

# Reservations and Democracy in India: The debate around the 103 Amendment

Peter Ronald deSouza

---

## Recalibrating moral coordinates:

Periodically, democracies across the world recalibrate their moral coordinates. This happens both because pressures build up from within the polity, that challenge the significance given to these coordinates, and because new moral arguments have emerged in the public domain. Between any two periods of revision, however, the routine business of consolidation of the moral coordinates goes on as the democracy seeks to make the existing coordinates a part of public commonsense. This historical process of revision-consolidation-revision-consolidation of moral coordinates, is normal, and is similar to the process of scientific evolution described by Thomas Kuhn who argued that science went through a similar sequence of scientific revolution causing a disruption which is then followed by phase of normal science. During this phase of normal science anomalies accumulate leading, once again, to a scientific revolution.

Such a disruption is today taking place in two of the world's largest democracies, India and the United States. Both are currently recalibrating their moral coordinates. In both, coincidentally, anomalies have accumulated in the policy field of affirmative action (AA) that has been in place for over half a century. Over these decades periodic challenges to the structure of affirmative action have taken place. In the US this has been in landmark Court cases such as *Brown v Board of Education* (1954), *Bakke v Regents of the University of California* (1978), *Grutter v Bollinger* (2003) *Fisher v University of Texas* (2016) and the latest concerning admissions to Harvard/University of North Carolina - UNC (2022). In this last challenge, arguments have been completed and the judgment is awaited perhaps by the summer of 2023.<sup>1</sup>

The central question in these challenges in the US is whether AA unfairly subordinates the individual's right to equal treatment to broader social aims such as producing leadership required by different areas of society ranging from large corporations to the Armed Forces, i.e., AA as a leadership pipeline,<sup>2</sup> to offering a diverse learning ecosystem as a desirable pedagogical strategy adopted by a university,<sup>3</sup> to contributing to a more inclusive society,<sup>4</sup> to reducing discrimination and expanding opportunity for disadvantaged groups,<sup>5</sup>

---

<sup>1</sup><https://www.vox.com/policy-and-politics/23405267/affirmative-action-supreme-court-race-harvard-unc-chapel-hill>, accessed 31.12.2022.

<sup>2</sup> Adam Liptak, 'In Clash Over Affirmative Action, Both Sides Invoke *Brown v. Board of Education*', **NYT**, 3.10.2022.

<sup>3</sup> Young Jean Lee. 'I'm Asian-American. Affirmative Action Worked for me', **NYT**, 9.2.2019.

<sup>4</sup> Gary Gutting, 'I'm For Affirmative Action: Can You Change my Mind?' **NYT**, 10.12.2018

etc., a panoply of moral arguments that have so far undergirded the existing structure of AA policies.<sup>6</sup> The legacy of slavery and its cumulative effects and what should be done about them, and by who, has been central to the disputes about the structure and consequences of AA in the US. The argument has been that while individual rights are fundamental, they may be over-ridden by a conflicting or stronger right or by a very great social benefit that will follow that over-riding.<sup>7</sup> Race as a factor has been central to all the cases. In this latest challenge to the admissions policy at Harvard/UNC the challengers argue that the use of race is discriminatory and violative of Amendment 14 of the US Constitution that guarantees 'equal protection of the laws'.

In India too, the structure of AA policies has evolved through distinct stages,<sup>8</sup> from the discussions in the Constituent Assembly<sup>9</sup> which instituted reservations for Scheduled Castes and Scheduled Tribes, based on arguments of discrimination, deprivation, exclusion, social and economic disadvantage, to the Kaka Kalelkar and the Mandal Commissions known as the First and Second Backward Classes Commissions which sought to expand reservations for Other Backward Castes, invoking the distance these groups, as groups, would have to travel to compete effectively for social resources<sup>10</sup>, and finally through a series of court cases, the last but one being the full constitutional bench that heard the Indira Sawhney v Union of India case of 1992 that specified a ceiling of 50% for all categories of reservations.<sup>11</sup> The latest challenge, known as the Janhit Abhiyan V Union of India, or the EWS case, questions the constitutionality of Amendment 103, enacted on 14.01.2019, that grants reservation of upto 10 percent, to Economically Weaker Sections of the polity.<sup>12</sup> The judgment was delivered on 07.11.2022.

---

<sup>5</sup>John McWhorter, 'It's Time to End Race-Based Affirmative Action', **NYT**, 28.01.2022

<sup>6</sup>Ronald Dworkin, 'The DeFunis Case: The Right to Go to Law School', **New York Review of Books**, 5 Feb 1976; Nathan Glazer, 'Thirty Years of Affirmative Action', **Du Bois Review** 2:1, (2005) p5-15; Marshall Cohen et al, **Equality and Preferential treatment: A Philosophy and Public Affairs Reader**, Princeton University Press, 1977.

<sup>7</sup>Kenneth W Simons, 'Philosophical Perspectives on Affirmative Action', 77 **Mich L. Rev** 513 (1979); Matthew DeBell, 'Affirmative Action in Higher Education: Insults, Preferences and the Dworkin Defense', **85 Neb L Rev** (2011).

<sup>8</sup>Bhagwan Das, 'Moments in a History of Reservations', **Economic and Political Weekly**, 28.10.2000.

<sup>9</sup>Anurag Bhaskar 'Reservations, Efficiency, and the Making of the Indian Constitution', **Economic and Political Weekly**, May 8, 2021, vol LVI no 19, pp 42-49.

<sup>10</sup>Marc Galantar, 'The Long Half-Life of Reservations', chap 12, in **India's Living Constitution: Ideas, Practices Controversies**, ed (Zoya Hasan, E.Sridharan, R.Sudarshan, Permanent Black, Ranikhet, 2005).

<sup>11</sup>Malavika Prasad, 'From the constituent assembly to Indra Sawhney case, tracing the debate on economic reservations' <https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates>(accessed 12.12.22)

<sup>12</sup>Guest Post: The 103<sup>rd</sup> Amendment and the New Typology of the Basic Structure', <https://indconlawphil.wordpress.com/?s=103>(accessed 12.01.23)

Challenges in both countries have moved from the public sphere, where they began, to the theatre of the Supreme Court, regarded as the final arbiter in such foundational ethical disputes. The arguments that have been mounted have been both wide ranging e.g., in the US the residues of slavery that constrain the enjoyment, by the descendants of slaves, of constitutionally guaranteed freedoms and full and equal participation in public life and, in India, the obstructive and hurtful cumulative effects, on its victims, of the abominable caste system. The arguments are also finely tuned e.g., the reasons why the 'creamy layer' of OBCs are ineligible for reservations,<sup>13</sup> or whether there should be a 'sunset clause' for AA as suggested by Justice Sandra Day O'Connor when delivering the majority judgment in the 2003 Grutter v Bollinger case.<sup>14</sup> Both challenges have drawn on a range of knowledge fields such as ethics, law, politics, history, social psychology, sociology, and even the politics of language.

In fact, the contestation begins in the domain of language itself with respect to the naming of these policies. Sometimes they are referred to as 'compensatory discrimination', or 'reverse discrimination', or even 'protective discrimination' or 'preferential policies' and sometimes as 'quotas', 'reservations', or 'affirmative action'. Casual usage occasionally results in these descriptors being used interchangeably, which is strictly wrong. Loose usage extends to other keywords too which are seminal to the arguments being made, such as 'discrimination', 'deprivation', 'disadvantage', 'exclusion', 'stigma', and 'social and economic disadvantage'. Later in the article, when I examine the 103 EWS case, I shall show why such loose usage is illegitimate. In India the preferred term is 'reservations' while in the US it is 'affirmative action'. The term Affirmative Action entered the lexicon of policy discussions from John F Kennedy's Executive Order 10925 that required federal contractors to 'take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin'.<sup>15</sup> It established the President's Committee on Equal Employment Opportunity.

### **Overview of the case for AA:**

For ease of understanding, this six-decade engagement with AA in both countries can be disaggregated into responses given to four key questions. The first concerns the ethical arguments given to justify the institution of AA policies and why this responsibility should devolve on the state, i.e., why AA? The second seeks to specify in which sectors these policies are to apply i.e., in which domains and why? The third engages with the actual and desired consequences of the working of AA i.e., what are the outcomes? This looks at concerns such as the claims of the creamy layer, the duration of the AA policies i.e., the

---

<sup>13</sup>Pradipta Chaudhury, 'The Creamy Layer', **Economic and Political Weekly**, May 15, 2004, p1989-91.

<sup>14</sup>Linda Greenhouse, 'One Affirmative Action, What Once Seemed Unthinkable Might Become Real', **NYT**, 28.10.2022

<sup>15</sup>Adam Liptak, **NYT** 30.10.2022.

sunset clause, the stigma problem that devils those who benefit, and the hostility dimension that emerges in those who are denied, etc. The fourth looks at the consequences of AA to democracy i.e., how does AA impact democracy?

The arguments advanced to justify AA begin with an acknowledgement of the reprehensible aspects of the social system that existed in the past, the history dimension. Slavery in the US was a social system (yes, a social system) where some citizens were subjected to inhuman and degrading treatment including lynching. In India the centuries old caste order was structured in such a way as to treat some groups as inferior, and therefore eligible for physical and psychological abuse.<sup>16</sup> They were regularly discriminated against, humiliated, and even sometimes lynched.<sup>17</sup> These lived experiences, and these life situations of degradation and stigmatization, continue to constrain the ability of victim populations, i.e., the descendants of slaves or of oppressed castes, from equal participation in public life. It is sociologically demonstrated that these reprehensible systems of the past have cumulative consequences in the present handicapping victim communities from competing equally or effectively for public resources<sup>18</sup>. Because of the historical wrongs, and because the residues of these wrongs persist today, the claim is made for steps to be taken by the state in the present to redress the wrongs. While it is acknowledged that the victims of the past are not the victims of the present, which is also true of the beneficiaries, it is held that the state today carries the responsibility to address the historical wrongs either through reparations or through positive initiatives such as affirmative action. This responsibility derives from the social contract, between citizen and state, to build a constitutional democracy. In the public discourse there is a misguided discussion on whom should the responsibility lie since, in the present, neither the victims nor the perpetrators are present. I reiterate that it should fall on the state, which is the inheritor of the earlier oppressive system and which, as a constitutional democracy, has entered into a new contract to promote both substantive and formal equality.

In addition to reparation a second cluster of moral arguments, to justify AA policies, concerns the elimination of discrimination and humiliation which certain groups continue to disproportionately experience in the present. Practices of discrimination and humiliation are pervasive, even today, in both democracies and must be eliminated if they are to be true to their commitment to ensure the equality and dignity of all their citizens. Persisting discrimination in India is a social practice that, both psychologically and physically, damages the well-being of a section of citizens. AA policies help to mitigate them. The third justification for AA policies is to build a society of equal opportunity for all its citizens. These three core justifications - reparations, anti-discrimination, and equal

---

<sup>16</sup>Franz Fanon's, who was a psychologist, discusses in his many studies the psychological consequences of such inferiorization. **Black Skin, White Masks**, 1967

<sup>17</sup>Gopal Guru (ed), **Humiliation: Claims and Context**, Oxford, India, 2011; Arjun Dangle (ed) **Poisoned Bread: Translations from Modern Marathi Dalit Literature**, Orient Blackswan, Delhi, 1992.

<sup>18</sup>Nathan Glazer, 'In Defense of Preference', **The New Republic**, April 6, 1998.

opportunity - based on a reading of the past, an understanding of the present, and an aspiration for the future, are at the base of all secondary arguments made in support of AA.<sup>19</sup>

Since redressal through the reversal of social exclusion from important social spaces is the aim of AA policies, three domains are specified in India where AA policies will apply. These are education in public institutions, which includes reservations of seats for SC/ST and OBC as well as reservation of positions among the faculty, reservations in representative bodies such as Parliament, State Assemblies, and even the third tier of Government the Panchayati Raj and Nagarpalika institutions, and reservations in public bureaucracies.

The arguments for reservations in these three public spaces is primarily sociological since it is held that presence,<sup>20</sup> voice, and the representation of excluded groups in these spaces will result in their interests being given attention and being promoted. In other words, these hitherto invisible groups will be seen and heard. It is also argued that the presence of these groups in spaces of social status and power, from which they were earlier excluded, will result in, or at least contribute to, the dismantling of structures of discrimination and exclusion. They will also produce opportunities for social advancement. Presence of socially and economically disadvantaged groups in educational institutions, representative bodies, and public bureaucracies, it is argued, will significantly challenge the living structures of power.<sup>21</sup>

Over the last few decades in India there have been several court challenges to these policies that have resulted in a fine-tuning of the gamut of reservation policies. For example, do reservations apply in private institutions? Should reservations also apply for faculty promotion or only at the stage of recruitment? Does party loyalty trump group loyalty resulting in the non-representation, or feeble representation, of group interests since now representatives are more loyal to the party position on issues, than to the perception of the community? For how many generations are persons from designated groups eligible for reservations especially if they have initially benefitted from access to quality educational institutions? Should reservations also be extended to corporations in the private sector? Should they be extended to religious groups?<sup>22</sup> It is accepted that all domains do not merit reservations. For example, there are no reservations for members in national sports teams or in the appointment of judges or in the hiring of journalists although, in the latter, a demand

---

<sup>19</sup>Marc Galanter, **Competing Equalities: Law and the Backward Classes in India**, Oxford, 1984.

<sup>20</sup>Anne Phillips, *The Politics of Presence*, Oxford, 1995.

<sup>21</sup>Marc Galanter, 'Compensatory Discrimination in Political Representation', **Economic and Political Weekly**, Annual Number 1979, pp 437-454

<sup>22</sup>D.L.Sheth, 'Revisiting the Reservations Policy', chapter 14 in **At Home With Democracy: A Theory of Indian Politics**, D.L.Sheth edited Peter Ronald deSouza, Palgrave/Macmillan, Delhi, 2018.

has been voiced.<sup>23</sup> In contrast, in the US, AA policies are limited to admissions to university. AA is not mandated by legislation, as in India, but adopted, for their own reasons, by some private and some public universities in response to court cases.<sup>24</sup> Most Universities in the US do not pursue AA policies. Still it has become an issue on which there has been a great deal of public attention.<sup>25</sup>

The third cluster of issues looks at the societal outcomes of several decades of AA policies. It is very evident that presence and voice have entered the university system with existing curricula being challenged, settled public iconography being contested,<sup>26</sup> faculty being recruited, a new public culture being valorized, and a new leadership emerging. It is significant that the current Presidents (2023) of Harvard and Columbia universities are members of minority communities. Such a politics of presence has even resulted in new economic initiatives being started in India such as a Dalit Indian Chamber of Commerce and Industry.<sup>27</sup> At the level of party politics it has led in India to new social and political coalitions being established.<sup>28</sup>

The fourth cluster of issues is about the consequences for democratic politics of these AA policies.<sup>29</sup> In India it has generated intense activity in the demand side of politics as groups use their voting power to seek changes in extending reservations to them. Powerful castes such as Marathas, Patidars, Jats, Lingayatshave, in recent years, launched movements for reservations. In addition, the supply side of politics also grows as governments make promises to increase the quota for most backward, most disadvantaged etc., with states of the union working out their own political formulas of reservation.<sup>30</sup> EWS 103 is an illustration of this supply side response.

#### **Four features of significance from this ecosystem of ideas:**

---

<sup>23</sup>Yogendra Yadav, 'Hindu upper Caste Indian Media is a lot like White-dominated South Africa', The Print, 27 October 2022, <https://theprint.in/opinion/hindu-upper-caste-indian-media-is-a-lot-like-white-dominated-south-africa/1184213/>

<sup>24</sup>Becky Sullivan, 'How the Supreme Court has ruled in the past about affirmative action', NPR, 01.11.2022. <https://www.npr.org/2022/11/01/1132935433/supreme-court-affirmative-action-history-harvard-admissions-university-carolina> (accessed 15.01.2023)

<sup>25</sup>Chris Quintana, 'Supreme Court weighs affirmative action case, but most college admissions won't be affected', USA TODAY, 30.10.2022. <https://www.usatoday.com/story/news/education/2022/10/30/college-admissions-affirmative-action-supreme-court/8233859001/> (accessed 28.01.2023)

<sup>26</sup>Gail Omvedt, 'The Anti-Caste Movement and the Discourse of Power', chap 16 in **Democracy in India** ed Niraja Gopal Jayal, Oxford India, 2001.

<sup>27</sup><https://dicci.in>

<sup>28</sup>Kanchan Chandra, **Why Ethnic Parties Succeed: Patronage and Ethnic Head Counts in India**, Cambridge, 2004; Christophe Jaffrelot, **Religion, Caste and Politics in India**, Primus, Delhi, 2010; Zoya Hasan, **Democracy and the Crises of Inequality**, Primus, Delhi, 2014.

<sup>29</sup>Nathan Glazer, 'The affirmative action stalemate', **Public Interest**, no 90, Winter 1988, pp 99-114.

<sup>30</sup><https://www.hindustantimes.com/india-news/decoding-tamil-nadu-s-reservation-policy-101615315765316.html>; <https://www.deccanchronicle.com/nation/politics/221222/kapu-reservations-in-ap-centre-says-state-can-decide.html>

Following from this brief overview I shall draw out features of the ecosystem of ideas that comprise the AA discourse to illustrate that it is into this ecosystem that the 103 Amendment has been immersed. The key arguments of 103 must hence be read through the lenses offered by these four questions: why AA?, in which domains?, for what outcomes?, and with what consequences for democracy?

The first issue of significance from the extensive discussions on AA, in both the US and India, is the fact of psychological harm that has been caused, by the social systems of slavery and caste, to the victims and their descendants. It is important to recognize this harm for it finds expression in literature, for example in books such as **Another Country** by James Baldwin, and in collections of stories and poems such as that by Arjun Dangle in **Poisoned Bread**. It finds expression in films, biographies, essays, academic texts, and even campaigns such as the demand to rename Calhoun College at Yale University and movements such as the Black Lives Matter in the US. Similar protests have been taking place in India such as the Dalit Panther movement whose most visible leader, Namdeo Dhasal, wrote a powerful poem *Man, You Should Explode* published in a collection *Golpitha* (1972) in which, in anguish, he demands that all the literatures of the world and all the scriptures should be torn up and given to people 'to wipe shit from their arses'. In his poem *Cruelty* he describes himself as '.. a venereal sore in the private part of language...'. Similar emotions of anger and pain can be found in the essays of James Baldwin in *The Price of a Ticket*. He ends his essay on the Harlem Ghetto thus: 'All over Harlem, Negro boys and girls are growing into stunted maturity, trying desperately to find a place to stand; and the wonder is not that so many are ruined but that so many survive'. Baldwin's essays are about the continued afterlife of slavery in the US. Assuaging psychological hurt is therefore an important consideration in the aspiration to create a true constitutional democracy. Society must apply some balm. Society must take responsibility for the hurt and suffering caused by the social systems of the past that continue to have an after-life in the present. Society cannot go into the future without deliberately ethically choosing policy measures for redressal. The decision must be demonstrably deliberate. AA is one such significant measure.

The second issue is the cumulative nature of such discrimination. Reparation, therefore, cannot be the only response to the social condition of these victim communities since they require better and more assured access to opportunities to build better lives. The array of AA measures developed, particularly in India, seek to create a more level playing field in recognition of the cumulative consequences of the reprehensible social systems.

This leads to the third lesson from the debates on AA that economic disadvantages cannot be seen in isolation from cultural disadvantages. While the economic dimension looks at availability and access to economic opportunity, the cultural dimension looks at issues such as discrimination and stigma. Groups that are beneficiaries of AA, especially in India, suffer

in varying degrees from both dimensions. They are in fact interlinked such as the practice of social and economic boycott.<sup>31</sup> That is why the analytical distinctions between discrimination and deprivation, for example, is important. In the current discussion in India the two words are often wrongly used interchangeably as if they are synonymous. The EWS 103 judgment is guilty of such an error. Disadvantage refers to a lack of opportunity. Discrimination regards such lack as a denial based on a social characteristic such as race or caste. The victim group is not just excluded but also stigmatized because of their group identity<sup>32</sup>.

The cultural frame within which practices of stigmatization, i.e., the caste system in India or white supremacy in the US, must hence be considered when evaluating the merits or demerits of AA policies. Unfortunately, in the present discourse in both democracies this cultural aspect is either underplayed or ignored and the discussion merely revolves around whether merit is negatively impacted by AA policies. Merit as a social value, which it should be, is taken out of society and treated as if it exists without the support of social structures.<sup>33</sup> Many of the opponents of AA suffer amnesia towards their repressive cultural history of their society a history that had been acknowledged in the early years of AA but has since faded away. The exasperated comment of Chief Justice Roberts in 2007 illustrates this point: ‘... the way to stop discrimination on the basis of race is to stop discrimination on the basis of race.’<sup>34</sup> This amnesia is also evident in the EWS 103 judgment.

That is why the quarrel over the merits of the EWS 103 amendment, on social and economic disadvantages, is so crucial.<sup>35</sup> The terms are used interchangeably by the defenders of the amendment as if there is no qualitative difference between social and economic disadvantage. Social disadvantage refers to the cultural world in which the victim community is embedded. Economic disadvantage refers only to the poverty of the material world in which the community is located. Social and economic disadvantage is much more than just economic disadvantage, more in a qualitative sense since it also includes psychological hurt. In the arguments opposing the amendment there was much discussion on the word ‘and’ i.e., social **and** economic, or social **and** educational not social **or** economic or social **oreducational**. Addressing economic disadvantage can be done by other economic instruments such as poverty alleviation programs, which do not have to depend on the politics of presence and of representation that are key aspects of AA policies in India.

---

<sup>31</sup><https://www.thehindu.com/news/national/other-states/facing-social-boycott-dalit-families-threaten-to-skip-voting/article26832309.ece>. (accessed 14.02.23)

<sup>32</sup><https://www.ohchr.org/en/stories/2021/04/dalit-born-life-discrimination-and-stigma> (accessed 14.02.2023)

<sup>33</sup>Ronald Dworkin, ‘Affirming Affirmative Action’, **NYRB**

<sup>34</sup>Chief Justice John G Roberts jr in a case in the supreme court quoted in Ronald Turner, ‘The Way to Stop Discrimination on the Basis of Race..’ **Stanford Journal of Civil Rights and Civil Liberties**, XI: 45. <https://www.corteidh.or.cr/tablas/r33547.pdf>(accessed 28.01.23).

<sup>35</sup>Bheemeshwar Reddy, et al, ‘New Reservation Policy: Is it Empirically Justifiable?’ **Economic and Political Weekly**, June 8, 2019, pp 12-14.



The final big issue that emerges from this ecosystem of ideas and justifications is that AA is targeted at groups and not at individuals. While individuals are indeed the beneficiaries, they become eligible as individuals because they belong to victim or oppressed groups. It is the fact of their carrying the cultural load, the stigma of the group or its social backwardness, that qualifies them for consideration.<sup>36</sup> In the US it is belonging to the Afro-American community, the heirs to the victims of slavery, that qualifies a person for consideration. In India it is belonging to SC, ST or OBC groups. The SC community carries the burden of caste stigma which has been and continues to be, in many places, so psychologically damaging to the victims. India, in fact, passed the Atrocities Act 1989, that lists (an unusual practice in Law) the various expressions of discrimination and humiliation that members of SC communities face and which the state affirms must be penalized.

The ST community is eligible for AA benefits because of their extreme marginalization from both economy and society.<sup>37</sup> Because their habitations are in remote areas, often in forests, and because they have no access to the opportunities of the modern state and market, the goal of equal citizenship requires the state to extend to them preferential treatment. The ST groups are the ones most adversely affected by large development projects robbing them of their cultural resources and reducing them to further economic destitution.<sup>38</sup> The third group, OBCs, are considered backward and while they do not suffer the stigma and humiliation suffered by SCs, or are as marginalized as the STs, they are unable to participate effectively in public life because of this backwardness. The Mandal Commission set out a methodology to identify such backward groups listing 4 social, 3 educational and 4 economic indicators of backwardness. Individuals from all three groups become eligible because of their belonging to these groups. Social and economic factors are combined in a matrix to determine the eligibility of individuals as members of a group.

Ofcourse, there is the issue of the 'sunset clause' in these AA policies, asked by Justice Sandra Day O'Conner in 2003 whosuggested a time limit of 25 years after which AA policies in the US would be withdrawn. This issue of duration i.e., for how long will the policies be in place since being permanently in place means they are ineffective. The duration issue remains a pertinent question in Indian AA discussions as well. Justice Trivedi concluded her separate note in the EWS 103 judgment with the words a 'time limit if prescribed, for the special provisions in respect of reservations and representations provided in Article 15 and Article 16 of the Constitutions, it could be a way forward leading to an egalitarian, casteless

---

<sup>36</sup><https://www.ohchr.org/en/stories/2016/04/shadow-caste-and-its-stigma-continue-violate-all-aspects-human-rights> (accessed 14.02.23)

<sup>37</sup>Report of the High Level Committee on Socioeconomic, Health and Educational Status of Tribal Communities of India <https://cjp.org.in/wp-content/uploads/2019/10/2014-Xaxa-Tribal-Committee-Report.pdf> (accessed 14.02.23)

<sup>38</sup>An illustration of their loss and their vulnerability can be seen in the detailed report on the displacement produced by the Narmada dam. Ravi Hemadri, et al, 'Dams, Displacement, Policy and Law in India', Contributing Paper prepared for thematic review 1.3, ..... (accessed 12.12.22)

and classless society'. (para 29)The simple response to the question of 'how long should we have reservation policies' can be: as long as we have *The Atrocities Act 1989*, and as long as the crimes against Dalits and Adivasis continue to be high, and in some states to increase, (as per the data collected by the National Crime Records Bureau).<sup>39</sup>

---

<sup>39</sup><https://www.newsclick.in/NCRB-Report-Shows-Rise-Atrocities-Towards-Dalits-Adivasis> (accessed 28.01.2023)

### The 103 EWS case:

Into this ecosystem of ideas and justification was the EWS 103 case introduced. While the regime tries to portray it as a continuity and seeks to align its provisions with earlier extensions of AA to specific groups, it is in fact a disruption. The judgment has overlooked the vital connections between social and economic backwardness, and between an eligible claimant and their belonging to a social group. By allowing AA policies – reservations – for economically weak sections from among the upper castes EWS 103 has reduced the AA framework to merely an instrument of poverty alleviation. No longer is the cultural history of stigmatization faced by the targeted group, or the identity of claimants as members of a socially and economically disadvantaged group i.e., as a group and not as a statistical category, or the cumulative consequences of structures of oppression, significant. EWS 103 has justified reservations only on the limited aspect of disadvantages produced by material poverty.

For individuals who are poor from what by default are upper castes since other castes are covered by the earlier reservations, the judgment permits the state to give reservations, upto 10 %, to Central government educational institutions and private educational institutions and for employment in Central Government jobs. It is presented merely as an enabling provision. To be considered eligible a claimant requires an EWS certificate given by the Tehsil or the local authority which confirms the following conditions; that the family income from all sources does not exceed rupees 8 lakhs per annum, that they do not own more than 5 acres of agricultural land and that they do not have a residential flat larger than 1000 sq ft in a municipal area. Critics allege that there are no guard rails here, as in the case of OBC claimants.<sup>40</sup> An income and asset certificate from the local government authority (Tehsil or Local government authority) is all that is required. The moral reasoning is limited to helping the poor, rather than reparation for historical abuse, or psychological hurt, or cultural stigmatization, or social exclusion. While other policy instruments are available to meet this need of helping EWS, as listed in Chapter 6.101 of the budget 2023 titled 'Social Protection for a Rainy Day'<sup>41</sup> they are not seen as enough. Or as critics allege this is an electoral initiative rather than an ethical one.

Since the EWS 103 judgment thinks it legitimate to include reservations for EWS in the basket of AA policy instruments they have, by doing so, produced a disruption of the ethical and moral ecosystem within which AA policies have so far been considered. For example, we are compelled to ask if the labels of 'compensatory discrimination' or 'reverse discrimination' or 'preferential policies' or even 'affirmative action' can be used since all these are

---

<sup>40</sup>Malavika Prasad "From the constituent assembly to the Indra Sawhney case:, tracing the debate on economic reservations', <https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates> (accessed 12.12.22)

<sup>41</sup><https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> (accessed 14.02.23)

predicated on the larger moral argument that is invoked by the state to over-ride the 'equal treatment' provisions of the constitutions.

In his Commencement Address at Howard University titled 'To Fulfill These Rights' President L.B. Johnson, on 4 June 1965, made his famous 'hobbled by chains' remark which is often quoted in many of the AA discussions in the US.

FREEDOM IS NOT ENOUGH But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been *hobbled by chains* (emphasis mine) and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.<sup>42</sup>

This address, because of its moral tone, became a powerful reference point in the defence for affirmative action. It provides the moral grounds to over-ride the formal equality provisions of the constitution. It is from these moral arguments that the EWS 103 judgment constitutes a disruption. The cultural amnesia from which it suffers becomes clearer as one reads the judgment.

After the EWS 103 amendment was enacted on 9<sup>th</sup> January 2019 that made reservations in higher education and public employment in Central government institutions, on the basis of economic criteria alone through the insertion of clauses 15(6) and 16(6), more than 20 petitions were filed challenging its constitutional validity on the grounds that it violated the basic structure of the constitution and the basic right to equality under Article 14. Arguments were made before a three judge Bench of the Supreme Court headed by CJI Bobde with Justices Reddy and Gavai. They decided, on 5<sup>th</sup> August 2020, that constitutional issues were involved and that the case must be referred to a Constitution Bench of five judges. The issues to be considered were:

1. Reservations cannot be based solely on economic criteria as laid down in the *Indra Sawhney v Union of India* case of 1992.
2. Excluding SCs/STs and OBCs from this new category of reservations would violate the fundamental right to equality.

---

<sup>42</sup><https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights> (accessed 14.02.23)

3. The ceiling of 50% set by *Indra Sawhney* was being breached thereby also violating basic structure of equality.
4. Imposing reservations on private unaided educational institutions violates the fundamental right to equality.

A five-member bench headed by CJI UU Lalit heard the cases. They accepted the framing of the issues by the learned Attorney General KK Venugopal and heard the arguments from 8<sup>th</sup> September 2022 till 17<sup>th</sup> September. The judgment was delivered on 7<sup>th</sup> November 2022. The AG framed 3 questions for consideration:

1. Whether reservations can be granted solely on the basis of economic criteria?
2. Whether reservations can be provided in private educational institutions that do not receive state aid?
3. Whether excluding SC/ST/OBC and SEBC members as claimants from the EWS category is valid?

In a 3:2 split the majority (Maheshwari, Trivedi, Pardiwala in the majority versus Lalit, Bhat in the minority) concluded that the EWS reservations were constitutionally valid. On some of the key issues deliberated there was concurrence among the 5 judges while on others there was basic disagreement. Let me now briefly review their contrasting positions.

All five members held that reservations based on economic criteria alone was constitutionally valid. This unanimity, on delinking the EWS reservations from the ecosystem of ideas and ethics discussed earlier, is interesting and prompts one to ask if it is because they did not consider the argument meritorious that one must see it as 'socially AND economically' and not 'socially OR economically'. In other words they did not give credence to the significance of AND. In my view the emphasis on 'and' is important in two senses: (i) it shows a link between stigmatization and backwardness and (ii) it acknowledges the cumulative effect of such stigmatization on the existential opportunities of the hitherto stigmatized. President L.B. Johnson recognized this cumulative effect when he made his 'hobbled by chains' remark. All five judges, however, appear not to see the link and thereby seem to ignore the cultural history of humiliation and discrimination faced by SCs in India.

The other issue on which there is unanimity is to accept that the EWS 103 amendment in private unaided institutions is constitutionally valid. It is regarded as part of the state's responsibility to meet the welfarist goals set out in the Directive principles of Part IV. Justice Pardiwalawent so far as to see it as consistent with the 'socialist goals' of the Preamble.

On other key issues, however, there was a split of 3:2. While the majority of Maheshwari, Trivedi and Pardiwala see EWS 103 as not in violation of the basic structure of the Constitutions, an argument extensively made by many of the submissions,<sup>43</sup> Bhat and CJI

---

<sup>43</sup>Judgment....

Lalit held that the exclusion of SC/ST/OBC and SEBC from the EWS category was in violation of the right to equality regarded as a key element of basic structure. Further Bhat/Lalit regard the granting of EWS reservation in public employment as unconstitutional. By deploying what looks like a 'politics of presence' argument they hold that since EWS candidates come from forward classes they are adequately represented in public spaces and hence can make no claim for preference in public employment. The majority opinion disagreed with this position.

The final point of disagreement between the majority and minority was on whether EWS can breach the 50% limit specified by the *Indra Sawhney* case. Here one finds some deft legal footwork by the majority. They interpreted the 50% limit as 'flexible' i.e., it could be breached in extraordinary situations although they did not specify what these extraordinary situations are. If the persistence of poverty over 75 years constitutes an extraordinary situation, then it is indeed a sad commentary on the working of our democratic state when the ordinary is no different from the extraordinary. In another illustration of deft footwork, the majority held that the limit of 50% in the *Indra Sawhney* case applied only to reservations for socially and educationally backward classes and not to all types of reservations. By implication new reservations could therefore exceed the 50% limit. To justify EWS they have opened the door for a plethora of demands for consideration from hitherto excluded groups.

There are several issues of law and constitutional morality that were argued during the course of the case such as the importance of how long should reservations exist i.e., the sunset clause, the interlinkages between social and economic backwardness, the cumulative nature of backwardness, the classification of EWS as a class even though it has no discernible social identity but only a statistical one, the question of nomenclature, and the issue of 'basic structure' and the imperative of the 'equality' condition. On the latter two points 'basis structure' and 'infringement of equality' there was a substantial discussion where both the parties, and subsequently the Court, set out their understanding. From this substantial discussion I shall, in what follows, discuss just one aspect from each of the basic structure and equality arguments that, I believe, has been underexplored.

The first concerns the exclusion of SC/ST/OBCs from being considered under the EWS category. In her separate note, para 21, to the majority judgment Justice Trivedi presented her reasoning for excluding SC/ST/OBC persons from the benefit of EWS reservations although they are economically weak.

The Scheduled Castes/Scheduled Tribes and the backward class for whom the special provisions have already been provided in Article 15(4), 15(5) and 16(4) form a separate category as distinguished from the general or unreserved category. They cannot be treated at par with citizens belonging to the general or unreserved category. The impugned amendment creates a separate class of "economically weak sections of the citizens" from the general/unreserved class, without affecting the

special rights of reservations provided to the Scheduled Caste/Scheduled Tribe and backward class of citizens covered under Article 15(4), 15(5) and 16(4). Therefore, their exclusion from the newly created class of the “economically weaker sections of the citizens” in the impugned amendment cannot be said to be discriminatory or violative of the equality code.

She prefaced this reasoning by stating in para 20 that ‘treating unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution’. There is a flaw in this argument, and it centers on the grounds for eligibility. Reservations for SCs is based on the acknowledgement that they have suffered, and continue to suffer, discrimination and stigmatization as individuals because they are members of a group. Discrimination and stigmatization make them eligible for consideration. No other group faces such stigmatization and hence no other group can claim reservations under the SC quota. Similarly, STs are eligible for reservation because of marginalization and deprivation. This too is specific to STs, as a group, because of their remote habitations and because of the absence of opportunities where they live and what they can access. No other group meets this eligibility condition and hence only STs can claim reservations under the ST quota. Finally, OBCs are eligible because of their social and educational backwardness and because of the distance they have to travel to compete effectively for public resources. The Mandal Commission listed 11 indicators (4 social, 3 educational and 4 economic indicators) which fixed a claimant as a member of the eligible OBC category. Here too members outside the OBC category would not satisfy these 11 aspects and hence only OBCs can claim reservations under the OBC category.

With respect to EWS, however, this is not the case. Eligibility is based on only three factors, income, agricultural property, and size of dwelling. If any person meets these three conditions then, legally, and on the principle of equal treatment, they should be considered. To exclude SC/ST/OBC claimants on the grounds that ‘they have their own quotas’, which is what Trivedi seems to be saying, is clearly discriminatory and violative of the equality condition under Article 14. It is hence violative of the basic structure of the constitution.

There are many aspects of the basic structure argument that were deployed in the course of the hearing. I do not wish to repeat them here but merely to reflect on three points of significance that have not got the significance they deserve. The first is the admission by the court that in spite of many cases being brought before it where the principle of basic structure was invoked to strike down legislation or policy, it adopted a conservative position using the striking down power, given by the principle of basic structure, in only very few cases. This hesitancy is a concession to both the idea of separation of powers, which must be respected, and to the acceptance that legislatures have to make laws to meet rising aspirations and new demands coming from a dynamic democracy. This point of conservatism and hesitancy was made in the judgment. It is to be appreciated.

The second is the importance of the doctrine of basic structure as a guard against legislative tyranny. Legislatures, when making laws, have to be careful that they do not go against the basic structure of the Constitution, outlined clearly by Justice Chelameswar in his dissenting opinion in the NJAC judgment. He listed them as 'democracy, secularism, equality of status, independence of judiciary, judicial review, and some fundamental rights'. These are fundamental features of our constitutional democracy and undermining one would result in a damage to the basic structure. Justice Chelameswar made a distinction between basic features (the list above), and basic structure, the latter being the 'sum total of the basic features'. The 'abrogation of any one of the basic features results normally in the destruction of the basic structure of the Constitution...' 'As to when the abrogation of a particular basic feature can be said to destroy the basic feature of the Constitution depends upon the basic feature sought to be amended and the context of the amendment. There is no universally applicable test vis-à-vis all the basic features.'<sup>44</sup>

J.Chelameswar has a point not just in terms of the relationship that he discusses between the basic features and basic structure, but also with respect to the absence of a universally applicable test. This brings me to the third point of interest. By suggesting that violation of basic structure must be examined in each case, and not by reference to a 'universally applicable test', he leaves open the possibility of a dialogue between the Court, at that particular conjuncture, and the political discourses of the time. EWS 103 is such a conjuncture. It allows the polity to place its arguments before the court which has to consider them by reference to precedence, the test of reasonableness, and their validity to the context. Such a reasoning I find attractive since it retains two key aspects of our constitutional system. On the one hand is the power of basic structure against legislative tyranny. Basic structure is a bulwark against the executive that feels it has electoral legitimacy to decide on all matters.<sup>45</sup> Such electoral autocracy is a danger in many democracies.<sup>46</sup> On the other hand is the power of the legislature to frame legislation to respond to the emerging demands in the polity. This too is an important power since it is a measure of the responsiveness of government, an essential feature of a democracy. The doctrine of 'basic structure' preserves the creative tension between the legislature/executive on the one hand and the judiciary/constitution on the other. It is used sparingly, but it is used. This idea of basic structure, and the role it plays in constitutional evolution, is not dissimilar to the role played by the 'originalist position' in the evolution of US jurisprudence. Both become an essential go to place as democracies recalibrate their moral coordinates.

The third aspect of the judgment is the issue of 'time span of the reservation policy' as stated by Justice Bela Trivedi or the 'sunset clause' as described by Justice Sandra O'Conner.

---

<sup>44</sup>37.14 of the EWS judgment and 1196.6, 1196.7 and 1196.8 of the NJAC judgment

<sup>45</sup>Ernest Gellner, 'Democracy and Industrialisation', *European Journal of Sociology*, vol 8, no 1, p47-70.

<sup>46</sup>V-Dem, 'Democracy Report 2022: Autocratization Changing Nature?' [https://v-dem.net/media/publications/dr\\_2022.pdf](https://v-dem.net/media/publications/dr_2022.pdf) (accessed 18.02.2023)



Approvingly quoting the views expressed by the Supreme Court in *Ashok Kumar Thakur v Union of India* Justice Trivedi ends her separate note with:

Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently'. (666)<sup>47</sup>

That it should be for a limited period is not in doubt. But how long should that limited period be? In a preceding section I suggested two measures of time. The first is the continuation of the Atrocities Act 1989 on our statute books. As long as such an act is required to deter violence against SCs then the protections offered by AA are required. The system needs more persons from victim communities in the spaces of power made available by the reservation policy. This is based on the premise that they will act and work to safeguard the members of their social group from the injustices and atrocities visited upon them. Does such protection emerge? Will members of the elevated group turn their backs on those who suffer indignities from among their social group is another matter for empirical investigation and sociological theorizing and hence will need to be debated separately? At this point it is sufficient to accept that there is a connection between presence and the protection of interests. The logic of AA is that members of the elevated group will protect and represent the interest of the group from which they come. The second measure of time I suggested is the data from the National Crime Records Bureau which shows that victims of crime are disproportionately from among the vulnerable groups. This only confirms that the social system still carries with it the prejudices and attitudes of tyranny of the erstwhile caste system. When the data of such crimes statistically mirrors the profile of the whole population then we can say that it is time to revisit the duration question. Till then AA must stay.

### **Consequences for Indian Democracy:**

This brings me to the final section on how will EWS 103 impact Indian democracy? Answering to question allows me to return to the argument on moral coordinates of a democracy. We need to revisit the remark of LB Johnson on 'hobbled by chains'. He held that removing the chains was not enough. We had also to create opportunity. AA has moved some way in that direction. Not only has it placed more persons from among stigmatized and excluded groups in public spaces and positions of social power, but it has also made AA the new normal of democratic politics in India. AA is for groups who have suffered, and continue to suffer, indignities, who have been excluded from access to public resources by virtue of their social group and who have been denied opportunities to develop their full human capabilities. Will the political normal that AA has produced, as a rights claim in Dworkian terms, be diminished by EWS since now the emerging normal moves the needle

---

<sup>47</sup>Para 27 in Justice Trivedi's separate note.

from discrimination, deprivation and backwardness, to mere disadvantage. I say it will diminish the old normal because the cultural practices emanating from religion will no longer be the site for political struggle. This will be supplanted by economic disadvantage as the concern. It may weaken the momentum of dismantling the structures of caste oppression, of defeating the afterlife of a tyrannical caste system.

Some would argue in response to my diminishing thesis that in fact it will speed up the transition from a vertical system of social stratification to a horizontal system since it will now increase the pipeline of leadership to include, in addition to SC/ST/OBC/SEBC, EWS. The question to debate is whether the leaders coming from the EWS category will side with the hegemon of the system or with the subaltern challenge? This is an open question.

The other aspect of the impact of EWS Indian democracy is the growth in the demand side of politics. Groups that were hitherto ineligible for reservation in the three important domains - higher education, public employment and elected representation - will now look for criteria to make them eligible. Since EWS has expanded eligibility requirements to include economic criteria alone and since the 50% limit has been breached, an innovative Indian democracy may come up with new aspects for eligibility. This may be a good thing because it will destabilize established political coalitions and shift the polity towards a more unstable phase. Identity politics will increase and this too is a good thing since we are as D.L.Sheth argued a democracy of communities.<sup>48</sup> Both the Indian and US democracies are reworking their moral coordinates in their highest court. The EWS 103 judgment has done so for India. The US judgment is expected in the summer of 2023. Quite a coincidence really.

8250 words approximately

18 February 2023.

---

Peter Ronald deSouza is an independent scholar. He was Director of the Indian Institute of Advanced Study (2007-2013) and DD Kosambi Visiting Professor at Goa University (2020-2022). His recent publications are **Companion to Indian Democracy: Resilience, Fragility and Ambivalence**, eds, Peter Ronald deSouza, SanjeerAlam, and Hilal Ahmed, New Delhi, Routledge, 2022; **Keywords for India: A Conceptual Lexicon for the 21<sup>st</sup> Century**, Eds Rukmini Bhaya Nair and Peter Ronald deSouza, London, Bloomsbury, 2020.

---

<sup>48</sup>D.L.Sheth, **At Home With Democracy: A Theory of Indian Politics**, edited Peter Ronald deSouza, Palgrave/Macmillan, Delhi, 2018.