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Skim the Cream

PRIYANKA SARMA AND TANISHQ TOOR¹

ABSTRACT

Through this article, the authors propose the idea of excluding the “creamy layer” among the Schedule Caste/Schedule Tribes (SC/ST) from reservation in education, employment and promotion. Backwardness, though equated only with caste, the authors have rationalized it to be a much bigger concept inclusive of economic status. The creamy layer, that we propose in this article, needs to be adequately determined on the basis of economic indicators which can be achieved through a detailed survey given the abysmal lack of data on caste and socio-economic backwardness. In the light of Jarnail Singh v. Lachhmi Narain Gupta, the Hon’ble Supreme Court of India has extended the applicability of creamy layer exclusion to the SC and ST categories but on the basis of social indicators like untouchability and backwardness only, which is yet to be implemented in the country. By means of this article, the authors argue that it is the economic status that should be the intelligible differentia excluding the creamy layer by applying the doctrine of reasonable classification. The social justice that the country seeks to achieve can never be achieved if the creamy layer, that includes the economically forward and socially empowered, are not excluded from availing reservation benefits thereby disallowing the same to percolate down to the actually deserving. Empowerment of the already empowered is nothing short of fraud on the Constitution.

I. INTRODUCTION

Way back in 1902, Shahu IV, the Maharaja of Kolhapur in Maharashtra, took the first organised step to provide reservations for backward classes in India. His aim was two-fold: to eradicate poverty in the backward classes and increase their involvement in public administration², leaning towards economic status of the people as a basis.

At present, we have constitutional safeguards protecting the varied interests such as social, economic and political interests of the “backward classes”, namely **Articles 15(4)³, 15(5)⁴**,

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² ZIA MODY, 10 JUDGEMENTS THAT CHANGED INDIA 119 (1st ed., Penguin Books 2013).

³ Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

⁴ Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to

16(4)⁵, 16(4A)⁶, 16(4B)⁷, 341⁸ and 342⁹ of the Constitution of India.

“In order to bring about real equality, affirmative action fills the bill and allows to give preference to the socially and economically disadvantaged persons by inflicting handicaps on those more advantageously placed”.¹⁰

Although the need for a reservation strategy to elevate the downtrodden sections of society has been argued for years, its working as a policy seems a little problematic. It is supposed to benefit a socio-economic category of people presumably poorer than the rest of society, and not the upper echelons of this segregated segment. However, what we see at present is that only the privileged groups within these so-called backward classes reap all the benefits of such reservation with the result that the lowest of the low who are stricken with poverty and therefore socially and educationally backward remain deprived though these constitutional provisions under **Articles 15(4)** and **16(4)**¹¹ which are meant for their advancement.¹²

The reservation policy in post-independent India was designed using caste as the basis for classifying classes of citizens as backward for the purpose of uplifting them socially and educationally by reserving access to seats in legislatures, educational institutions and

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.

⁵ 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 which, in the opinion of the State, is not adequately represented in the services under the State.

⁶ Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, 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.

⁷ Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

⁸ Scheduled Castes

(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

⁹ Scheduled Tribes

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

¹⁰ Jagdish Lal & Ors vs State Of Haryana & Ors (1997) 6 SCC 538 (India).

¹¹ Constitution of India, 1950.

¹² KC Vasanth Kumar v State of Karnataka (1985) Supp SCC 714 (India).

government jobs which was a significant move on the part of the Government of India to correct the historical injustices faced by the backward classes in the country and to ensure their advancement and adequate representation in State services. However, while certain types of reservations are necessary in principle, and some cases and for some time, there cannot be reservation of all types, for all cases and for all times.¹³

II. AVAILABILITY OF DATA

The efficacy of reservation policy through the decades has still not been proven given the lack of any empirical data. The last time a caste census was carried out was in the year 1931¹⁴, on the basis of which the Mandal Commission submitted its report in December 1980, identifying 3743 socially and economically backward castes and the same being implemented in the year 1991. Thus, the report of the Mandal Commission simply runs on the assumption that the relative rates of growth of the population of different castes of Hindus have been identical and thus concludes that SCs, STs and OBCs are today the same percentage of the Hindu population as they were in 1931 which is extremely unreasonable. In 2011, another socio-economic caste census was conducted but the caste data has still not been made a public document.¹⁵ Furthermore, the Government of India has made no mention of including caste-wise data in Census of 2021 despite there being a dire need for it in order to restructure the policy of affirmative action in the country for the greater good of the society.

Currently, reservations are being provided for what are in effect castes without even knowing what their numbers are. It is poverty on which state policy must focus for it is from poverty that other ills like deprivation, social discrimination and backwardness in general flow. Poverty knows no caste. Unless the economically backward amongst the socially and educationally backward are not included in the schemes of empowerment, we may end up with a catastrophe of collapse because of something which the Constitution wants to obliterate. While caste may be used for identifying the beneficiaries of reservations, policy must also focus on other economic indicators like income and property amongst others since poverty is the prime cause of all backwardness as it generates social and educational backwardness.¹⁶

The concepts of efficiency, backwardness and lack of representation are required to be identified and measured and this exercise heavily depends on the availability of data. The

¹³ S RANGANATHAN, CONSTITUTION OF INDIA – FIVE DECADES (1950-1999) 312 (1st ed., Bharat Law House 1999).

¹⁴ Kaivan Munshi, *Caste and the Indian Economy*, Cambridge Working Papers in Economics 1759, Faculty of Economics, University of Cambridge (2017).

¹⁵ Rahul Tripathi, *Despite Promise, No OBC Category yet in Census 2021*, The Economic Times, July 31, 2019.

¹⁶ ARUN SHOURIE, *FALLING OVER BACKWARDS: AN ESSAY AGAINST RESERVATION AND AGAINST JUDICIAL POPULISM* 427 (1st ed., Harper Collins 2012).

Ministry of Tribal Affairs' survey of statistical profile of Scheduled Tribes in India found that the literacy gap between other social groups and SC/ST has decreased, a significant amount of SC/ST is in non-agricultural work, and poverty has decreased, suggesting that SC/ST's living conditions have improved, if not changed completely.¹⁷ Since the survey only indicates the people who crossed the marginal line, there is no detailed survey of the spectrum above this line. Thus, a comprehensive survey is necessary to determine the extent of the top layer in order to find out the top layer census in SC/ST.

III. JUSTIFICATION FOR INCLUSION OF CREAMY LAYER

Society is a dynamic institution. It is ever changing, never static. The processes of industrialisation and urbanisation in India led to tremendous advancement on political, social and economic fronts especially after the commencement of the Constitution that abolished the practice of untouchability and discrimination on the basis of caste as well as secured the benefits of reservation followed by the social reform movements of the last several decades and the spread of education in general have all helped, at least some if not many, individuals and families among the “backward classes” gain sufficient means to develop their capacities to compete with others in every field. “Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens.....to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally”¹⁸ thereby violating the fundamental principle of justice and debauching the objectives of the special constitutional provisions the object of which is “not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence, taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution.”¹⁹

The backward class under **Article 16(4)** means the class which has no element of “creamy layer” in it. It is mandatory under **Article 16(4)** that the state must identify the creamy layer in a backward class and thereafter, excluding the creamy layer, extend the benefit of reservation to the class which remains after such exclusion.²⁰ The principle of creamy layer in Indira

¹⁷ Statistics Division, Ministry of Tribal Affairs, Government of India, *Statistical Profile of Scheduled Tribes in India* (2013).

¹⁸ *Indira Sawhney v. Union of India* (1995) 5 SCC 429 (India).

¹⁹ *Ibid.*

²⁰ *Ibid.*

Sawhney v. Union of India extends to public employment, though it has been expanded to include educational institutions, as adjudicated in Ashok Kumar Thakur's case. Very pertinent questions pertaining to the creamy layer were answered in Indira Sawhney II, popularly known as the Kerala Creamy Layer case. The State of Kerala passed a legislation providing reservations, contrary to the recommendations of the commission, and denied the existence of any creamy layer in the State. The judgment made it amply clear that the creamy layer must be excluded from the ambit of reservation. Backward class is characterized as being of low social standing and permitting those who have been uplifted to take advantage of the system, to reach the top of the hierarchy, is unfair. A class would be compact and truly backward only after excluding the creamy layer, failing which the truly backward will not be identified and shall not benefit.²¹

“In order, therefore, to have real equality and theoretical or formal equality it was, in view of the Constitution, necessary to make special provision for the backward classes, the Scheduled Castes and Scheduled Tribes. It must, however, be not forgotten that the backwardness, social and educational, is ultimately and primarily due to poverty”²²

Regardless, the State has not taken into consideration that would be more unjust to benefit the already privileged in a society where economic status is intimately linked to social status. Special advantage should not be granted on an ongoing bias to those who have already reached their desired impact, as this would be unfair, discriminatory and would manifest in reverse discrimination.

In the *Ambica Mills case*²³, the Supreme Court explained reasonable classification to be one which includes all who are similarly situated and none who are not. Discrimination is the essence of classification. Equality is violated if it rests on unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved.²⁴ It is equally well founded that permissible classification must be based on an intelligible differentia that separates individuals or objects grouped together from those left out of the category and that differentia must have a logical relationship to the purpose that the law in question seeks to accomplish.

²¹ Indira Sawhney v. Union of India, AIR 2000 SC 498 (India).

²² M. R. Balaji v. State of Mysore, 1963 Supp (1) SCR 439 (India).

²³ State of Gujrat and Anr v. Shri Ambica Mills Ltd, Ahmedabad and Anr, AIR 1974 SCR (3) 760 (India).

²⁴ State of Kerala v. N. M. Thomas (1976) 2 SCC 310 (India).

Permissible classification, it is equally well established, must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia must have a rational relation to the object sought to be achieved by the statute in question. Thus, the economic status of a social group is nothing but the creation of a class within a class warranted by the intelligible differentia.

Krishna Iyer, J. has iterated, "In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. 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 overplayed 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 calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism."²⁵

"It is well settled that a measure which was considered reasonable at a given point of time may, with the passage of time, become unreasonable and arbitrary."²⁶

The **Report of the Advisory Committee on Revision of the Lists of Scheduled Castes and Scheduled Tribes (Lokur Committee Report)**, 1965 reveals that a large share of the benefits and concessions meant for the Scheduled Castes and Scheduled Tribes are usurped by the numerically larger and politically well-organised communities while the smaller and more backward communities are often left out but in reality, they are the ones who, for all intents and purposes, require these special benefits. The Report further states that there is a need to focus on the smaller and more backward communities with regard to distribution of special benefits and this must be done on a selective basis.²⁷

Because of lack of education and extreme deprivation, the most backward sections within the category of backward classes are unable to take advantage of quotas. Except for the satisfaction of appearing in the backward class list, most of them do not derive any significant benefit in real terms. The ground reality is that the quotas tend to be cornered by the dominant parts

²⁵ State of Kerala v. N.M Thomas, AIR 1976 SC 490 (India).

²⁶ Motor General Traders v. State of Andhra Pradesh 1984 1 SCC 222 AIR 1984 (India).

²⁷ The Report of the Advisory Committee on Revision of the Lists of Scheduled Castes and Scheduled Tribes, 1965 (14).

among the backward classes. There lies a glaring contrariety amongst the classes to which the reservation is accorded, “a tiny elite gobbling up the benefits and the darker layers sleeping distance away from the special concessions.”²⁸ An intelligible differentia with a reasonable nexus to the object should be the basis for different treatment. That is a reasonable person should be able to understand the classification of individuals into categories, and classification must help directly to achieve the objective. The object of categorizing people into SC / ST and General Category is to provide equal opportunities for social, economic and educational upliftment through adequate representation in society. If forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the “actually backward” among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer. That will leave the truly backward, backward forever. The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an “advanced social level or status”, he would no longer belong to the backward class and would have to be weeded out.²⁹

Considering the social set up of the Hindu society, backwardness of a community or a social group is often associated with caste. Though it is indisputable that caste is an important indicator of backwardness, it cannot be solely relied upon for the determining the backwardness of a social group. “**Article 16(4)** as also **Article 15(4)** lay the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* is too significant a development to be ignored.”³⁰

The existence of other forms of backwardness thus cannot be disputed.

IV. CONCLUSION

Whether the creamy layer is excluded or whether forward castes get included in the list of backward classes, the position is the same, namely, that there will be a breach not only of **Article 14** but also of the basic structure of the Constitution. The non-exclusion of the creamy

²⁸ State of Kerala v. N. M. Thomas (1976) 2 SCC 310 (India).

²⁹ Indira Sawhney v. Union of India AIR 2000 SC 498 (India).

³⁰ Ram Singh v. Union of India (2015) 4 SCC 697 (India).

layer or the inclusion of forward castes in the list of backward classes will, therefore be totally illegal. Such an illegality offending the root of the Constitution cannot be allowed to be perpetuated even by Constitutional amendments.³¹

Time and again, the Court itself has deviated from its precedents, being very undecided on matters, saying precedent cannot be allowed to become a straightjacket.

It would be futile to exempt the creamy layer merely from OBCs, and not the SC & STs on the same economic criterion. During the span of 70 years, it is a fact that sections of the SC & STs would have advanced socially and economically and not be shrouded in disadvantage.

It becomes imperative to identify the creamy layer and the identification must be real, and not so unrealistic so as to defeat the purpose itself.

In the case of *Ashok Kumar Thakur v. State of Bihar*, the Court relied on criteria like children of Constitutional officers, certain professionals, large holding of property owners to segregate into them creamy layer and non-creamy layer for OBC.³² These can act like guidelines to introduce the creamy layer in SC/ST, so as to not doubly and unfairly empower the already advanced within the reserved classes.

As recently as in September 2018, the Supreme Court decided that creamy layer should be applied to the Scheduled Castes and Scheduled Tribes in case of promotions but on the basis of untouchability and backwardness.³³ This decision of the Apex Court expands the scope of “creamy layer” but it is equally essential for the Court to take cognizance of economic indicators in order to determine who should be the actual beneficiaries, the truly deserving. In *MR Balaji v. State of Mysore*, the Supreme Court highlighted that although caste is a relevant factor, under no circumstances, must it be made the sole or dominant test.³⁴ At present, the scenario of reservation is such that only “the privileged groups within the backward classes reap all the benefits of such reservation with the result that the lowest of the low who are stricken with poverty and are therefore socially and educationally backward remain deprived though these constitutional provisions under **Articles 15(4)** and **16(4)** are meant for their advancement.”³⁵

Since unequal persons are treated as equal it is in violation of **Articles 14, 15 and 16** of the **Constitution of India**. Therefore, inclusion of “creamy layer” in the Scheduled Caste and

³¹ *Indra Sawhney v. Union of India*, (1995) 5 SCC 429 (India).

³² *Ashok Kumar Thakur v. State of Bihar* (2008) 6 SCC 1 (India).

³³ *Jarnail Singh v. Lacchmi Narain Gupta* (2018) 10 SCC 396 (India).

³⁴ *M. R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439 (India).

³⁵ *K. C. Vasanth Kumar and Anr v. State of Karnataka* AIR (1985) Supp. SCC 714 (India).

Scheduled Tribe categories is thus necessary to cure the defect which has not been acknowledged by the Legislature of the country.
