
LIST OF ACRONYMS

ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
AIR	All India Reports
ALJ	Administrative Law Judges
AP	Andhra Pradesh
ARB	Arbitration
Bom.	Bombay
BCEA	Basic Conditions of Employment Act of 1997
BCLR	Butterworths Constitutional Law Reports
BFOQ	Bona Fide Occupational Qualification
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CFR	Code of Federal Regulations
Cir.	Circuit
CJ	Chief Justice
Co.	Company
CRA	Civil Rights Act
DBE	Disadvantaged Business Enterprise
EEA	Employment Equity Act
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
FEPC	Fair Employment Practices Committee
GG	Government Gazette
HNP	Hereinigde National Party
IC	Indian Constitution
IDRA	Intercultural Development Research Association
ILJ	Industrial Law Journal
ISC	Indian Supreme Court
ILO	International Labour Organisation
Ker.	Kerala

LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
Ltd.	Limited
Mad.	Madras
Madh. Pra.	Madhya Pradesh
Mich.	Michigan
Mys.	Mysore
NAACP	National Association for the Advancement of Coloured People
NACO	National AIDS Control Organization
NP	National Party
OBC's	Other Backward Classes
OFCC	Office of Federal Contract Compliance
OFCCP	Office of Federal Contract Compliance Programs
PCEEO	President's Commission on Equal Employment Opportunity
PCGC	President's Committee on Governments Contracts
PEPUDA	The Promotion of Equality and Prevention of Unfair Discrimination Act
Pty	Propriety
PWA	Public Works Administration
RSA	Republic of South Africa
SA	South Africa
SALLR	South African Labour Law Reports
SAPS	South African Police Services
SC	Supreme Court
SC's	Scheduled Castes
SCC	Supreme Court Case
SCR	Supreme Court Ruling
SDA	Skills Development Act
ST's	Scheduled Tribes
UC	University of California
UCDLR	University of California Davis Law Review
UCG	University Grants Commission
UN	United Nations
USA	United States of America
USC	United States Code

USCA	United States: Code of America
US	United States
VEVRA	Vietnam Era Veterans Readjustment Act
VEVRAA	Vietnam Era Veterans' Readjustment Assistance Act
VCT	Voluntary Counselling and Testing

TABLE OF CONTENTS

	Page
SUMMARY	ii
ACKNOWLEDGEMENTS	iii
LIST OF ACRONYMS	iv

PART I

**A HISTORY OF DISCRIMINATION — SETTING
THE STAGE FOR PRESENT DAY AFFIRMATIVE
ACTION MEASURES**

CHAPTER ONE GENERAL INTRODUCTION

1.1 The Purpose of this Thesis	2
1.2 Why a Comparative Analysis.....	2
1.3 The Chapters.....	3

**CHAPTER TWO A HISTORICAL BASIS FOR AFFIRMATIVE
ACTION IN SOUTH AFRICA**

2.1 Introduction.....	7
2.2 South Africa — An Overview.....	8
2.3 Historical Background.....	9
2.3.1 The Anglo-Boer War 1899 — 1902.....	11
2.3.2 World War II.....	12
2.3.3 Apartheid: 1948 — 1989.....	15
2.3.4 The Consolidation of White Power.....	18
2.3.4.1 Legal Restrictions — An Overview.....	18
(i) The Industrial Conciliation Act and the Mines and Works Act.....	19
(ii) The Wage Act and the Public Services Act.....	20

	(iii) The Native Labour Regulation Act.....	20
	(iv) The Natives Land Act and the Bantu Authorities Act.....	21
	(v) The Native Urban Areas Act.....	21
	(vi) Bantu Building Workers Act.....	22
	(vii) Native Labour (Settlement of Disputes) Act.....	22
	(viii) Bantu Education Act.....	22
2.3.5	State Machinery and Apartheid.....	23
2.3.6	Computers and Labour.....	23
2.4	Repeal.....	25
2.4.1	International Law and Apartheid.....	25
2.4.2	Internal Changes.....	27
2.5	Post Apartheid — pre 1994.....	29

**CHAPTER THREE SETTING THE STAGE FOR
AFFIRMATIVE ACTION IN THE
UNITED STATES OF AMERICA**

3.1	The USA — An Overview.....	32
3.2	Slavery.....	33
3.3	The Jim Crow System.....	37
3.4	African Americans and Hispanic Americans.....	37
3.5	Segregation in the Industries.....	38
3.5.1	The Construction Industry.....	38
3.5.2	The Textile Industry.....	39
3.5.3	The Tobacco Industry.....	39
3.5.4	The Pulp and Paper Industry.....	39
3.5.4.1	The Migration.....	40
3.5.5	The Automobile Industry.....	40
3.5.6	The Steel Industry.....	40
3.5.7	Government Employment.....	41
3.5.8	Organised Labour.....	42

3.6	Time-line of Affirmative Action Milestones.....	42
3.7	Executive Orders.....	44
	(i) President Theodore Roosevelt (1901-1909).....	44
	(ii) Warren G Harding (1921-1923).....	44
	(iii) Executive Orders 9980 and 9981.....	45
	(iv) Executive Order 10479.....	45
3.8	The Passing of Civil Rights Legislation.....	46
	(i) President J F Kennedy and Executive Order 10952.....	46
3.9	The Civil Rights Act.....	48
	(i) President Lyndon Johnson and Executive Order 11246.....	48
	(ii) President Richard Nixon and the Philadelphia Order.....	51
	(iii) President Gerald R Ford.....	52
	(iv) President Ronald Reagan.....	52
3.10	The Civil Rights Time Line — Milestones in the Civil Rights Movement.....	53
3.11	Summary of Important Judicial Events and Other Important Dates in the History of Affirmative Action.....	56

**CHAPTER FOUR A BRIEF HISTORY OF
DISCRIMINATION IN INDIA**

4.1	The Republic of India — Overview.....	64
4.2	Understanding Caste and the Caste System.....	64
4.3	The Evolution of the Theories of Caste and Class.....	67
	4.3.1 Caste and Closure.....	70
4.4	Origins of the Cast System.....	72
	4.4.1 The Religious Theory of the Caste or Varna Systems.....	72
	4.4.1.2 The Theory of Purity.....	75
	4.4.2 The Historical or Indo-European Theory of the Caste System.....	76
	4.4.3 The British and India.....	79

4.5	Economic Privileges and the Division of Labour.....	81
4.5.1	The Untouchables and Segregation.....	83
4.5.2	Discrimination and Exploitative Forms of Labour.....	85
4.5.3	Manual Scavenging.....	86
4.6	Reform.....	86
4.7	Summary.....	89

PART II

UNDERSTANDING AFFIRMATIVE ACTION IN SA, THE USA AND INDIA

CHAPTER FIVE UNDERSTANDING AFFIRMATIVE ACTION AND ITS SYNONYMS IN SA, THE USA AND INDIA

5.1	An Overview of Affirmative Action in SA, the USA and India.....	92
5.2	Understanding Affirmative Action in SA.....	94
5.2.1	Employment Equity and Affirmative Action.....	99
5.2.2	Equality and Affirmative Action.....	100
5.3	The Beneficiaries of Affirmative Action in SA.....	102
5.4	Suitably Qualified Candidates for Affirmative Action Programmes.....	104
5.5	Understanding Preferential Treatment in the USA and its Definitions.....	105
5.6	The Beneficiaries of Affirmative Action in the USA	111
5.7	Suitably Qualified Candidates and the Use of Quotas.....	115
5.7.1	Quotas and Executive Order 11246.....	117
5.8	Caste and Reservations in India.....	117
5.9	The Beneficiaries of Affirmative Action in India.....	125
5.9.1	Scheduled Castes.....	127
5.9.2	Scheduled Tribes.....	128
5.9.3	Other Backward Classes.....	128

5.10	Reservations for the Beneficiaries.....	130
5.10.1	Important Aspects of the Scheme of Reservation for SC's and ST's.....	132
5.10.1.1	Concessions to the SC's and ST' Applicants.....	133
5.10.1.2	Fifty Percent Limit in Reservation to Apply to Current as well as Backlog Vacancies.....	134
5.10.1.3	Public Sector Undertakings and Other Autonomous Bodies.....	134
5.10.2	Important Aspects of the Scheme of Reservation for Other Backward Classes.....	134
5.11	Reservations for Special Groups (Other than Women).....	135
5.12	The Problem of the Suitably Qualified Candidate in India.....	138
5.13	Tensions in the Caste System.....	139
5.14	Upward Mobility in India.....	141
5.15	Affirmative Action and the Quota System in India, the USA and SA.....	142
5.16	Affirmative Action vs Preferential Treatment.....	144
5.17	Understanding the Importance of the Definitions.....	145

PART III

THE REGULATION OF DISCRIMINATION AND AFFIRMATIVE ACTION MEASURES

CHAPTER SIX THE REGULATION OF AFFIRMATIVE ACTION AND DISCRIMINATION IN SA

6.1	Anti-Discrimination Legislation in SA.....	153
6.1.1	The Labour Relations Act.....	154
6.1.2	The Promotion of Equality and Prevention of Unfair Discrimination Act.....	155

6.1.3	The Basic Conditions of Employment Act.....	156
6.1.4	The Skills Development Act.....	157
6.1.5	The Employment Equity Act.....	157
6.2	Constitutional Provisions.....	158
6.2.1	A Constitutional Basis for the EEA.....	158
6.2.2	The Constitution and Equality.....	159
6.2.3	The Constitution and Affirmative Action.....	160
6.3	Application of the EEA.....	161
6.3.1	Scope of the EEA.....	162
6.3.1.1	Designated Employers.....	162
6.3.1.2	Temporary Employment Services.....	163
6.3.1.3	Independent Contractors.....	163
6.3.1.4	Other Groups.....	164
6.3.2	The Beneficiaries of Affirmative Action.....	164
6.4	The Regulation of Unfair Discrimination by the EEA.....	164
6.5	Barriers to Employment Equity.....	166
6.5.1	Harassment.....	167
6.5.2	Medical and HIV Testing.....	170
6.5.3	Psychological Testing.....	172
6.6	The Regulation of Affirmative Action in the EEA.....	173
6.6.1	Duties of a Designated Employer.....	174
6.6.2	The Consultation Requirement.....	175
6.6.3	The Requirements for Conducting an Analysis.....	175
6.6.4	The Types of Information to Collect.....	175
6.6.5	The Workforce Profile.....	175
6.6.6	Preparing the Employment Equity Plan.....	176
6.6.7	Reporting.....	180
6.6.8	Compliance with the Act.....	181
6.7	Affirmative Action and the Suitably Qualified Candidate.....	182
6.8	Defences against Claims of Discrimination.....	183
6.8.1	The Inherent Requirements of a Job.....	184

6.8.2	Affirmative Action.....	190
6.8.2.1	Affirmative Action — A Defence or a Right?.....	190
6.8.2.2	Affirmative Action and Efficiency.....	193
6.8.2.3	Compliance with the Employment Equity Plan.....	198
6.8.2.4	Affirmative Action — Designated Groups Only.....	204
6.8.3	Fair and Compulsory Discrimination by Law.....	204
6.8.4	Discrimination Based on Productivity.....	204
6.8.5	A General Fairness Defence.....	205

**CHAPTER SEVEN THE REGULATION OF
DISCRIMINATION AND AFFIRMATIVE
ACTION IN THE USA**

7.1	Anti-Discrimination Legislation in the USA.....	209
7.2	Specific Legislation Prohibiting Unfair Discrimination.....	210
7.2.1	The Vietnam-Era Readjustment Assistance Act.....	211
7.2.2	The Americans with Disabilities Act.....	212
7.2.3	The Age Discrimination in Employment Act.....	213
7.2.4	The Civil Rights Act.....	214
7.3	Major Features of the CRA.....	215
7.3.1	Title I.....	215
7.3.2	Title II.....	215
7.3.3	Title III.....	215
7.3.4	Title VI.....	215
7.3.4.1	Scope of Coverage.....	217
7.3.5	Title VII.....	218
7.3.5.1	Scope of Title VII.....	219
7.3.5.2	Citizenship or Alienage as a Basis of Discrimination.....	221

7.4	Defences or Exceptions to Prohibitions on Discriminatory Conduct.....	223
7.4.1	Business Necessity.....	223
7.4.2	<i>Bona Fide</i> Occupational Qualification.....	225
7.4.3	Affirmative Action.....	228
7.5	What is Discriminatory Treatment or Disparate Impact?.....	229
7.5.1	Allocation of Proof.....	232
	(a) <i>Prima facie</i> case.....	233
	(b) Business necessity.....	233
	(c) Alternative practice with lesser impact.....	233
7.6	Title VII Violations.....	234
7.6.1	Sexual Harassment Discrimination.....	234
7.6.2	Race and Colour Discrimination.....	236
7.6.3	National Origin Discrimination.....	237
7.6.4	Other Anti-Discrimination Provisions.....	238
7.7	Executive Order 11246; Title VII and the EEA Compared.....	239
7.7.1	Policies and Practices.....	242
7.8	Executive Order Affirmative Action Requirements.....	243
7.8.1	For Supply and Service Contractors.....	243
7.8.2	For Construction Contractors.....	244
7.9	The EEOC's Affirmative Action Guidelines.....	244
7.10	The EEOC's Guidelines under Title VII of the CRA.....	245
7.10.1	Circumstances Calling for Affirmative Action.....	248
7.10.2	Reliance on the Guidelines as a Defence to a Title VII Charge.....	249
7.11	Analysis of the Anti-Discriminatory Provisions in SA and the USA.....	250

**CHAPTER EIGHT THE REGULATION OF
DISCRIMINATION AND
AFFIRMATIVE ACTION IN INDIA**

8.1	The Constitution of India and Anti-Discrimination Principles.....	255
	8.1.2 Fundamental Rights.....	258
	8.1.3 Group Rights.....	262
8.2	The Constitution and Positive Discrimination.....	264
8.3	The Constitution and Reservations.....	264
	8.3.1 Reservations in Education.....	266
8.4	Time Frame for Reservations.....	267
8.5	Analysing the Constitutional Provisions.....	268
8.6	Other Legislative Protections.....	270
	8.6.1 The Protection of Civil Rights Act.....	271
	8.6.2 The Bonded Labour System Act.....	272
	8.6.3 The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act.....	273
	8.6.4 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.....	273
8.7	Discrimination in the Workforce.....	275
	8.7.1 Invidious Discrimination.....	275
	8.7.2 Sexual Harassment in India.....	276
8.8	Analysis of Provisions in SA, the USA and India.....	279

PART IV
THE CONSTITUTIONAL DIMENSION OF
AFFIRMATIVE ACTION MEASURES

CHAPTER NINE THE CONSTITUTIONAL DIMENSIONS
OF AFFIRMATIVE ACTION IN SA

9.1	Affirmative Action and the Equality Principle in SA.....	284
9.2	How the CC Justifies Affirmative Action.....	285
9.3	Understanding the Relationship Between Equality and Discrimination.....	289
9.3.1	The Meaning of Discrimination.....	290
9.3.2	Problems with Proving Discrimination.....	293
9.4	The Development of the South African Constitutional Equality Jurisprudence.....	296
	(i) Establishing differentiation with a rational connection to its aim.....	297
	(ii) Establishing Unfair Discrimination.....	299
	(iii) Is the unfair discrimination justified?.....	300
9.4.1	Equality and Differentiation.....	304
	(i) The position of the complainants in society.....	305
	(ii) The nature and purpose of the power.....	306
	(iii) The impact on the complainants.....	306
	(iv) The nature and purpose of the measure.....	307
	(v) The impact on the complainants.....	307
	(vi) Justification.....	308
9.4.2	Non-Citizens Rights under the Equality Clause.....	309
9.5	Analysing the CC's Approach to the Equality Jurisprudence.....	311

**CHAPTER TEN THE CONSTITUTIONAL DIMENSIONS
OF AFFIRMATIVE ACTION IN THE
USA**

10.1	Overview.....	315
10.2	The Supreme Court Affirmative Action Cases.....	316
10.2.1	The <i>Bakke</i> Case.....	316
10.2.2	<i>Fullilove v Klutznick</i>	320
10.2.3	The <i>Weber</i> Decision.....	322
10.2.4	Affirmative Action and Layoffs — The <i>Wygant</i> and <i>Stotts</i> Decisions.....	323
10.2.4.1	The <i>Wygant</i> Decision.....	325
10.2.5	The <i>Sheet Metal Workers</i> Case.....	326
10.2.6	The <i>Paradise</i> Case.....	326
10.2.7	The <i>Johnson v Santa Clara</i> Case.....	328
10.3	Constitutional Turning Points — The Rehnquist Court and the CRA of 1991.....	328
10.3.1	The <i>Croson</i> Case.....	329
10.3.2	Attack on Affirmative Action in Court.....	330
10.3.2.1	<i>Hopwood v University of Texas</i> <i>Law School</i>	330
10.3.2.2	Affirmative Action Today.....	331
10.3.2.3	The <i>Grutter</i> Case.....	333
10.4	Analysing the Supreme Courts Decisions.....	344

**CHAPTER ELEVEN THE CONSTITUTIONAL
DIMENSIONS OF AFFIRMATIVE
ACTION IN INDIA**

11.1	The IC and the Equality Principle.....	341
11.1.2	Justifying Positive Discrimination under the IC.....	344
11.1.2.1	Article 14 — The Right to Equality in General.....	344

11.1.2.2	The Legislative or Permissible Classification of Equality.....	344
11.1.2.3	Article 15 — The Right to Equality in Particular.....	348
11.2	The IC and the System of Reservation.....	348
11.2.1	Reservations in Admissions.....	354
11.2.2	Reservation and the Merit Principle.....	356
11.2.2.1	The Constitutionality of Concessions for the Backward Classes.....	359
11.2.3	Reservation and the Seniority System.....	361
11.2.4	Extent of Reservation — An Individual’s Right to Equality vs Group’s Right to Equality.....	363
11.2.5	The Rules of Reservation.....	367
11.2.5.1	The Rules of Reservation and Reservation on the Basis of Merit.....	370
11.2.6	Reservations for Persons Falling Outside the Backward Classes.....	371
11.3	Equality in Matters of Employment or Appointment under Article 16.....	372
11.4	The Constitution and the Creamy Layer.....	376
11.5	Criteria for Defining the Backward Classes.....	379
11.6	The Problem with the Carry-Forward Rules.....	380
11.7	Analysing the Supreme Courts Decisions.....	383

PART V

MANAGING AFFIRMATIVE ACTION BETTER

CHAPTER TWELVE MANAGING AFFIRMATIVE ACTION BETTER

12.1	The Purpose of Looking to Other Jurisdictions.....	392
12.2	Does Affirmative Action Spell Equality or Justice?.....	394

12.2.1	Achieving Equality in a Constitutional Manner — What does this entail?.....	399
12.3	Proving Discrimination.....	402
12.4	Analysing the Effect of the US Jurisprudence on Affirmative Action.....	406
12.4.1	The Cost of Scepticism to Affirmative Action in the USA.....	408
12.4.2	The Trend Towards a Colour Blind Society in US Jurisprudence.....	410
12.4.3	The Effects of Ending Affirmative Action Prematurely.....	412
12.5	The Merit Principle and Equality.....	415
12.5.1	Quotas or Reservations and the Merit Principle.....	416
	12.5.1.1 Skills Development.....	419
12.5.2	Problems with Reservations and Quotas.....	420
12.6	The Creamy Layer Debate.....	423
12.6.1	Group vs Individual Rights.....	433
12.7	The Constitution and Other Forms of Equality.....	436
12.7.1	The Advancement of Human Rights and Freedoms — Equality and Socio-Economic Rights.....	436
12.8	Numerical Goals or Quotas? The Better Option.....	439
12.9	Why Legislative Measures Have Been a Failure in India.....	444
12.9.1	When Must Affirmative Action End?.....	449
12.10	The Governments Role in Ensuring Effective Affirmative Action.....	450
12.10.1	Enforcement and Monitoring.....	451
12.11	Affirmative Action — The Right Way and the Wrong Way.....	451
12.12	Conclusion.....	456

PART VI
BIBLIOGRAPHY

BOOKS, JOURNALS, MEDIA REPORTS, PAPERS AND THESES.....	460
CASE LAW.....	489
LIST OF STATUTES.....	506
REGULATIONS, GUIDELINES AND CODES OF GOOD PRACTICE.....	508
REPORTS AND DOCUMENTS.....	510
LIST OF CHARTERS, DECLARATIONS AND INTERNATIONAL INSTRUMENTS.....	511
WEBSITES.....	513