creamy layer principle is a facet of equality embedded in Article 14 and 16 and thus, the courts have jurisdiction to exclude creamy layer from SC/STs when applying the principle of equality. It observed that the purpose of reservation would be defeated if the creamy layer within the class secures all the jobs leaving the truly backward class as they were.[49] The Court disagreed with the views of Balakrishnan, C.J., in *Ashok Kumar Thakur v. Union of India*[50] that

[47]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 23.
[48]Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694.
[49]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 26.
[50]Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1.

the creamy layer principle is only a test of identification and not a principle of equality.[51]

The author is of the view that the Court has committed certain errors that have further muddled the law on reservations in promotions. These are discussed below:

Firstly, the Court has misconstrued *Nagraj* as applying the creamy layer principle to SC/STs. *Nagraj* did not expressly apply the test of creamy layer to SC/STs under Article 16(4A). In *Nagraj*, Article 16(4A) and Article 16(4B) were challenged and in that context the Court held that "*the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.*"[52] This statement of the Court only signifies that the principle of creamy layer is a facet of equality under Article 16. It does not indicate that the State has to apply creamy layer principle to SC/STs under Article 16(4A). Furthermore, the Court was also judging the validity of Article 16(4B) which is not restricted to SC/STs alone, unlike Article 16(4A).

Secondly, the ruling that the creamy layer principle applies to SC/STs is contrary to the preliminary holding of the Court that SC/STs are presumed to be backward. In *Indra Sawhney*, the Court observed that the discussion on creamy layer has no relevance to SC/STs and it is confined only to Other Backward Classes (hereinafter, "**OBC**").[53] This is because the social disadvantage suffered by SC/STs is much graver than the one faced by OBCs. In the case of OBCs, it can be argued that the presumption of backwardness can be displaced with economic upliftment as their backwardness is largely political, economic or educational. However, in case of SC/STs where

[51]Jarnail Singh v. Union of India, (2018) 10 SCC 396, 27.
[52]M. Nagaraj v. Union of India, (2006) 8 SCC 212, 122.
[53]Indra Sawhney v. Union of India, AIR 1993 SC 477, 792.

backwardness is mainly social and their group identity itself is the locus of their social subordination, it is difficult to claim that with their economic or educational upliftment, they also break free of the social backwardness. Thus, the creamy layer principle which takes into account the economic advancement is not sufficient to displace the presumption of backwardness of SC/STs who are victims of historical injustice by virtue of their membership to a particular group. The gravity of the social injustice suffered by SC/STs is evident from the specific provision in the Constitution that prohibits the abominable practice of untouchability.[54] The Court's justification for extending the test of creamy layer does not take into account the peculiar disadvantage suffered by SC/STs. Instead, the Court has equated the magnitude of backwardness suffered by SC/STs to that of OBCs. In *Indra Sawhney*, the Court was cognizant of the severe social disadvantage suffered by SC/STs and therefore it restricted the application of the test of creamy layer to only OBCs.

Moreover, in *Indra Sawhney*, the test of creamy layer was applied by the Supreme Court to determine OBCs. On the other hand, in the case of SC/STs, they are specified by the presidential list under Article 341 and Article 342 which list can be modified only by the Parliament through a law. In *Chinnaiah*, the Court recognized this and held that SC/STs cannot be subdivided into forwards and backwards as the whole class by virtue of the presidential list is presumed to be backward.[55]

Therefore, in *Jarnail Singh*, the Court marked a major shift in the reservation jurisprudence by extending the applicability of creamy

[54]INDIA CONST. art. 17.
[55]E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 SC 162, 39.

layer principle to SC/STs. The analysis of the Court lacks the depth required to justify this shift.[56]

Thirdly, the observation that the constitutional courts when applying Article 14 and 16 can exclude the creamy layer from SC/STs is vague. The Court did not lay down that the State has to exclude creamy layer from SC/STs; it only stated that the courts can apply the test of creamy layer as a principle of equality. Thus, it is not clear whether the State is required to mandatorily apply the test of creamy layer to SC/STs under Article 16(4A). It is not known how the constitutional courts will apply the test of creamy layer to SC/STs in cases that are not litigated before it. This ambiguity has led to a hiatus in the policy matters of the State regarding reservation in promotions. Furthermore, the reasoning of the Court can equally be applied to reservation in initial appointments in favour of SC/STs under Article 16(4). The Court was silent on whether the creamy layer test is applicable only in case of reservation in promotions under Article 16(4A) or it can be extended even to reservation in initial appointments under Article 16(4).

Thus, it can be asserted that the decision of the Court on both the issues, namely proof of backwardness of SC/STs and application of the test of creamy layer to SC/STs is unfounded.

## V. CONCLUSION

In *Jarnail Singh*, the Constitution bench of five judges was called upon to decide whether *Nagraj* needs to be referred to a bench of seven judges to decide upon its correctness. The Court instead of referring the matter to a larger bench, took upon itself to strike down

[56]Gautam Bhatia, *The Nagraj/Creamy Layer Judgement and its Discontents*, (Sept. 30, 2018) https://indconlawphil.wordpress.com/2018/09/30/the-nagaraj-creamy-layer-judgment-and-its-discontents/.

one of the conditions laid down by a coordinate bench in *Nagraj*. It is respectfully submitted that the five-judge bench in *Jarnail Singh* lacked the requisite jurisdiction to invalidate one of the conditions laid down by a coordinate bench in *Nagraj*. The Court, thus, erred when it declined to refer *Nagraj* to a bench of seven judges for reconsideration.

The ruling that the Courts can exclude creamy layer from SC/STs while applying the principle of equality lacks sufficient clarity. The decision by the Constitution Bench in *Jarnail Singh* was supposed to clearly lay down the law and put an end to the paralysis in governance. However, it has failed on both these counts as it aggravates the ambiguity and confusion already surrounding the matter of reservation in promotions. Consequently, the rights of thousands of SC/ST employees are kept in abeyance as the law on reservation in promotions is still unsettled.

It must be noted that the issue of reconsideration of *Nagraj* has overarching political consequences. The debate on reservations has always created a politically charged environment resulting into a confrontation between the Supreme Court and the Parliament. The decision of *Nagraj* and subsequent cases that interpreted *Nagraj* were not welcomed by the State as they subjected the policy decisions of the State to strict judicial scrutiny. The Court's emphasis on collection of quantifiable data in order to satisfy conditions of *Nagraj* has created difficulties for the State. Thus, to nullify the decision of *Nagraj*, the Parliament introduced a bill to amend Article 16(4A).[57] The amendment purports to circumvent the condition of proving backwardness of SC/STs and inadequacy of representation of SC/STs through quantifiable data as mandated by *Nagraj*. Such a move would

[57]The Constitution (One Hundred Seventeenth Constitutional Amendment) Bill, 2012; See http://www.prsindia.org/uploads/media/117%20Amendment/Bill%20Text%20Const%20117th%20Amendment%20Bill%202012.pdf.

again result in challenging the amended Article 16(4A) on the ground of abrogation of basic structure of the Constitution.

Thus, the solution is not to amend Article 16(4A) but for the Supreme Court to reconsider *Nagraj* and authoritatively specify the conditions on which the State can provide reservation in promotions. The Court must clearly lay down the unit of determination of inadequate representation of SC/STs in the services and the nature of quantifiable data. The Court must interpret Article 16(4A) as conferring power coupled with duty on the State to collect quantifiable data so that the provision is not rendered otiose. Finally, the Court must end the ambiguity on the issue of application of creamy layer to SC/STs. The Court is required to address these significant questions that were left unanswered in *Nagraj* and which are further muddled in *Jarnail Singh*. While doing so, the Court must acknowledge that there are conflicting claims at stake that must be balanced against each other.