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

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**5.1 An Overview of Affirmative Action in SA, the USA and India**

This part of the thesis provides a theoretical background to affirmative action. It will focus *inter alia* on the meaning of affirmative action, the intended beneficiaries of affirmative action and the scope of affirmative action measures in SA, the USA and India. In fact, on a subject as complicated and controversial as affirmative action, it is as well to establish the scope of affirmative action before exploring its implications.

The current scope of affirmative action programmes is best understood as a consequence and continuation of efforts to remedy the oppression of racial and ethnic minorities and of women. In the US some affirmative action efforts began before the great burst of civil rights statutes in the 1950's and 1960's. However, in the US, SA and India, affirmative action efforts did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination. The historical background to affirmative action in the three countries shows that the approach to affirmative action concentrates on a history of injustice and is an attempt to end discrimination against certain individuals and groups of a population. Affirmative action has also been identified as a means of ending the inequalities faced by these persons in society.

In SA there is the history of apartheid and the segregation of white people from black people. In India, by contrast, there is what one commentator termed three thousand years of caste hierarchy, a product of indigenous, cultural, religious and political thought reproduced in detail within villages where local relationships of fear, subordination and labour are structured through the caste relationships. Rather than having a highly segregated society with townships and whole regions being set off for blacks or for whites, one has in India a situation where the caste hierarchy makes social relations and social change extremely difficult. In the US too, inter-group relationships play an

important part of the history of American culture. This is because, it is not just white versus other people of colour, but there is a history of immigration and to some degree absorption into white culture by various other ethnic groups. Looking at the historical chapters, these groups were identified and organised politically and economically as racially segregated groups at different phases in their histories.<sup>1</sup>

Looking at Part I, affirmative action was born in the US in the mid-1960s. It was the ex-US President Johnson who had introduced it as a policy that would redress racial imbalances that existed in the US in spite of constitutional guarantees and laws banning discrimination.<sup>2</sup> Under pressure from civil rights groups, Johnson's administration issued an EO that put affirmative action in place. These affirmative action measures were to focus specifically on education and employment.

So affirmative action in the US was initiated to rectify past injustices caused by racism. In India such measures were implemented to end caste discrimination and in SA affirmative action programmes are primarily aimed at the black majority who has historically suffered great injustices due to the apartheid system. Affirmative action in these three countries is unavoidable when looking at the extent of past discriminatory practices.

In SA, the discussion around affirmative action has evolved in the same way to that of the USA. In fact, it has been argued by many scholars that many of the provisions and information that eventually found their way into South African law were in fact adopted from the US experience.

Affirmative action itself produces deep feelings on all sides. A balanced analysis of this subject must begin with a basic knowledge of various aspects relating to affirmative

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<sup>1</sup> For example, the Irish, Italians, Asians etc.

<sup>2</sup> Msimang Sisonke Affirmative Action in the New South Africa — The Politics of Representation, Law and Equity (2001) Women In Action No.2 (Msimang) at <http://www.isiswomen.org/wia/wia100/hum00016.html> last visited 22/08/05.

action, for example, what is affirmative action?; what is the purpose of affirmative action?; is it the same in all circumstances?; and how does that purpose intersect with other goals of the government and the legal systems of the three countries? This chapter provides a basis for an understanding of what affirmative action is and who it applies to. There is a wide range of definitions on affirmative action as there are relevant literature. This chapter gives assistance to the reader in that it will attempt to give a definition of what current day affirmative action actually means and its intended synonyms.

The term “affirmative action” carries many meanings in today’s society. Often the terms itself elicit strong feelings; either positive feelings or negative feelings. Frequently these feelings arise from a misunderstanding of what affirmative action is all about.

## **5.2 Understanding Affirmative Action in SA**

The historical background to anti-discrimination legislation in SA and the extent of discriminatory practices in that country provides a background to an understanding of the need for present day affirmative action measures. As can be seen from Chapter Two, prior to 1994, black South Africans were unprotected by the law. The legal codes of the country categorised human beings as Africans, Coloureds, Indians or Whites.<sup>3</sup>

This history of apartheid in SA caused blacks to mostly occupy the lower ranks in companies. Further, blacks were given inferior education and had no or very little part to play in the country’s resources. According to Mkhwanazi “the economics of exclusion has found expression in the underdevelopment and under-utilisation of blacks in skilled, technical and managerial fields, both at macro and micro levels”.<sup>4</sup>

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<sup>3</sup> Msimang *op cit* 2. African refers to indigenous people without mixed race heritage, Indian refers to those of South Asian descent who were brought to South Africa as railway workers in the 1800's, Coloured refers to mixed race South Africans and white refers to the descendants of Dutch and English colonisers who are not of mixed-race heritage. The term “black” refers to all non-white South Africans.

<sup>4</sup> Mkhwanazi D New Breed of Managers needed in a new South Africa (1993) Human Resource Management V(9) No.9 at 14-17 (Mkhwanazi).

Given this history the new government has focussed its attention on changing the laws of the country so that they would reflect the spirit of the new Constitution. Looking at who the disadvantaged person of society is, the government set about writing proactive laws that would encourage the hiring of blacks, disabled people and women, as well as to guarantee their attendance at institutions of higher learning. Having gained political democracy<sup>5</sup> as a nation, the South African labour market is on the threshold of workplace democracy.<sup>6</sup> In order to accelerate the democratisation process the government introduced new labour laws to promote fair labour practices and to encourage employee participation. The autocratic management styles which were practised by most managers in the past are no longer acceptable in this new democracy. Today's employees demand equality, transparency and autonomy in their work.

This meant drafting legislation to ensure that all South Africans would be able to compete for jobs on an equitable basis. As such, the Ministry has drafted numerous pieces of legislation. Among these labour laws were the Labour Relations Act of 1995 (LRA), the Basic Conditions of Employment Act of 1997 (BCEA), The Skills Development Act of 1998 (SDA) and the Employment Equity Act of 1998 (EEA).

The LRA and the BCEA have been instrumental in setting out the parameters under which workers can be employed and organised. The BCEA establishes clear rules about overtime, working hours and remuneration while the LRA allows legal strikes and industrial action for all workers for the first time. Most relevant for the purposes of this thesis is the EEA.

Looking at the labour market inequalities, the EEA specifically provides for the implementation of affirmative action to redress the disadvantages of the past. One can see that the term itself has at its root the idea of giving preference or privilege to those

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<sup>5</sup> The word "democracy" is commonly interpreted to encompass the principle of equal rights and that of "the government of the people by the people".

<sup>6</sup> As a concept, workplace democracy is used increasingly with reference to workplace transformation in the new SA.

who had been previously disadvantaged or marginalised. In SA it has its roots in colonial history. Sachs states that —

“[A]ffirmative action in the South African context has extremely broad connotations, touching, as apartheid did and still does, on every area of life .....affirmative action covers all purposive activity designed to eliminate the effects of apartheid and to create a society where everyone has the same chance to get on in life.....”<sup>7</sup>

The term itself has been controversial and alternative terminology has been used to define or describe affirmative action.<sup>8</sup> These alternatives include terms like black advancement, equal opportunities, preferential treatment, career development programmes<sup>9</sup>, to management of diversity. Affirmative action is concerned with the notion of equality, specifically for the purpose of this thesis, with equality in the workplace. What follows is a brief examination of the term “affirmative action” and its synonyms.

Affirmative action is seen as a means of correcting historical injustices and levelling the playing fields to enable all South Africans to gain equal access to opportunities from which they were previously restricted.<sup>10</sup> Mkhwanazi<sup>11</sup> defines affirmative action as a “deliberate and sustainable interim strategy” aimed at enhancing the abilities and capacities of disadvantaged groups to enable them to compete on an equal footing with those who benefited from the apartheid system. Affirmative action is seen as a set of procedures aimed at proactively addressing the disadvantages experienced by sections of the community in the past.

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<sup>7</sup> Sachs A Affirmative Action and Good Government (1991) at 14-15 (Sachs).

<sup>8</sup> Herbert T Affirmative Action in the South African Workplace (1994) at 25.

<sup>9</sup> Charoux E Coaching and the Black Manager (1990) at 10.

<sup>10</sup> Thomas A Beyond Affirmative Action — Managing diversity for competitive advantage in South Africa (1996) at 6 (Thomas).

<sup>11</sup> Mkhwanazi *op cit* 4 at 14-17.

It is important to note right from the start that affirmative action is not necessarily a single policy or strategy; rather there can be a number of different ways of implementing affirmative action.<sup>12</sup> Affirmative action is also described as a temporary or interim strategy that will enable an employer to achieve equality at work “without lowering standards and without unduly limiting the prospects of existing competent employees”.<sup>13</sup>

Khoza<sup>14</sup> adopts this approach —

“Affirmative action is a form of positive discrimination used as a measure to correct imbalances created by generations of oppression. It has been called different names at different times: whether you call it affirmative action, black advancement, equal opportunity employment, or strategic resourcing.....the issue remains: the need to redress discriminatory employment practices.”

Andrews<sup>15</sup> contends that affirmative action entails drawing up preferential policies to ensure the employment, upgrading and retention of members of certain less fortunate groups of society. Wingrove<sup>16</sup> summarises affirmative action definitions by defining affirmative action as a process aimed at redressing the disadvantage caused by poor education, prejudice, segregation, job reservation, racism, the lack of political rights and the unequal distribution of wealth.

A distinction is made between the broader concept of affirmative action and affirmative action in employment. The Green Paper on Affirmative Action defines affirmative action as a strategy for the achievement of employment equity through redressing imbalances in the organisational culture of a company and by ameliorating the conditions of individuals

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<sup>12</sup> Innes D Affirmative Action — Issues and Strategies (1993) at 4-5.

<sup>13</sup> Andrew Levy and Associates What is Affirmative Action? (1998).

<sup>14</sup> Khoza H Affirmative Action — A Personal View (1993) at 77-85.

<sup>15</sup> Andrews Y Affirmative Action — A suspected equaliser SAIPA (1993) (V)27 No. 1 at 34-43 (Andrews).

<sup>16</sup> Wingrove T Affirmative Action A “how to” guide for managers (1993).

and groups in the workplace.<sup>17</sup> This definition takes on board the broad objectives of affirmative action which emphasise affirmative action as a transformational and corrective mechanism. The upliftment of previously disadvantaged groups is seen as a means of correcting imbalances created by apartheid and should therefore be an integral part of the affirmative action process.

This implies that these disadvantaged people should be given special treatment.<sup>18</sup> According to Meintjies — “this view stresses the need to remove obstacles to advancement, as well as the need for extra support and resources for people traditionally excluded”.<sup>19</sup> Hattingh stresses this view of affirmative action by stating that affirmative action is a means of correcting “imbalances regarding employment ratios in terms of race groups enabling the previously disadvantaged to enjoy equal opportunity within the workplace”.<sup>20</sup>

So there are specific definitions of affirmative action that places the focus on equal treatment of all people at the workplace and emphasises interventions aimed at the creation of equal employment opportunities. Such definitions focussing on equality in the workplace emphasises the unbiased treatment of all employees when recruiting, selecting, developing or promoting. Equity in managerial positions is often highlighted in definitions promoting the equal opportunity strategy as blacks were traditionally excluded from these positions and were forced to occupy only the lower ranked positions.

McDonald stresses this standpoint by stating that affirmative action involves integrating the majority of the population in SA into the management hierarchy of South African businesses through the adoption of compensatory discrimination to ensure equality of

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<sup>17</sup> COSATU A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service (1997) GG GN 851 of 1997 V(383) No. 18034 (COSATU).

<sup>19</sup> Meintjies F *Confronting Discrimination in Organisations Reversing Discrimination — Affirmative Action in the Workplace* (1993).

<sup>20</sup> Hattingh B *Affirmative Action* (1994) *Information Technology Review* V(7) 16-19 at 17.

employment opportunities and an equitable distribution of these opportunities over all the levels of the management hierarchy.<sup>21</sup> This therefore, views affirmative action as a means to create a workplace free from any form of discrimination.

### ***(5.2.1) Employment Equity and Affirmative Action***

One of the main purposes of affirmative action is the achievement of employment equity in the workplace. The purpose of the EEA is the redressing of these imbalances of the past.<sup>22</sup> The EEA recognises that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market. It also recognises that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.<sup>23</sup> Employment equity legislation therefore became an imperative to address economic inequality in SA.<sup>24</sup>

The essence of employment equity is to eradicate all forms of unfair discrimination in terms of employment policies<sup>25</sup> and to initiate steps that will encourage employers to implement programmes to accelerate the training and promotion of historically disadvantaged people.<sup>26</sup> Employment equity centres on the eradication of unfair discrimination of any kind in hiring, promotion, training, pay, benefits and retrenchment.<sup>27</sup>

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<sup>21</sup> McDonald J D Changing the Colour of South Africa's Management (1994) South African Journal of Labour Relations V(18) No. 241-65 at 245.

<sup>22</sup> Preamble to the Employment Equity Act 55 of 1998 (EEA).

<sup>23</sup> The EEA 55 of 1998 (Assented to on 12 October 1998) as stated in the Preamble of the Act.

<sup>24</sup> Adams C (ed) Affirmative Action in a Democratic South Africa (1993) at 110 (Adams).

<sup>25</sup> These policies include hiring, promotion, training, remuneration, benefits and retrenchment practices.

<sup>26</sup> S P A Consultants Implementing Equity in the Workplace (1996).

<sup>27</sup> Employment equity is the term used in Canada and elsewhere to connote principles and procedures to ensure that the work force becomes representative of the talents and skills of the whole population.



Under the EEA equal opportunity and fair treatment in employment will be achieved through the elimination of unfair discrimination and the implementation of affirmative action measures to redress the disadvantages experienced in employment.<sup>28</sup> Affirmative action is considered to be one step toward the achievement of employment equity involving “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer”.<sup>29</sup>

Affirmative action seeks to reverse the effects of past discrimination by increasing the presence of historically excluded groups in a workforce or section thereof, mainly through hiring, recruitment and promotions, whilst employment equity seeks to eradicate discrimination and eliminate barriers to entry and advancement for members of designated groups, through a wide range of measures.<sup>30</sup> Affirmative action is not intended to be a permanent measure, as opposed to equity which is an ongoing process and will end once the broader goal of workplace equity has been achieved.

Thus, the goal of any affirmative action programme must be to promote equal opportunity or employment equity. Affirmative action is only one of several tools used in the public and private sectors to move a country away from a world of continuing biases and the banes of prejudice, toward one in which opportunity is equal. Affirmative action measures recognise that existing patterns of discrimination, disadvantage and exclusion may require race — or gender-conscious measures — to achieve that equality of opportunity.

### ***(5.2.2) Equality and Affirmative Action***

The concept of equality is another important aspect with regard to affirmative action measures. As equality in relation to affirmative action will be discussed in great detail in

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<sup>28</sup> Section 2 (a) of the EEA.

<sup>29</sup> Section 15 (1) of the EEA.

<sup>30</sup> These measures are aimed at correcting under-representivity and promoting diversity in the workplace including affirmative action.

Parts III and IV of this thesis, for the sake of completeness of this chapter I will briefly discuss the concept of equality. This is important as the achievement of equality is considered to be one of the most important goals of affirmative action measures.

The Green Paper on affirmative action points out that “equality” is the point around which affirmative action turns.<sup>31</sup> The interpretation of the concept of equality contained in the South African Constitution as encapsulating both formal and substantive equality is important for affirmative action. It has been stated that —

“In South Africa, the quest for affirmative action is located within the pursuit of substantive equality in the workplace. Substantive equality necessitates the acknowledgement and eradication of the actual social and economic conditions that generate inequality in individual’s and group’s lives. Substantive inequality presupposes the existence of formal equality. It is premised on the assumption that social goods (rights, entitlements, opportunities, access) are not equally distributed throughout society and that deeply entrenched indirect controls generate disadvantage and prevent the disadvantaged from equality of access and enjoyment of rights.”<sup>32</sup>

Looking at this approach to equality, in India too, it was the realisation that the provision of formal equality would not suffice to bring about the desired “equality of status and of opportunity”.<sup>33</sup> This approach to equality has led to various adoptions of preferential treatment programmes. In the *Hariharan Pillai* case the Full Bench of the Kerala High Court held —

“It has.....been realised that in a country like India where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees of equality would be meaningless unless provision is made for the upliftment of such backward classes who are in no position to compete with the more advanced classes. Thus to give meaning and content to the equality guaranteed by Articles 14, 15,

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<sup>31</sup> COSATU *op cit* 17.

<sup>32</sup> *Ibid.*

<sup>33</sup> Galanter M *Competing Inequalities — Law and the Backward Classes* (1984) at 378 (Galanter).

16 and 29, provision has been made in Articles 15(4) and 16(4) enabling preferential treatment in favour of the weaker sections.”<sup>34</sup>

The basic premise therefore, for regulating affirmative action is that equality cannot be achieved by merely removing all discriminatory legislation. In a sense, the equal treatment of unequals will foster inequality. The SC of India has observed that guarantees of equality might by themselves aggravate existing inequalities.<sup>35</sup> Only by proactively reversing the negative effects of discriminatory legislation can equality in the workplace be achieved.<sup>36</sup> This is also in line with the concept of substantive equality adopted by the CC of SA —

“Substantive equality is envisaged when s 9(2) unequivocally asserts that equality includes the ‘full and equal enjoyment of all rights and freedoms’. The State is further obliged to promote the achievement of such equality by legislative and other measures designed to protect and advance persons or categories of persons, disadvantaged by unfair discrimination, which envisages remedial equality.”<sup>37</sup>

In this sense, then, affirmative action seeks to achieve substantive equality and not merely formal equality.<sup>38</sup>

### **5.3 The Beneficiaries of Affirmative Action in SA**

Affirmative action measures are not meant to benefit all citizens of SA. By looking at who the previously disadvantaged people of apartheid-SA were, the government of SA

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<sup>34</sup> *Hariharan Pillai v State of Kerala* (1968) AIR 42 (Ker.) at 47-8.

<sup>35</sup> *Triloki Nath Tikku v State of Jammu and Kashmir* (1967) AIR 1283 (SC) at 1285.

<sup>36</sup> The EEA therefore embraces a concept of equality that is both substantive and proactive, seeking not only to address and eradicate instances of unfair discrimination, but also to impose positive duties to advance equality in all aspects of the workplace. Solomon M The Regulation of Affirmative Action by the Employment Equity Act 55 of 1998 (1999) SAMLJ V(II) No. 299 at 231-239.

<sup>37</sup> *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (1999) (1) SA 6 (CC) at para 62.

<sup>38</sup> See Part III, Chapter Nine, for a more comprehensive discussion on the Constitutionality of Affirmative Action in SA.

has identified the following groups to be beneficiaries of affirmative action measures. They are black people; women and people with disabilities. The term “black people” is used in the generic sense to include Africans, Coloured’s and Indians. “People with disabilities” refers to people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.<sup>39</sup>

According to the EEA —

“Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”<sup>40</sup>

Therefore the intended beneficiaries of affirmative action in SA are Black people, women and people with disabilities who are suitably qualified to perform a specific job.<sup>41</sup>

Since the ultimate goal is to perfect and realise this ideal of equal opportunity and equality, affirmative action cannot supplant the concept of merit, because to do so would unfairly deprive others of opportunities that is their due. Employers must make sure that designated groups have equal opportunities in the workplace. Designated groups must be equally represented in all job categories and levels. In other words, it would be wrong if an unqualified person receives a preference and is thereby, chosen for a job, a scholarship, or a federal contract over a qualified person in the name of affirmative action. Affirmative action measures are meant to ensure the equitable representation of suitably qualified persons from the designated groups.

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<sup>39</sup> Code of Good Practice on Key Aspects of Disability in the Workplace (2001).

<sup>40</sup> Section 15(1) of the EEA.

<sup>41</sup> Section 13(1) of the EEA.

#### **5.4 Suitably Qualified Candidates for Affirmative Action Programmes**

The EEA requires an employer to ensure the appointment of employees who are suitably qualified to perform the inherent requirements of a job. It therefore explicitly rejects tokenism. A designated employer is not required to appoint persons who are not suitably qualified.<sup>42</sup> In determining whether or not a job applicant is “suitably qualified” an employer<sup>43</sup> is obliged to take into account all the requirements listed in section 20(3) of the EEA. These requirements are —

- Formal qualifications;
- Prior learning;
- Relevant experience; or
- The capacity to acquire within a reasonable time, the ability to do the job.

The employer must determine if the applicant has the ability to do the job as a result of having one or more of these requirements. When an employer is recruiting or selecting a potential candidate for employment he must review *all* these factors, and assess whether the person has the skills and competencies to do the job. The employer may however, not exclude an applicant solely because of the lack of relevant experience.<sup>44</sup>

Sections 20(3) to (5) apply to the evaluation of whether an employee is suitably qualified for a job for the purposes of the EEA as a whole. In other words the requirements for determining whether or not an applicant is suitably qualified for a job are relevant to determining a claim of unfair discrimination instituted in terms of Chapter II, regardless of whether the employer is a designated employer or not.

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<sup>42</sup> Section 20(2)(g) of the EEA.

<sup>43</sup> Section 20(2)(h) of the EEA.

<sup>44</sup> Section 20(5) of the EEA.

## **5.5 Understanding Preferential Treatment Programmes in the USA and its Definitions**

Acknowledging that the term “affirmative action” is a highly debated and volatile concept in the USA and other countries, the basic notion of what affirmative action means in the US, is simplified in this chapter to give the reader an understanding of the common factors attached to this term in this and other countries.<sup>45</sup>

Most people in the US became familiar with the term affirmative action in the late 1960's and early 1970's when federal contractors were first required to design and carry out affirmative action programmes. EO 11246 which was signed by President Lyndon Johnson on September 24, 1965 which required that federal contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin”. The EO goes on to say that —

“Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.”

The problem is that even though EO 11246 specifies that affirmative action is one of the conditions of agreeing to do work for the government, it does not define affirmative action. This lack of a definition in the USA leaves affirmative action initiatives very vulnerable, as will be seen in the next part to this thesis. Even though the statutes in the US are silent on the definition of affirmative action the OFFCP’s manual does give a definition to affirmative action programmes. According to the manual, affirmative action consists of —

“Those results oriented actions which a contractor by virtue of its contracts must take to ensure equal employment opportunity. Where appropriate, it includes goals to correct

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<sup>45</sup> The reason for this is that Chapter Eleven will look in great detail at the US courts approach to affirmative action and the various definitions attached to this concept.

underutilisation, correction of problem areas, etc. It may also include relief such as back pay, retroactive seniority, make-up goals and timetables, etc.”<sup>46</sup>

Essentially the same definition occurs in Title 41 of Chapter 60 of the Federal Regulations where the regulations outline what constitutes an affirmative action programme. The language that appears in the regulation states that —

“An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity.”

In the USA, where affirmative action has had a longer spell of implementation, Brown and Connerly states that —

“As a general rule affirmative action consists of three components: measures aimed at eliminating discrimination in hiring, promotions and terminations; programs to increase the representation of women and minorities in government employment and contracting; and policies for special admissions to institutions of higher learning, which are always the gateways to the nation’s best jobs.”<sup>47</sup>

Jones<sup>48</sup> defines affirmative action in the US as “public or private actions or programmes which provide, or seek to provide, opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups”.<sup>49</sup> Affirmative action in the US can be further defined as the “setting of goals and the writing of policies

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<sup>46</sup> US Department of Labor Employment Standards Administration Federal Contract Compliance Manual (1979).

<sup>47</sup> Brown W and Connerly W Choosing Sides (1995) Black Enterprise V(26) No. 4 156-157 at 156.

<sup>48</sup> Jones J The Origins of Affirmative Action (1988) at 383-385 (Jones).

<sup>49</sup> See in this regard Jones *op cit* 48 at 383-385.  
It must be noted here that although such race-conscious programmes are rooted in the legal history of the US, opponents of these measures argue that the notion of affirmative action is contrary to a principle of a colour-blind application of the Constitution of the USA and fair employment laws.

which should create equality and social balances in the workplace”.<sup>50</sup> Synonyms used to define or describe affirmative action includes; “positive action”<sup>51</sup>, “reverse discrimination”, “affirmative discrimination”, or “quotas”.<sup>52</sup> Some commentators in the US have characterised affirmative action as a policy “designed to right the wrongs of the past”<sup>53</sup> as a quota system or as a set of remedial programmes aimed to compensate for the inadequacies of people of colour or of women.<sup>54</sup>

The term “affirmative action”, like in SA and India, encompasses a broad spectrum of measures and initiatives which are utilised to “overcome the effects of past or present policies, practices or other barriers to equal opportunity”.<sup>55</sup> These initiatives are very much like the initiatives adopted by SA and India and include training programmes,<sup>56</sup> recruitment, voluntary affirmative action measures,<sup>57</sup> changes in promotion and retrenchment procedures<sup>58</sup> and also includes the elimination of adverse impact relative to an employer’s selection criteria.<sup>59</sup> Unlike SA, but very much like the practices in India, the US provides for a quota system.<sup>60</sup>

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<sup>50</sup> Ross J J Equal Employment Opportunities Compliance (1973) at 35-37.

<sup>51</sup> Parekh B in Hepple B *et al* Discrimination — The limits of the law (1992) at 269 (Hepple).

<sup>52</sup> See generally Dworkin R A Matter of Principle (1985) at 316-331.

<sup>53</sup> Belz H Equality Transformed — A Quarter Century Transformed News (1991).

<sup>54</sup> Roberts P C and Stratton L M The New Colour Line — How Quotas and Privilege Destroy Democracy (1995).

<sup>55</sup> Equal Employment Opportunity Commission Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 (1985) 29 CFR 1608.1(c).

<sup>56</sup> *United Steelworkers of America v Weber* (1979) 443 US 193 at 255.

<sup>57</sup> *United Steelworkers of America v Weber* (1979) 443 US 193 at 256.

<sup>58</sup> *Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561.

<sup>59</sup> *Griggs v Duke Power Company* (1971) 401 US 424.

<sup>60</sup> *Adarand Constructors Incorporated v Frederico Pena, Secretary of Transportation* (1995) 115 S.Ct. 2097.



Goldman argues that there are two goals that are attached to the practices of affirmative action in the US. These have been characterised as forward — and backward looking goals.<sup>61</sup> Forward-looking goals focuses on the promotion of equality of opportunity by relief from discrimination and the meeting of needs,<sup>62</sup> whilst backward-looking goals emphasises the remedial nature of the practices as a means of compensating persons for past harm and injustices resulting from negative discrimination.<sup>63</sup> In India it has been argued that this form of compensatory justice would require that “counter-balancing benefits be provided to those individuals who have been wrongly injured and which will serve to bring them up to the level of wealth and welfare that they would now have, if they had not been disadvantaged”.<sup>64</sup> The notion of compensatory justice implies that the burden actually falls on those who are responsible for causing injury to the recipients.<sup>65</sup>

The aim of compensatory justice is to provide counterbalancing benefits to those individuals who have been wrongfully injured in the past so that they could be brought up to the level of wealth and welfare that they would now have had if they had not been disadvantaged. Thus, compensatory programmes differ from redistributive programmes mainly in regard to their concern with the past. Redistribution is concerned with eliminating present inequalities while compensatory justice is concerned not only with this, but also with providing compensation for unfair burdens imposed in the past.<sup>66</sup> Considerations of compensatory justice can justify a person getting more in the present than he would unless his past losses are considered. Edwards has identified five broad

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<sup>61</sup> Goldman A Affirmative Action (1976) *Philosophy and Public Affairs* V(5) No. 2 at 178-95.

<sup>62</sup> Commonly referred to as the distributive goal.

<sup>63</sup> This is commonly referred to as the compensatory goal.

<sup>64</sup> Anand C L Equality Justice and Reverse Discrimination (1987) at 53 (Anand).

<sup>65</sup> *United Steelworkers of America v Weber* (1979) 443 US at 223.

<sup>66</sup> *International Brotherhood of Teamsters v United States* (1977) 431 US 299.

aims for affirmative action programmes in the US; compensation, equality of opportunity as an end in itself and as a means to other ends, diversity and racial equality or justice.<sup>67</sup>

Affirmative action goals in the US is similar to affirmative action goals in SA and India. It is seen as a means of achieving equality. Where equality of opportunity is seen as a means of compensation for past harms it will generally be seen as an end in itself.<sup>68</sup> When affirmative action is used to meet needs, it is generally seen as contributing to greater equality of opportunity<sup>69</sup> or as an end in itself.<sup>70</sup>

Affirmative action in the US can be further defined as an outreach programme intended to broaden the pool of eligible or qualified individuals to include more members of specific groups; targeted or compensatory training to upgrade the qualifications of individuals in these groups; goals and timetables to measure progress; preferences; set-asides; and (sometimes) actual quotas. Affirmative action programmes have arisen as a result of executive orders, legislation, consent decrees stemming from government investigations, court-ordered remedies, and voluntary action by corporations and other non-public institutions.

The distinction between government-mandated and voluntary programmes is important. For the most part, court decisions restricting public programmes on constitutional grounds do not directly affect voluntary programmes in the private sector. Some scholars argue that retrenchment in public programmes could nonetheless lead to private-sector retreat. “Without government enforcement”, writes sociologist Alan Wolfe, “some

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<sup>67</sup> Edwards J When Race Counts — The Morality of racial Preference in Britain and America (1995) at 29 (Edwards).

<sup>68</sup> That is, fulfilling a requirement of justice and not as a mean to other ends. See in this regard Edwards J *op cit* 67 at 30.

<sup>69</sup> For example through skills training.

<sup>70</sup> By way of fulfilling the needs principle of justice and hence promoting distributive justice.

private companies may indeed drop their enthusiasm for diversity and retreat to birds of a feather hiring policies.”<sup>71</sup>

Looking at the historical background to affirmative action in the US,<sup>72</sup> the basis behind affirmative action is that because of past discrimination and oppression, such as the unequal treatment of women, and the enslavement of African Americans, minorities and women have difficulty competing with their white male counterparts. Affirmative action is a term, which refers to a variety of efforts used by employers and educational institutions to overcome past and continuing discrimination in order to allow qualified women and minorities to compete equally for jobs, education, and promotional opportunities.

Affirmative action in the USA can be identified as a programme that became law with the passage of the Equal Employment Opportunity Act of 1972, whereby employers, labour unions, employment agencies, and labour management apprenticeship programmes must actively seek to eliminate minorities. Although Title VII of the Civil Rights Act of 1964 (CRA) had outlawed future discriminations in employment practices, it had done nothing to redress already existing imbalances. The 1972 law, later strengthened by executive orders, requires employers to take positive steps, to draw up a detailed written plan for equalising economic salaries, training programmes, fringe benefits and other conditions of employment. These plans included numerical goals and timetables for achieving such changes.

Affirmative action became Government programmes intended to assure minorities of equal hiring, educational, and other admission opportunities. It was introduced in the US by President Johnson under the CRA.<sup>73</sup>

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<sup>71</sup> Wolfe Alan Guess Who Likes Affirmative Action? (1996, November 25).

<sup>72</sup> See Chapter Three of Part I.

<sup>73</sup> The CRA was signed on July 2, 1964 and first enforced on September 24, 1965 under EO 11246.

Some of the positive steps envisaged were steps to enhance the diversity of some groups, often to remedy the cumulative effect of subtle as well as gross expressions of prejudice. When numerical goals are set, they are set according to the group's representation in the applicant pool rather than the group's representation in the general population. For example, a medical school with an affirmative action programme would seek to admit members of an under-represented group in proportion to their representation in the population of those who had completed pre-medical requirements and wished to attend medical school.

The affirmative action programmes in the USA included policies which seek to compensate victims of previous racial and other forms of discrimination, to remedy lingering effects of such discrimination, or to combat ongoing institutionalised and unintentional discriminatory practices by providing reverse preferences favouring members of classes who were previously disadvantaged.

### **5.6 The Beneficiaries of Affirmative Action in the USA**

Like SA, those positive steps taken by an employer to ensure the provision of equal employment opportunity were meant to cover only persons previously disadvantaged or thought to be disadvantaged by past discrimination. So the original reasoning behind affirmative action in the US was conceived as a means to compensate African Americans for centuries of slavery, as newly granted legal equality was considered insufficient to redress African American grievances.

However, even though the original incentive for affirmative action in the USA was the advancement of African Americans only, the initiative quickly expanded to encompass various other racial minorities that had never suffered from slavery but were the victims of other forms of discrimination. The groups now protected by a series of federal legislation include American Indians or Native Americans, Hispanics and Asians. In addition, newly immigrated Africans without any enslaved ancestors are entitled to benefit as well. Women were later included as candidates for affirmative action

programmes as a result of the women's liberation movement.<sup>74</sup> Later persons with disabilities, the Vietnam-era veterans, and special disabled veterans were included to be beneficiaries of affirmative action measures. Therefore, affirmative action regulations now cover minority persons, women, persons with disabilities, Vietnam-era veterans, and special disabled veterans.

Although it is well known which ethnic groups and races are preferred or "protected" by the Government, almost no list or enumeration is made in writing, presumably because of a fear that such a list would be held unconstitutional as a form of invidious discrimination against groups not on the list.

However, the definitions of targeted minority groups used by the federal government may be defined as the following —

- America Indian or Alaskan Native — Persons having origins in any of the original people of North America, and who maintain cultural identification through tribal affiliations or community recognition.
- Asian or Pacific Islander — Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.
- Black, not of Hispanic Origin — Persons having origins in any of the black racial groups of Africa.
- Hispanic — Persons of Mexican, Puerto Rican, Cuban, central or South American or other Spanish Culture or origin, regardless of race.<sup>75</sup>

Further, employers on or near Indian reservations are permitted by Title VII of the CRA to give preferential treatment to Indians living on or near that reservation, with respect to

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<sup>74</sup> Beach D S Personnel — The management of people at work (1991) 5ed.

<sup>75</sup> Holloway A Frances in Blanchard F A & Crosby F J Affirmative action in Perspective (1989) 9-19 at 10-11.

any publicly announced employment practice.<sup>76</sup> This preference, allowing preferential treatment to be given to an individual because he is an Indian living on or near a reservation, does not allow discrimination based on tribal affiliation,<sup>77</sup> although at least one circuit has held that tribal membership requirements may apply.<sup>78</sup>

Legislation enacted in the 1970's broadened the scope of affirmative action originally established by EO 11246. The Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Act of 1974 (VEVRA) require federal contractors to develop, maintain, and update written affirmative action plans for the employment of handicapped persons and for disabled veterans and veterans of the Vietnam era.

Further, Title VII of the CRA explicitly states that nothing in the statute may be construed to repeal or modify any federal, state, territorial, or local law creating special rights or preferences for veterans.<sup>79</sup> Vietnam-era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorised are protected in employment by the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.<sup>80</sup> The law requires that employers with Federal contracts or subcontracts of US\$25,000 or more provide equal opportunity and affirmative action for Vietnam-era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorised.

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<sup>76</sup> 42 USCA §2000e-2(I).

<sup>77</sup> *Dawavendewa v Salt River Project Agr. Imp. and Power Dist.* (2000) 154 F.3d 1117 (9<sup>th</sup> Cir.).

<sup>78</sup> *Mullenburg v US* (1988) 857 F.2d 770 (Fed. Cir.).

<sup>79</sup> 42 USCA §2000e-2(h).

<sup>80</sup> 38 USC 4212.

Unlike SA where it is the majority of the population, i.e., the Africans who are the primary beneficiaries of affirmative action measures, in the US affirmative action is specifically targeted at minority groups.

There is a grey area in law about whether or not affirmative action is meant to benefit non-citizens of America. According to the Fourteenth Amendment all persons born or naturalised in the US are American citizens and citizens of their state of residence.<sup>81</sup> The citizenship of African Americans was thereby established and the effect of the *Dred Scott*<sup>82</sup> case was overcome. The section forbids the states to abridge the privileges and immunities of US citizens, to deprive any person of life, liberty, or property without due process of law and to deny any person the equal protection of the laws.<sup>83</sup>

Section 1 of the Fourteenth Amendment has been used extensively by the US SC to test the validity of state legislation. The privileges and immunities of citizenship have never been defined by a majority of the court, but some justices have argued that among the activities envisaged are freedom to cross state boundaries and freedom to gather for the discussion of legislation in a peaceful manner. The court has preferred to base its decisions on the due process and the equal protection clauses, which apply to all persons irrespective of citizenship.<sup>84</sup>

However, a number of different laws cover employees who immigrate to the US from another country. Title VII and other anti-discrimination statutes protect all employees regardless of their citizenship or work status. This means that regardless of whether a person is a US citizen or not, an employer may not discriminate on the basis of their race, colour, national origin, sex, religion, disability or age. Citizenship requirements intended to discriminate on the basis of national origin are usually illegal.

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<sup>81</sup> See section 1 of the Fourteenth Amendment.

<sup>82</sup> *Dred Scott v Sandford* (1857)15 L Ed 691.

<sup>83</sup> A similar provision restraining the federal government is in the Fifth Amendment.

<sup>84</sup> The term “person” was soon applied to corporations as well as human beings.

In SA, the court in the *Larbi-Odam* case has held that discrimination on the basis of citizenship could be discriminatory.<sup>85</sup> The Court has further held that denying permanent residents job security when they are allowed to live and work in SA indefinitely (and to apply in due course for citizenship) was unfair discrimination. In general, employment opportunities should be available to permanent residents and South African citizens on an equal basis.

### **5.7 Suitably Qualified Candidates and the Use of Quotas**

Although the US has adopted the quota system, the courts have rejected the use of these quotas to a certain extent.<sup>86</sup> It is submitted that affirmative action in the college admissions process has, in the decades following *Bakke*, been primarily an ethical rather than a legal issue. *Bakke* decided that as long as the decision process of whom to admit or not to admit in university admissions did not employ strict racial quotas, colleges could choose to accept whomever they wanted.

Insofar as the question is an ethical one, the bulk of the disagreement is over whether or not affirmative action increases fairness in the admissions process. Additionally, the debate over affirmative action raises the question of what role diversity in student bodies play in both the academic mission of a university and in the quality of life on a campus. It is submitted that the use of strict quotas will never ensure fairness in admissions.

It would seem that even though American law does not agree with a system of strict quotas, the use of set-aside programmes is equivalent to the quota system as it is used in the Indian system of reservations.<sup>87</sup>

Like SA, the courts of the USA advocate the use of goals. The difference between a quota and a goal is that a quota is a number that must be achieved. Consequently, if a

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<sup>85</sup> *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* (1997) 12 BCLR 1655 (CC).

<sup>86</sup> Racial quotas for public colleges were declared unconstitutional by the SC in the case of *University of California Regents v Allen Bakke* (1978) 438 US 265.

<sup>87</sup> See for example the case of *Adarand Constructors Inc. v Pena* (1995) 115 S.Ct. 2097.



company fails to show it has made an effort toward following this quota the company can be fined. This is different from an affirmative action goal. A goal is a flexible percentage, which is established by the company to achieve a diverse workforce. The percentage is based on the availability of minorities or persons from designated groups in a specific area. The recruitment efforts of an employer must ensure that every applicant pool includes a diverse mix of people.

To achieve these goals, an employer must make sure that many people are made aware of job openings as soon as possible to ensure that the applicant pool is reflective of the number of people who are suitably qualified. To accomplish this, employers must place advertisements in different sources for example journals, newspapers, publicising job notices in locations that are seen by a wide range of people, etc. Goals and timetables encourage the hiring of members from designated and minority groups.

These programmes are not intended to reach out to unqualified individuals but instead are designed to increase the number of qualified applicants for employment. If among a list of finalists for a job there is a woman or a minority candidate, that candidate shall be chosen unless another candidate is proven to be better qualified. Critics attack affirmative action by assuming that it results in the hiring of less qualified minorities over more qualified whites.<sup>88</sup> Like the position in SA, affirmative action in the US, is not about hiring less qualified workers, but about looking for employees in various places. Affirmative action used correctly only brings in qualified people.<sup>89</sup>

Unfortunately American law does not adequately define what is meant by the term “qualified” people. This is one of the reasons that the American people believe that affirmative action is strictly a quota system whereby a person is preferred only because of his or her colour and is therefore unfair discrimination. However, both the Rehabilitation

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<sup>88</sup> Lewis Brian C An Ethical and Practical Defense of Affirmative Action (1996) at 6.

<sup>89</sup> Hirsch J Affirmative Action (1996) at 4.

Act of 1973<sup>90</sup> and ADA<sup>91</sup> define what qualified individual means. These definitions are however not helpful when one is looking to choose the most qualified affirmative action individual for the purposes of admissions to universities or jobs.

### ***(5.7.1) Quotas and Executive Order 11246***

According to EO 11246 numerical goals are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. The EO numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The EO and its supporting regulations do not authorise the OFCCP to penalise contractors for not meeting goals. The regulations specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals.<sup>92</sup> In other words; unfair discrimination in the selection decision is prohibited.

## **5.8 Caste and Reservations in India**

The concept of affirmative action is generally referred to in international law as “special measures”.<sup>93</sup> The first mention of these “special measures” was made by the Government of India during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). India suggested that an explanatory paragraph should be included in the text of article 2 specifying that —

“Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively,

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<sup>90</sup> 29 CFR §1614.203(a)(6).

<sup>91</sup> 42 USCA §12112(8).

<sup>92</sup> The regulations at 41 CFR 60-2.12(e), 60-2.30 and 60-2.15.

<sup>93</sup> Devanesan Nesiah *Discrimination With Reason? The Policy of Reservations in the United States, India and Malaysia* (1997) at 344.

the Committee might wish to insert in its report a statement, which would make that interpretation clear.”<sup>94</sup>

Although many other nations are characterised by social inequality, perhaps nowhere else in the world has inequality been so elaborately constructed as in the Indian institution of caste. Caste has long existed in India and has undergone significant change since independence, but it still involves millions of people in India. In much of Asia and parts of Africa, caste is the basis for the definition and for the exclusion of distinct population groups by reason of their descent. Over 250 million people worldwide continue to suffer under what is often a hidden apartheid of segregation, modern-day slavery, and other extreme forms of discrimination, exploitation and violence. Caste imposes enormous obstacles to their full attainment of civil, political, economical, social and cultural rights.<sup>95</sup>

In its preamble, India’s Constitution forbids negative public discrimination on the basis of caste. However, caste ranking and caste-based interaction have occurred for centuries and it seems that it will continue to do so well into the foreseeable future.<sup>96</sup> Caste systems in India and caste like groups are ranked. Within most villages or towns, everyone knows the relative rankings of each locally represented caste, and people’s behaviour toward one another is constantly shaped by this knowledge. The caste system is a closed group whose members are severely restricted in their choice of occupation and degree of social participation. Marriage outside the caste is prohibited. Social status is determined by the caste of one’s birth and may only rarely be transcended. A specialised labour group may operate as a caste within a society otherwise free of such distinctions.<sup>97</sup>

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<sup>94</sup> UN Economic and Social Council Comprehensive Examination of Thematic Issues Relating to Racial Discrimination (1999, June 22) and also see The United Nations Document (198508) A/C.3/SR 1182 at para 17.

<sup>95</sup> Human Rights Watch World Report 2001 Racial Discrimination, Xenophobia and Related Intolerances (December 2001).

<sup>96</sup> More so in the countryside than in urban settings and more in the realms of kinship and marriage than in less personal interaction.

<sup>97</sup> For example the ironsmiths in parts of Africa.

In general, caste functions to maintain the status quo in the Indian society.

From a reading of Chapter Four, it can be seen that discriminatory practices prevalent in the Indian society were largely the product of the deep rooted caste system. Rather than a basic expression of Indian tradition, caste is a modern phenomenon and the product of a concrete historical encounter between India and British colonial rule. The historical background to caste discrimination in India shows that although caste was not invented by the British, it was cemented during their period of control

The historical background to caste in India has shown that it is a country with a highly rigid caste-based hierarchal structure, with ascending order of privileges and descending order of disabilities, which operated for about 3000 years. There was and continues to be an overwhelming majority in the nation that are socially, economically, educationally, and politically backward. These victims of entrenched backwardness comprise the present SC's, ST's and OBC's. Even though, these classes are generically the "backward classes," the nature and magnitude of their backwardness are not the same.

Past discriminatory practices and inequality on the basis of gender, age, caste, religion, economic power, etc., were not only not prohibited, but were in fact expected as systematic elements.<sup>98</sup> The extreme manifestation of such inequalities in India, led to a growing awareness of the need for reform.<sup>99</sup> Affirmative action was needed to outweigh the imbalances of the past. In India, affirmative action is known as "preferential treatment", "protective discrimination" or "reverse discrimination".<sup>100</sup> It is known by the name of reverse discrimination because it involves discrimination in favour of those who, until recently, had themselves been the victims of discrimination. The phrase "reverse discrimination" may mean different things to different people. The phrase is sometimes

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<sup>98</sup> Beteile A (ed) Equality and Inequality — Theory and Practice (1983) (Beteile).

<sup>99</sup> Sharma B A V and Reddy K M (ed) Reservation Policy in India (1982) (Sharma & Reddy).

<sup>100</sup> Anand *op cit* 64 at 1.

charged with being a term of prejudice and is restricted to refer to those situations where an absolute preference is given to the preferred groups.<sup>101</sup>

Some authors are of the opinion that affirmative action should take the form of preferential treatment like in India. According to Andrews affirmative action should be seen as “preferential policies to ensure the enhanced employment upgrading and retention of members of certain less fortunate groups of society”.<sup>102</sup> Fischer is more explicit and refers to affirmative action as “preferential treatment which requires employers to discriminate against better-qualified, or equally qualified whites”.<sup>103</sup>

The Indian governments’ policy of compensatory discrimination comprises of various preferential schemes. The policy initiatives used in India to offset the inequalities of society is a policy of reservations.<sup>104</sup> The term “reservations” denotes a set quota of public service positions for recognised minorities<sup>105</sup> and includes reservation of seats in educational institutions.<sup>106</sup>

Like the quota system of the US, seats and jobs are reserved for persons from disadvantaged groups.<sup>107</sup> This policy of special or preferential treatment of the

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<sup>101</sup> Brounaugh R (ed) Authority, Equality, Adjudication, Privacy (1978) Philosophical Law V(II) at 47.

<sup>102</sup> Andrews *op cit* 15 at 34-43.

<sup>103</sup> Fischer S Affirming Equal Opportunities For White Males (1996) People Dynamics V(14) No. 3 30-34 at 32.

<sup>104</sup> Tummala K Policy of Preference — Lessons from India, the United States and South Africa (1999) Public Administration Review V(59) No. 6 at 495 - 508 (Tummala).

<sup>105</sup> *Sukhnandan Thakur v State of Bihar* (1957) AIR 617 (Pat.).

<sup>106</sup> Although such reservations were declared unconstitutional in various decisions. *Surendra Kumar v State* (1969) AIR 182 (Raj.); *Ramachandra v State of Madhya Pradesh* (1961) AIR 247 (Madh. Pra.).

<sup>107</sup> Reservations are being made in the services as well as both at the point of initial entry and in promotions and this benefit has been extended to embrace the whole chunk of weaker sections.

disadvantaged sections of society is called by the name of “protective discrimination”,<sup>108</sup> or “protective measures”, “compensatory discrimination programmes”<sup>109</sup> or “reverse discrimination”.<sup>110</sup> These phrases however, have the same import and are not dissimilar to the concept of affirmative action as used in the South African and the US context. The difference is that whereas in the South African context affirmative action means more than just the achievement of numerical goals or targets, the Indian policy of affirmative action subscribes mainly to the policy of reservations of jobs and the reservation of places for admissions at universities.

These preferences in India are of three basic types. Firstly, there are reservations. These reservations allot or facilitate access to valued positions or resources.<sup>111</sup> Secondly, there are programmes involving expenditure or provision of services for e.g., scholarships, grants, loans, land allotments, health care, and legal aid to the beneficiary groups.<sup>112</sup> Thirdly, there are special protections.<sup>113</sup> Reservations coupled with other welfare programmes constitute the core of affirmative action for the upliftment of these groups.<sup>114</sup> To indicate the magnitude of this policy the central government has reserved twenty-

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<sup>108</sup> It is given the name “protective discrimination” because the purpose of special or preferential treatment is not to award any special privileges but to give protection to those who, because of centuries of oppression, are vulnerable to get exploited despite the removal of legal sanctions behind exploitation which has been practised so far.

<sup>109</sup> These programmes are authorised by constitutional provisions that permit departure from formal equality for the purpose of favouring specified groups. See in this respect *Galanter op cit* 32 at 41 and 379. Also see the case of *Devadasen v Union of India* (1964) AIR 179 (SC).

<sup>110</sup> It is known by the name of “reverse discrimination” because it involves discrimination in favour of those until recently had themselves been the victims of discrimination.

<sup>111</sup> The most important instance of this type is reserved seats in legislatures, reservation of posts in government service, and reservation of places in academic institutions.

<sup>112</sup> *Galanter op cit* 32 at 42-43.

<sup>113</sup> These distributive schemes are accompanied by efforts to protect the backward classes from being exploited and victimised.

<sup>114</sup> This policy consists of various schemes allowing preferential treatment, a reservation of a percentage of government jobs and of places in educational institutions being the most important.

seven percent of all government jobs and places in institutions of higher education for the socially and educationally backward classes.<sup>115</sup>

Specifically, the Constitution of India provides for “reservations” in favour of two disadvantaged groups; namely, The Scheduled Castes (SC’s) and the Scheduled Tribes (ST’s). These reservations exist in the following areas in —

- (1) The state legislatures and the union legislature or parliament,
- (2) Services under the states, and
- (3) Educational institutions.

Apart from reservations in educational institutions, other programmes for the upliftment of the backward classes include —

- (i) exemption from school fees,
- (ii) provisions for stipends or scholarships,
- (iii) provisions for facilities like book grants, and
- (iv) maintenance of hostels, or assistance to hostels for SC students.<sup>116</sup>

The central government further sponsors the following —

- (v) college scholarships,
- (vi) award of travel grants, and
- (vii) a seven and a half percent reservation in favour of SC’s in merit scholarships,
- (viii) the programmes also provide for assistance by way of special coaching for the SC’s students residing in hostels and pre-

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<sup>115</sup> The Constitution of India provided the legal opportunity for preferential treatment for their benefit even before it was clear who the socially and educationally backward classes were. The makers of the Constitution left the work of defining, selecting, and listing the backward classes to special commissions in the States and in the Centre.

<sup>116</sup> Seenarine Moses Dalit Women — Victims or Beneficiaries of Affirmative Action Policies in India — A Case Study (1996, April 10).

examination coaching facilities for SC students appearing in competitive examinations.<sup>117</sup>

- (4) In addition, some states have reservations in services under the state and in educational institutions in favour of OBC's. Reservations coupled with other welfare programmes constitute the core of affirmative action for the uplift of these groups.<sup>118</sup>

As can be seen from the above discussion, reservation policies in favour of the backward classes in India are quite extensive and forms the major part of preferential policies designed for their upliftment.

The following principles should be noted with regard to affirmative action programmes in India. With regard to the compensatory principle aspect of affirmative action, this principle which basically justifies the use of affirmative action measures, relates to counteracting the effects of past discrimination by reimbursing those persons or groups of persons there were previously disadvantaged or awarding these persons compensation for past injustices. Further, the protective principle of affirmative action measures relates to the protection of the weaker sections of the community as envisaged in Article 46 of the Constitution of India. The issues of proportional equality and social justice, under which concepts of distributive justice and utility are included to a large measure, also forms part of the justification for affirmative action programmes.

It has been argued on numerous occasions that India has developed a legal system that is probably more similar to that of the US than that of any other country.<sup>119</sup> SA will benefit

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<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> Both countries use a federal system with power shared between states and a central government. Both have written constitutions containing similar guaranteed rights; both have supreme courts with vast powers including the power to declare statutes unconstitutional; both countries turn to their courts to resolve their most important public controversies. Indian law is also very accessible to US readers because, like American law, it rests on the foundation of the English common law and because the constitution,



from looking at the Indians affirmative action policies as India is the country with the most extensive quota system in the world and it is a country where the government enforces these preferences. Unlike the US preference systems, the Indian system is based on one's caste, or one's place in the Hindu social hierarchy. On the other hand affirmative action in the US focuses on whether it can be shown that each beneficiary of an affirmative action programme is likely to have suffered some form of "cognitive bias".<sup>120</sup>

This form of discrimination calls for a harm caused by an actor who is aware of the person's "race" and nevertheless is motivated by this awareness. However, this is a very narrow approach to affirmative action and a lot of the cynicism surrounding affirmative action may arise from this narrow focus. In fact, there are many white persons who believe that they themselves are free of such cognitive bias and thus doubt any justification for affirmative action. To rely on this "cognitive bias" form of discrimination will negate legitimate reasons for the need for affirmative action measures. Further, this focus makes affirmative action particularly vulnerable in settings like university admissions where decisions based on grades and test scores seem, to many, to be immune to cognitive bias.

According to Cunningham although cognitive bias-type discrimination based on caste status is treated as a serious, continuing problem in India, affirmative action there is focussed more on eradicating the enduring effects from centuries' of oppression and segregation and there appears to be a more conscious commitment than in the US to change the basic social structure of the country.<sup>121</sup>

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statutes and appellate court decisions are all written in English. Cunningham C D Could Study of India Help US Design Better Affirmative Action Programmes (September 1999) Civil Rights Journal Third Draft (Cunningham).

<sup>120</sup> That is a harm caused by an actor who is aware of the person's "race" and is motivated (consciously or unconsciously) by that awareness.

<sup>121</sup> Cunningham Clark D Affirmative Action: India's Example (Fall 1999) Civil Rights Journal at [http://www.findarticles.com/p/articles/mi\\_m0HSP/is\\_1\\_4/ai\\_66678565](http://www.findarticles.com/p/articles/mi_m0HSP/is_1_4/ai_66678565) last visited 07/05/05.

## 5.9 The Beneficiaries of Affirmative Action In India

Like race, caste is something one is born into.<sup>122</sup> However, because caste in India is a social construction, in contrast to the beliefs in the US that “race” is an immutable and obvious physical condition, it is believed that the Indian jurisprudence has advanced well beyond American law in constructing and justifying affirmative action in terms of underlying social features.<sup>123</sup>

Attention has focussed on protective discrimination or preferential treatment for three major classes; the SC’s,<sup>124</sup> the ST’s,<sup>125</sup> and more recently there are the OBC’s.<sup>126</sup> Also included among OBC’s are a few tribal and nomadic groups, as well as converts to non-Hindu religions from the scheduled caste, and in some areas the Denotified Tribes.<sup>127</sup> The OBC’s category extends the principle of affirmative action in education and government employment from the case of the untouchables to “socially and educationally backward classes of citizens”.<sup>128</sup> Although, for historical reasons, affirmative action in India is phrased largely in terms of assisting “backward” groups, “backwardness” or the

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<sup>122</sup> Volokh Alexander Quotas in India have yet to create Harmony (1996, November 5) Los Angeles Daily Journal.

<sup>123</sup> Madhava M and Cunningham C D Race, Class, Caste.....? Rethinking Affirmative Action Michigan Law Review (March 1999) V(97) No.5 (Madhava & Cunningham).

<sup>124</sup> Clause 24 of Article 366 of the Constitution of India of 1950 (The IC).

<sup>125</sup> Clause 25 of Article 366 of the IC.

<sup>126</sup> See Chapter Four for a more detailed explanation of these castes.

<sup>127</sup> The Denotified Tribes, or Vimukta Jatis, are the former Criminal Tribes. They became ‘ex-criminal’ when the Criminal Tribes Act of 1924 was repealed in 1952.

<sup>128</sup> Article 15(4) of the IC.  
What is interesting is that in India both traditional low-caste status and economic class are factors in determining whether a group is categorised as an OBC’s, but these factors on its own are not considered to be sufficient.

“depressed classes”<sup>129</sup>, it should be understood as a comparative rather than a pejorative or patronising term.<sup>130</sup>

Another group that receives preferential treatment in India are women and children. Under clause (3) of Article 15 of the IC, special provision for the benefit of women and children may be made by the State and such special provision will not be open to attack as contravening Articles 14 or 15.<sup>131</sup>

So like the Constitution and anti-discrimination legislation of SA, the Constitution of India too does not contemplate affirmative action/ reservation and special treatment as a general principle of operation. With a view to making justice; social, economic and political justice; available to all effectively, the Constitution of India makes special provisions for certain members of society. The IC contains several provisions for the protection and amelioration of the lot of the SC’s, the ST’s and the OBC’s.

Before turning to a discussion on these specific provisions an understanding of who these beneficiaries are, becomes important.<sup>132</sup> Such a list is kept today, supplemented by lists of ST’s and OBC’s and includes a list of three thousand SC’s, ST’s and OBC’s. It is these groups that benefit under positive discrimination. Under constitutional provisions and various laws, the state grants *dalits* or the untouchables a certain number of privileges, including reservations (quotas) in education, government jobs and government bodies.

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<sup>129</sup> The term backward classes is commonly used in two senses — (a) as a generic term including the Scheduled Castes and Scheduled Tribes as well as the other so-called Other Backward Classes; or (b) as a designation of those backward groups not included in either of the first two categories. See Article 15(4) of the Indian Constitution.

<sup>130</sup> Cunningham *op cit* 119.

<sup>131</sup> *Savitri v K K Bose* (1971) AIR 1974 (HP); *Padmaraj Samendra v State* (1979) AIR 266 (Pat.).

<sup>132</sup> See Articles 344 and 342 of the IC.  
The government of India’s 1960 publication entitled *Scheduled Castes and Tribes Arranged in Alphabetical Order* lists 405 SC’s and 255 ST’s, for a total of 660 kinship groups (the boundaries distinguishing castes and tribes are unclear).

The implementation of legal provisions contained in the Protection of Civil Rights Act<sup>133</sup> and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act attempts to protect these castes from discrimination.<sup>134</sup> The Constitution therefore permits preferences for SC's, ST's and OBC's. The Constitution specifically provides reserved seats in the lower house of Parliament<sup>135</sup> and in the lower houses of the state legislatures for the SC's and ST's.<sup>136</sup> The Constitution of India itself does not define these groups, nor does it provide detailed standards by which they may be determined. In the case of SC's and the ST's, it does prescribe an agency and a method for designating them.<sup>137</sup> Not only are OBC's left undefined in the Constitution, but no such method or agency for their determination is provided.<sup>138</sup>

#### ***(5.9.1) Scheduled Castes***

The term "Scheduled Castes", which is the most recent of a long line of official euphemisms for untouchables includes in its communities those person's who were considered untouchables. In modern India the untouchables call themselves *dalits*.<sup>139</sup> The term as defined in article 366 (24) of the Constitution means "such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 of to be scheduled castes for the purpose of this Constitution". In accordance with the provisions of the Constitution, a SC's order was promulgated in August 1950.<sup>140</sup>

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<sup>133</sup> The Protection of Civil Rights Act of 1995.

<sup>134</sup> The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989.

<sup>135</sup> Article 330 of the IC.

<sup>136</sup> Article 332 of the IC.

<sup>137</sup> See Articles 15(4); 164 and 340 of the IC.

<sup>138</sup> Committee on the Elimination of Racial Discrimination Reports of India — Concluding Observations of Caste (1996, September 17) at para 7.

<sup>139</sup> This means depressed or the depressed classes. Until the late 1980's they were called Harijan, meaning children of God. This title was given to them by Mahatma Gandhi, who wanted the society to accept untouchables within them.

<sup>140</sup> This order was amended in 1956.

### ***(5.9.2) Scheduled Tribes***

The second category is ST's. The term "Scheduled Tribes" is defined under article 366(25) of the Constitution as "Scheduled Tribes means such tribes or tribal communities as are deemed under article 342 to be scheduled Tribes for the purpose of this Constitution". This category includes in it those communities who did not accept the caste system and preferred to reside in the jungles, forests and mountains of India, away from the main population.<sup>141</sup>

The object of articles 341(1) and 342(1)<sup>142</sup> of the Constitution is to provide additional protection to members of the SC's and the ST's having regard to the economic and educational backwardness from which they suffer.<sup>143</sup>

### ***(5.9.3) Other Backward Classes***

The third category is called OBC's or backward classes. The term "backward classes" appears in articles 15(4), 16(4), and 29(2) of the IC. The OBC's are the most loosely defined of the three categories. Their problems are also in many ways different from those of the first two. It is because of this loose definition of "backward classes" that the number of castes included into this group is continuously growing and expanding at the will of politicians and at the public demand.

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<sup>141</sup> Republic of India Backward Classes Commission Report of the Backward Classes Commission (1980) V(I-VII).

<sup>142</sup> The Constitution of India —  
Article 341 Scheduled Castes —  
(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.

Article 342 Scheduled Tribes —  
(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.

<sup>143</sup> *Bhaiya Lal v Harikishan Singh* (1965) AIR 1557 (SC).

This category includes in its caste those who belong to the *sudra varna* and also former untouchables who converted from Hinduism to other religions. While there is practically no discussion in the judicial decisions relating to the SC's and ST's, the courts have examined in detail the criteria laid down for the determination of backward classes.<sup>144</sup> The simple test for classification of socially backward classes is: whether members of such class are "socially and educationally" worst off than the rest of the citizens, irrespective of the fact whether or not they belong to the SC's and ST's. Social and educational backwardness must co-exist.

Broadly speaking, educational backwardness means that the average of students population in the particular class is below the State average.<sup>145</sup> Indian citizens who can establish their claim to belong to one of these publicly identified "castes" or "tribes" are entitled to special benefits from the government.

The government's 1980 publication of the Mandal Commission Report<sup>146</sup> lists on a state-by-state basis a total of 3 743 castes belonging to OBC's above and beyond the SC's and the ST's included in the earlier government lists. According to the central government policy these three categories are entitled for positive discrimination. Sometimes these three categories are defined together as backward classes. Fifteen percent of India's population are SC's. According to central government policy fifteen percent of the government jobs and fifteen percent of the students admitted to universities must be from SC's. For the ST's about seven and a half percent of the places are reserved which is their proportion in Indian population. The OBC's are about fifty-percent of India's population, but only twenty-seven percent of government jobs are reserved for them.

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<sup>144</sup> See the cases of *M R Balaji v State of Mysore* (1963) 1 SCR 439 at 456, *Hedge Janardhan v State of Mysore* (1963) Supplement I SCR 475, *Chitralkha v State of Mysore* (1964) 6 SCR 368.

<sup>145</sup> *State of A P v Balaram* (1972) AIR 1375 (SC).

<sup>146</sup> The Second Report for the Commission for Backward Classes was appointed in 1979 under the Chairmanship of Shri B P Mandal. The Mandal Report is based on the 1930 census of India.

Along with the central government, the state governments of India also follow a positive discrimination policy. Different states have different figures of communities entitled for positive discrimination based on the population of each state. Different state governments have different lists of communities entitled for positive discrimination. Sometimes a specific community is entitled for rights in a particular state but not in another state of India.

In the Constitution (Scheduled Castes) Order<sup>147</sup> it has been mentioned that no person professing a religion different from Hindu or Sikh religion can be deemed to be a member of SC's. There is, however, no religious bar for being treated as a scheduled tribe. Reservation, at present, is provided on the basis of caste and tribe only.

This list of beneficiaries in India is perhaps one of the largest lists in the world as no other country provides for positive measures for such a large group of beneficiaries.

### **5.10 Reservations for the Beneficiaries**

There are three main kinds of benefits for these beneficiaries and this aspect will be discussed in greater detail in the next part of this thesis. Basically, the first is what may be described as political reservation. This means that a certain number of seats in Parliament and in the state legislatures are reserved for members of the SC's and ST's, roughly in proportion to their strength in the population. Political reservation in Parliament and in the state legislatures is only for the benefit of the SC's and the ST's but not for the other OBC's. Political reservations are written into the Constitution of India and the provisions reveal the ambivalence of the makers of the Constitution as well as of policy makers in contemporary India.

The constitutional provisions for political reservations for the SC's and the ST's are mandatory. However, when the provisions were made mandatory in 1950, it was decided that this would apply only for ten years, so they would last for a single decade. Since

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<sup>147</sup> The Constitution (Scheduled Castes) Order, 1950 (as amended from time to time).

then the Constitution has had to be amended every ten years to keep on extending political reservations for the SC's and ST's.

The second kind of reservation which is even more contentious than the first is known as job reservation. Job reservations apply mainly to government appointments at union and state level and also to organisations which are substantially funded by the government. The provisions for job reservation apply not only to the SC's and ST's but also to the OBC's as well. Over the years there has been an extension of job reservations for the benefit of the OBC's. This has now become the most contentious issue of positive measures in India. The question is whether or not the wholesale extension of job reservations for the OBC's accords with the spirit of the Constitution or not. For job reservations, unlike political reservations, the provisions are not mandatory; they are enabling provisions. The Constitution says that the state may take such measures as are necessary for the special benefit of the OBC's.

Finally, there is what may be called reservations in education. These, again, are matters of contention, for reservation exists not only in general arts and science courses but also in medical and engineering schools as well. The logic of reservations or of positive discrimination in India is that special opportunities should be created for some over and above the general provisions for equality of opportunity for all.

The main objective for providing reservations for SC's and ST's in civil posts and services of the Government is to give jobs to some persons belonging to these communities and thereby increase their representation in the services; so as to facilitate their social and economic advancement and make due place for them in the society. Article 16(4) of the Constitution specifically empowers the State to make any provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. With the same end in view, the Constitution envisaged in the Directive Principles of State Policy and elsewhere economic and educational development of the weaker sections, particularly the SC's and ST's.



***(5.10.1) Important Aspects of the Scheme of Reservation for SC's and ST's***

In 1947 reservations were specifically provided for by the Government of India. It provided for the reservation of twelve and a half percent of vacancies for SC's in respect of recruitment made by open competition. In cases of recruitment otherwise than by open competition this percentage was fixed at approximately sixteen and a half percent. After the Constitution was promulgated,<sup>148</sup> it provided for five percent reservation of ST's apart from the percentage fixed for SC's already in force. The 1951 Census showed that the percentage of SC's in the total population was 15.05 percent and that of ST's 6.31 percent. The 1961 Census revealed that the SC's and ST's population in proportion to the Indian population stood at 14.64 percent and 6.80 percent respectively.

Accordingly, the percentage of reservation for SC's and ST's was increased from twelve and a half percent and five percent to fifteen percent and seven and a half percent respectively in 1970.<sup>149</sup> So over a period of time reservation in favour of the SC's and ST's have been on the increase to the detriment of the people belong to the other "upper" caste.

Further, reservations have been extended to other modes of promotion in stages. The limitation of the direct recruitment not exceeding fifty percent was raised to sixty-six and two-third percent in 1976 and to seventy-five percent in 1989. The SC had in the *Indra Sawhney*<sup>150</sup> case permitted the reservations for the SC's and ST's in promotion to continue for a period of five years from November 16, 1992. Consequent to this judgment the Constitution was amended and Article 16(4A) was incorporated. In pursuance of this Article, instructions have been issued on August 13, 1997 to continue the reservation in promotions for the SC's and ST's in the Services/ Posts under the Central Government beyond November 15, 1997 till such time as the representation of each of these categories in each cadre reaches the prescribed percentages.

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<sup>148</sup> In its Resolution of 13.9.50.

<sup>149</sup> The exact date was on the March 25, 1970.

<sup>150</sup> *Indra Sawhney v Union of India* (1993) AIR 447 (SC).

Apart from providing reservation the Government has also given numerous concessions to SC's and ST's in direct recruitment as well as promotion and infrastructure has also been built up, which contains procedural safeguards and institutional safeguards. These have been described in brief in the following paragraphs.

**(5.10.1.1) Concessions to the SC's and ST's Applicants**

- Age-relaxation — The maximum age limit prescribed for direct recruitment to a service or post is increased by five years in the case of candidates belonging to SC's and ST's.
- Fee Concession — SC's and ST's candidates are exempted from payment of fees prescribed for recruitment/selection.
- Relaxation of standards of suitability — In the case of direct recruitment while the SC and ST candidates who are selected on their own merit without relaxed standards along with the general candidates will not be adjusted against the reserved vacancies, the reserved vacancies will be filled up separately from amongst the eligible SC's and ST's candidates who are lower in merit than the last candidate in the merit test but who are otherwise found suitable for appointment even by relaxed standards, if necessary.
- Relaxation of “experience” qualification in direct recruitment — The UPSC/competent authority could, at its discretion, relax the qualification regarding “experience” in the case of SC's or ST's candidates if at any stage of selection, the UPSC or the competent authority is of the opinion that sufficient number of SC's or ST's candidates possessing the requisite experience are not likely to be available for appointment against the vacancies reserved for them.
- De-reservation — In April, 1989, orders were issued banning de-reservation in direct recruitment. Powers of de-reservations in promotion, however, have been delegated to individual Ministries/Departments subject to certain conditions.

***(5.10.1.2) Fifty Percent Limit in Reservation to Apply to Current as well as Backlog Vacancies***

The SC in its judgment in the case of *Indra Sawhney v Union of India* has directed that carry forward of reservation in whatever manner it is implemented should not violate the rule of fifty percent. Not more than fifty percent vacancies in a year including the backlog vacancies can be filled on the basis of reservation for SC's, ST's or OBC's. In other words, henceforth, backlog vacancies for the purpose of application of fifty percent ceiling on reservation shall not be treated as a distinct group.

***(5.10.1.3) Public Sector Undertakings and Other Autonomous Bodies***

Public Sector Undertakings, Statutory and Semi-Government Bodies, voluntary agencies etc., which are under the control of the Government or are receiving grants-in-aid from the Government are also required to make reservations for SC's, ST's and OBC's in their services on the lines of the reservations in services under the Government.

***(5.10.2) Important Aspects of the Scheme of Reservation for Other Backward Classes***

- Percentage of reservation in Services/posts — Subject to the rule of exclusion applicable to certain specified categories of person/sections, for e.g., the creamy layer, twenty-seven percent of the vacancies in civil services and posts are to be filled through direct recruitment and are reserved for OBC's. Candidates belonging to OBC's recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates will not be adjusted against the reservation quota. There are however, no reservation for OBC's in promotion.
- Public Sector Undertakings, autonomous bodies etc. — The above referred instructions are also applicable to the Public Sector Undertakings, Financial Institutions including the Public Sector Banks. The said instructions have also been extended to the autonomous bodies, statutory and semi-government bodies and voluntary agencies receiving grants from Government.
- Verification of castes and communities — For the purpose of verification of the castes and communities, OBC's candidates are required to produce a certificate in the prescribed form from the specified authorities. The same authorities which

- are notified as competent to certify OBC status are also authorised to certify that such a candidate does not belong to the excluded category of “creamy layer”.
- Migrants from other States — The OBC person on migration from the State of his origin to another State where his caste is not in the OBC list is entitled to the concessions/benefits admissible to the OBC’s from the State of his origin and Union Government but not from the State where he has migrated. The prescribed authority of a State Administration may issue the OBC certificate to a person who has migrated from another State on production of genuine certificate issued to his father by the prescribed authority of the State of his father’s origin.<sup>151</sup>
  - Carry-forward of unfilled vacancies — The vacancies reserved for OBC’s which remained unfilled are to be carried forward for a period of three recruitment years or till the vacancies are filled by OBC’s candidates, whichever is earlier.
  - Relaxation of standards — Relaxation of standards in written examinations and interviews is provided to OBC’s candidates as in the case of candidates belonging to the SC’s or the ST’s.
  - Liaison Officer — There is a separate Liaison Officer for overseeing the implementation of reservation orders for OBC’s.

### **5.11 Reservations for Special Groups (Other than Women)**

Unlike the USA and India, the IC does not specifically provide for reservations in favour of the disabled. However, according to the Mysore High Court, the State has the power to grant concessions to the handicapped groups of persons<sup>152</sup> in the exercise of its

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<sup>151</sup> In terms of Judgement Writ Petition (Civil) Persons/Sections Excluded from Reservations (1993) (Judgement Writ Petition). All competent authorities should satisfy themselves of the correctness of this certificate before issuing the OBC certificate in such cases.

<sup>152</sup> These handicapped persons may be —

- (i) Sons/ Daughters of Central Government Servants.
- (ii) Sons/ Daughters of Union Territories and States other than the State providing reservation.
- (iii) Cultural Scholars.
- (iv) Sportsmen.
- (v) Sons/ Daughters of political sufferers.
- (vi) Ex-servicemen and their children.
- (vii) Candidates from other countries who are given reservation on reciprocal basis etc.

executive power and the classifications in such cases are based on lawful state policy.<sup>153</sup> The problem is that when one is looking at the drafting history to the IC, it shows that reservations in matter of employment was intended to be limited to the backward classes of people only. Originally the word “backward” did not find place in Clause 6.<sup>154</sup> Article 16(4) as amended, now states that —

“Nothing in this section shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the public services.”

So even though the courts can make special reservations for the disabled they may only do so under Article 16(4). A disabled person may be given reservation only if the term “backward classes” is redefined in such a way as to cover these groups within its ambit.

As far as admissions are concerned, it is possible that the different States of India may grant concessions short of outright reservation to handicapped persons, for e.g., the awarding of stipends and scholarships etc. As there are no legislation mandating for the equal and fair representation of disable persons in the workforce these above mentioned concessions may prove to be inadequate.

In SA and the US, it is believed that reservations in favour of distinct groups helps in attaining a diverse student body which promotes an atmosphere of “speculation, experiment and creation — so essential to the quality of higher education”.<sup>155</sup> However, the situation in India is that there is no set criteria to select persons outside of the backward classes.

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See Judgement Writ Petition *op cit* 151.

<sup>153</sup> *Subhashini v State of Mysore* (1966) AIR 40 (Mys.).

<sup>154</sup> Clause 6 is now Article 16(4).

<sup>155</sup> *University of California Regents v Allen Bakke* (1978) 438 US 265 at 312.

The courts have accepted that various other persons may be beneficiaries under affirmative action programmes. In *Ramesh Chandra v State of Punjab*<sup>156</sup> the court provided for reservation of seats in favour of various categories of persons, including seats reserved for the SC's, ST's and OBC's. These persons included —

- (a) Government of India nominees.
- (b) Seats reserved for the nominees of The Government of Jammu and Kashmir.
- (c) Scheduled Caste and Scheduled Tribe candidates belonging to the State of Punjab.
- (d) Sportsmen.

Other court decisions have stated that reservations made in favour of the dependents of freedom fighters are valid.<sup>157</sup>

In India one does not have to be a citizen of India to benefit under the reservation schemes. The courts of India have included the following persons, who are not citizens of India, to benefit under the Indian reservation schemes. They include Colombo Plan Scholars, Thailand Scholars, Jammu and State Kashmir Scholars, students from Nepal, repatriates from Burma, Ceylon (now called Sri Lanka), Mozambique, students from less developed Commonwealth countries, and students from Goa.<sup>158</sup> This is not an exhaustive list. Candidates from other countries who are given reservation on a reciprocal basis may also benefit under the reservation system of India.<sup>159</sup>

Even though a list exists, it would seem that if any other person from another State or country wishes to benefit under the reservation scheme they would have to first prove their backwardness.

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<sup>156</sup> *Ramesh Chandra v State of Punjab* (1966) AIR 476 (Punj.).

<sup>157</sup> *Chhoteylal v State of U P* (1979) AIR 135 (All.).

<sup>158</sup> *D N Chanchala v The State of Mysore & Others* (1971) 2 SCC 293.

<sup>159</sup> *Subhashini v State of Mysore* (1966) AIR 40 (Mys.).

## 5.12 The Problem of the Suitably Qualified Candidate in India

Unlike SA, there are no hard and fast rules to appointing only suitably qualified persons to a position in India. In fact, in order to secure representation for SC's, ST's and OBC's, the Government of India has directed that duly qualified members of these classes might be nominated to a public service even though recruitment to that service was being made by competition.<sup>160</sup> The definition of what duly or suitably qualified means has however been left undefined by the Government of India.

Even though various measures have been taken since then to secure increased representation of the SC's, ST's and OBC's in the public services, the results obtained so far have, however, not been substantial. While the Government of India recognises that this is mainly due to the difficulty of getting suitably qualified candidates, they now consider that the reservation of a definite percentage of vacancies might provide the necessary stimulus to candidates of these castes to obtain better qualifications and thus make themselves eligible for various Government posts and services. So being suitably qualified no longer plays a role in reservations. It is enough for one to prove that he belongs to one of the backward class to benefit under the reservation schemes.

However, even though the government has reserved a certain percentage for the backward classes it will increase the percentage once suitably qualified candidates can be found.<sup>161</sup> Looking at the above discussion, the Government subscribes to a "carry forward" rule. Here, if duly qualified candidates of the backward classes are not available to fill the vacancies these vacancies will be carried forward to the next year and the vacancies not filled by them will be treated as unreserved. However in cases of reservations a minimum standard of qualification, which has been relaxed, will be prescribed and the reservation will be subject to this condition.

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<sup>160</sup> Government of India Resolution of 1943 on Representation of the Scheduled Castes in the Services (1943, August 11) (Government of India Resolution).

<sup>161</sup> *Ibid.*

The carry-forward rule relates to the fact that even though there have been relaxations in minimum requirements for qualifications and jobs granted to members of the preferred groups, certain posts reserved for them remain unfulfilled during a particular year because of the non availability of enough eligible candidates belonging to these groups. In such a situation the state adopts the “carry forward” process in one of two ways. Firstly, the State may provide that the vacancies not filled up shall be carried over to the second year or the third year, as the case may be, or secondly, that instead of providing for the carrying over of the said vacancies to the next selection, the said vacancies may be filled up by candidates belonging to the class other than the backward classes and the posts reserved for the backward classes but not filled up by them may be added to those reserved for them in the next selection period.<sup>162</sup>

Many problems arise with this “carry forward” rule. More importantly its constitutional validity is questionable.<sup>163</sup>

### **5.13 Tensions in the Caste System**

The high caste communities feel discriminated by the government policy to reserve positions for the OBC's. As can be seen from the above discussion, in many cases a large number of high caste members compete for a few places reserved for them, while the backward classes members do not have to compete at all because of the large number of reserved places for them compared to the candidates. This reservation system in favour of the backward classes seems to be leading to a situation of unfair reverse discrimination. To have such a high percentage of reservations as well as other measures for the upliftment of the backward classes at the expense of the promotion of the upper caste of society seems to be in direct violation of various rights and would a minefield for unfair discrimination law in SA.

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<sup>162</sup> Per Mudholkar J in *T Devadasen v Union of India* (1964) AIR 179 (SC) at 191. Here the SC described the various methods which may be resorted to for carrying over the unfulfilled vacancies reserved for preferred groups.

<sup>163</sup> The constitutionality of the carry forward rule is discussed in Part IV of this thesis.



Unlike SA, in India, sometimes in order to fill quotas, candidates from the lower classes are accepted even though they are not suitably qualified. Sometimes some reserved positions remain unmanned because there were few candidates from the lower classes causing more tension between the castes. Between the lower castes there are also tensions over reservations. In the order of priority for a reserved place of the OBC's, candidates from the SC's are preferred over a candidate from the ST's who in turn is preferred over a candidate from the other OBC's. As stated earlier OBC's are about fifty-percent of India's population but only twenty-percent of the OBC's are entitled for positive discrimination according to central government policy. Some OBC's communities are organising politically to be recognised as backward classes entitled to positive discrimination. The ST's who are seen as the aborigines of India got ownership and certain rights over Indian land. Many communities in India claim also to be aborigines of India and they are claiming the same rights as the ST's.

In India, the caste identity has become a subject of political, social and legal interpretation. Communities who get listed as being entitled to benefit under positive discrimination do not get out of this list even if their social and political conditions get better. In many cases the legal system is involved to decide if a certain person is entitled to positive discrimination. Notwithstanding these positive discrimination policies, most of the communities who were low in the caste hierarchy remain low in the social order even today. Further, the communities who were high in the social hierarchy remain even today high in the social hierarchy. Most of the degrading jobs are even today done by the *dalits*, while the *Brahmans* remain at the top of the hierarchy by being the doctors, engineers and lawyers of India.

The reservation system in India seems to be a drastic measure taken to achieve the goal of equality. As is the practice in SA, when a policy like preferential treatment, reservations or affirmative action is adopted, the reservation policies in India will have to be so arranged that it must not materially affect the right of equality of opportunity if the advancement of the backward communities is to be achieved.<sup>164</sup> Therefore, affirmative

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<sup>164</sup> Anand *op cit* 64 at 31.

action policies must ensure that the preferential relief employed to correct a particular situation is the least drastic means of remedying discrimination.<sup>165</sup>

It is submitted that the reservation of government positions for OBC's should not be interpreted as a narrow exception to the constitutional guarantee of equality but rather as a way of achieving true, substantive equality, notwithstanding its problems. To combat the problems faced with identification of beneficiaries, identification of a group as an OBC cannot and should not be based on economic criteria alone.

#### **5.14 Upward Mobility in India**

Reservations as "compensatory discrimination" in India does not seek to eliminate the caste system, it merely aims to uplift some downtrodden castes, whether at the bottom or the middle of the caste ladder. The Indian government's model of "affirmative action" is different in a way from the USA and SA as these societies do not have any rigid caste based hierarchy of *jati* (the endogamy family) and *varna* (class based on purity level) as the Indians do, but only classes created by economic disparity. In such societies, economic advancement of a person, family or group, brings about a confirmed position into a higher class.

However, in the Indian system, prosperity alone has never upgraded the status of a caste (*jati*) into a higher *varna*. Upward mobility into higher class (*varna*) has been a complex phenomenon which comes after a few generations of struggle by a particular *jati* which also has to acquire the behaviour patterns of the next higher *varna* in food, social and ritual habits. Nevertheless, upward mobility has occurred throughout the ages but not as quickly gained as one would be in the South African and American societies. The present day reservation policies, however, cannot provide upward caste mobility to a *jati*, although it may provide economic prosperity to some individuals. The beneficiaries have now a greater interest in sticking to their "down-trodden" *jati* label to ensure further benefits.

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<sup>165</sup> See for example *MR Balaji v State of Mysore* (1963) AIR 645 (SC); *Amlendu Kumar v State* (1980) AIR 1 (Pat.) at 7.

### 5.15 Affirmative Action and the Quota System in India, the USA and SA

Looking at the above discussion on affirmative action, affirmative action in India is directly linked to a system of quotas. A “quota” refers to a certain number or percentage of a population. According to Andrews the quota system stipulates that “a specific number or percentage of the members of a protected group must be appointed or promoted regardless of the number of qualified candidates available for the jobs in question”.<sup>166</sup>

In the USA affirmative action policies also contain some form of quotas. For example construction industries and universities have set aside a certain percentage for minority groups.<sup>167</sup> Affirmative action programmes are implemented according to a quota system in the US by stipulating that four-fifths of the current labour pool must reflect minority rights.<sup>168</sup> In India quotas are enforced through the system of reservations whereby at least forty percent of seats are reserved for persons from the SC’s, ST’s and OBC’s. Mitchell describes the quota system as a “numbers game enforced by a policing system supported by industrial courts” and warns that the quota methods can prove to be counter-productive with companies resorting to filling quotas without developing skills.<sup>169</sup>

Interestingly, although no legislation advocates the use of strict quotas in SA, a use of the more relaxed numerical goals is preferred.<sup>170</sup> If incorrectly used it could amount to the strict quota system as used in India and the USA. In comparison to the USA and India, affirmative action beneficiaries in SA represent a group of people who is unfavourably

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<sup>166</sup> Andrews *op cit* 15 at 30.

<sup>167</sup> Mitchell G Much Affirmative Talk (and little action) (1993) Productivity SA V(19) No.1 28-30 at 28 (Mitchell).

<sup>168</sup> Mitchell *op cit* 167.

<sup>169</sup> *Ibid* at 28-29.

<sup>170</sup> However with regard to the disabled members of society the Public service is bound by statutory provisions to employ a minimum of two percent people with disabilities by the year 2005. This has been complemented by a Code of Good Practice on the Key Aspects of Disability in the Workplace (2001).

positioned compared with the rest of the population. This is due to their lack of skills, training, education and experience.

When making use of the numerical goals system, SA must take this into account. The danger is that previously disadvantaged groups may be placed in managerial positions without receiving the necessary training and development to address the skills that they may lack. These persons may then be expected to perform as efficiently as effectively as their white counterparts.<sup>171</sup> In fact, one of the most important prerequisites of the affirmative action process is the gradual development and training of affirmative action appointees.

Human warns against the incorrect way to provide training to these disadvantaged groups by stating that —

“Filling quotas and then providing training programmes for blacks and white women *en masse* can do more harm than good. Affirmative action cannot be seen simply in terms of pumping education and training into formerly under-represented groups and then expecting them to function in an organizational context in which issues such as attitudes and expectations have not been addressed.”<sup>172</sup>

Looking at their historical disadvantage in SA, the beneficiaries of affirmative action programmes must be sufficiently developed and trained into a certain position in order that they may perform their duties in a satisfactory manner. Another reason for ensuring proper skills development is that numerical goals are not quotas. As opposed to India, South African employers are implored to look at the most suitably qualified candidate for a specific position. This, according to the above discussion on what suitably qualified means, does not entail the appointment of someone to a position on the basis of tokenism or to fill in a quota.

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<sup>171</sup> Moraba S To be affirmative — Get the disadvantaged into the door of corporate SA (1993) Finance Week V(58) No. 4 28-29 at 28.

<sup>172</sup> Human L Women in the Workplace — A Programme to Counteract Gender Discrimination at Work (1993) at 83 in Adams C (ed) Affirmative Action in a Democratic SA (1993) 77-78 (Adams).

Should they not be adequately trained and developed, the danger exists that affirmative action will seem to have failed as people from the designated groups will be considered to be incompetent people and even though they are incompetent the law says that they must be placed in managerial positions. This is not the goal behind the South African anti-discrimination legislation. The achievement of equality does not entail the appointment of people who are not adequately trained and developed. So to ensure that the proper enforcement of the laws and to not trample on the rights of persons from non-designated groups, only suitably qualified candidates from the designated groups must be appointed to positions in a workplace. To do otherwise would amount to unfair discrimination.

### **5.16 Affirmative Action vs Preferential Treatment**

Even though affirmative action in India takes the form of preferential treatment there has been a lot of debate about whether affirmative action and preferential treatment are synonyms or different from each other. While some writers argue that preferential treatment is a synonym for affirmative action others argue that affirmative action in the US is distinctive from preferential treatment in India. It is submitted that, looking at the above discussion on the meaning of affirmative action, both affirmative action and preferential treatment are used in pursuit of distributive and compensatory justice.<sup>173</sup>

To simplify a rather complex debate, whether you use the term “affirmative action” in SA or “positive discrimination” in the US or “preferential treatment” in India they all seek to ensure greater equality of opportunity and acknowledges rights to compensation for past harm.<sup>174</sup> Further, affirmative action and preferential treatment are similar in respect of the fact that target groups and their moral arbitrariness are the same for both sorts of practices.<sup>175</sup> The guarantee against arbitrariness ensures the fairness of affirmative action

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<sup>173</sup> See for instance Edwards *op cit* 67 at 16.

<sup>174</sup> Edwards *op cit* 67 at 168.

<sup>175</sup> The Supreme Court in *E P Royoppa v State of Tamil Nadu* (1974) AIR 555 (SC) stated that Article 14 (to the Constitution of India) embodies a guarantee against arbitrariness in State action and ensures fairness.

programmes or preferential treatment policies.<sup>176</sup> Therefore it may appear in theory that whilst there seems to be a clear boundary between affirmative action and preferential treatment, in practice however the boundaries become blurred and no such distinction seems to exist.

### 5.17 Understanding the Importance of the Definitions

The subject of affirmative action is a vast one, and its full dimensions in SA are far from being acknowledged. Definitions of affirmative action range from preferential treatment of minority or disadvantaged groups to the management of diversity. Different countries view equity policies, affirmative action policies, positive discrimination or positive action policies differently and yet certain common themes can be found in these policies.<sup>177</sup>

Firstly, not every form of injustice attracts affirmative action. The special programmes of accelerated search, capacity building and advancement must be well focused. Secondly, the objective must always be to ensure basic fairness as affirmative action is about removing injustice.<sup>178</sup> Thirdly, the processes should also be as inclusive as possible. Fourthly, the means used and the time frame must be proportionate to the ends to be achieved.<sup>179</sup> Fifthly, the processes must be transparent and accountable to public opinion and the courts and finally, affirmative action works well if it is neatly tailored to the particular situation it is intended to deal with and takes appropriate account of the culture of the enterprise being transformed.<sup>180</sup>

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<sup>176</sup> *Maneka Ghandi v Union of India* (1978) AIR 597 (SC).

<sup>177</sup> For more information see the Constitutions of for example, Malaysia and Sri Lanka. The term 'affirmative action' was not generally employed in these countries. Human L *et al* *Baking a New Cake — How to Succeed at Employment Equity* (1999) at 17 (Human).

<sup>178</sup> This means that its goals and methods must be equitable. *Public Servants Association of South Africa & Others v Minister of Justice & Others* (1997) 18 ILJ 241 (T) and *Eskom v Hiemstra No and Others* (1999) 11 BCLR 1320 (LC).

<sup>179</sup> *Leonard Dingler Employee Representative v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC).

<sup>180</sup> *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC); 1998 2 SA 363 (CC).

In SA employment equity measures has generally viewed affirmative action as a means of overcoming barriers to equal opportunity rather than as a means of unfairly advantaging the interests of certain groups at the expense of other groups.<sup>181</sup> In the US too, affirmative action is viewed as a means to overcoming the effects of past or current barriers to equal employment opportunities.<sup>182</sup> In India, the Indian Constitution goes one step further than affirmative action and argues for the reservation of appointments for state posts in favour of backward classes.<sup>183</sup>

Other general aspects which most affirmative action programme guidelines appear to share in common include the following —

- They tend to seek to increase the opportunities of formerly excluded groups without recourse to tokenism;<sup>184</sup>
- Affirmative action programmes are also generally viewed as temporary interventions which will cease as soon as equal employment opportunity has been achieved;<sup>185</sup>
- It is a means of creating equal employment opportunity;
- It should not be in accordance with rigid quotas,<sup>186</sup>
- It should be flexible;<sup>187</sup> and

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<sup>181</sup> Human *op cit* 177 at 16.

<sup>182</sup> The Guidelines of the Equal Opportunity Commission in the USA Part 1608 Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964 as amended.

<sup>183</sup> Imam M (ed) Minorities and the Law (1972) at 247-260.

<sup>184</sup> For example bringing in unqualified persons and without unnecessarily trammelling the expectations of white males.

<sup>185</sup> Blumrosen A W Improving Equal Employment Opportunities — Lessons from the United States Experience (1985) at 423-440.

<sup>186</sup> Human *op cit* 177 at 17-18.

<sup>187</sup> According to Albie Sachs quotas and timetables “.....could have an important role to play if they are well targeted, neatly tailored, participatory, limited in duration, and do not unduly or gratuitously trample on the rights of others.....” Sachs A Affirmative Action and Good Government as quoted in Human Linda A Practical Guide — Affirmative Action and the Development of People (1993) at 3.

- Affirmative action should also not unduly trample on the reasonable and legitimate interests of the group that has been privileged by past discrimination<sup>188</sup>

One can therefore state that affirmative action has generally been conceived as a process to eliminate discrimination rather than as a process whereby one form of discrimination is replaced by another. According to the guidelines of the EEOC in the USA, affirmative action is also perceived as a means to overcoming the effects of past or current barriers to equal employment opportunity through a broad variety of activities relating to, *inter alia*, selection, recruitment, development and training and promotion practices.<sup>189</sup> Affirmative action programmes are also generally viewed as temporary interventions which will cease as soon as employment equity has been achieved.

A further analysis of the variety of definitions presented by the various authors results in the following assessment of affirmative action. Affirmative action policies are there to ensure the redistribution of resources and opportunities, and the giving of preferential financial assistance by businesses to institutions of those communities that have traditionally been disadvantaged.<sup>190</sup> Affirmative action therefore advocates preferential treatment. The process of affirmative action is also seen as a means to allow the previously disadvantaged groups to share in the prosperity, opportunities and facilities of the country.<sup>191</sup>

Great significance is placed on past discrimination suffered by people who should now be the beneficiaries of affirmative action programmes. Looking at the definition of Innes in this respect, affirmative action is defined as “a set of procedures aimed at proactively

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<sup>188</sup> Human *op cit* 177 at 18.

<sup>189</sup> White C An Affirmative Action Prospectus for South African Universities — The Forgotten Other Half (1988).

<sup>190</sup> Sonn F Afrikaner Nationalism and Black Advancement as Two Sides of the Same Coin in Adams *op cit* 172 at 1.

<sup>191</sup> McDonald J D Changing the Colour of South Africa’s Management (1994) South African Journal of Labour Relations V(18) No. 2 41-65 at 43.



addressing the disadvantages experienced by sections of the community in the past”.<sup>192</sup> Looking at Khoza’s definition to affirmative action above, his definition emphasises the correcting of imbalances in the workplace. Daniel argues that affirmative action attempts to “place candidates in positions from which they had been previously excluded in order to create a more representative or diverse workforce”.<sup>193</sup>

These definitions stress the importance of the correction of past injustices by using preferential treatment in the advancement of blacks in order to rectify imbalances created by past discrimination. Wingrove’s definition of affirmative action states that here affirmative action is seen as a process addressing the disadvantages caused by poor education, prejudice, job reservation, racism, lack of political rights and unequal distribution of wealth.<sup>194</sup>

Looking at the definitions to affirmative action of Hattingh and Meintjies above, it views affirmative action as a means to create an environment where all members of the community are treated on an equal basis, irrespective of factors such as race, gender, culture or language. It also advocates programmes aimed at achieving equal employment opportunities.

Another goal of affirmative action as defined above is the management of diversity. Affirmative action will result in a diverse workforce being created and according to Norris, a part of the process of affirmative action is to manage this diverse workforce effectively in the long term.<sup>195</sup> Therefore the management of diversity is seen to be an integral part of affirmative action. In fact Daniel explains that “respecting the differences people bring and recognising the added value that those differences represent are what

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<sup>192</sup> Innes Duncan Affirmative Action — Issues and Strategies (1993) at 4.

<sup>193</sup> Daniel R Diversity — It’s Good For Business (1994) Human Resource Management V(10) No.4 14-19 at 15 (Daniel).

<sup>194</sup> Wingrove T Affirmative Action — A “how to” guide for managers (1993) at 7.

<sup>195</sup> Norris B Manage Diversity or Sink (1996) People Dynamics V(14) No.6 34-39 at 36-39.

managing and valuing diversity is about”.<sup>196</sup> As affirmative action itself creates diversity, it is seen as a method to recognise these differences in people and to manage these differences in an efficient manner. Organisations are therefore encouraged and must attempt to, by means of affirmative action, create a workforce that can reasonably reflect the diversity of its society.<sup>197</sup>

Looking at the historical background to affirmative action in SA in Part I of this thesis, the diversity of SA’s population was one of the main precipitators of apartheid.<sup>198</sup> People were ethnically and racially grouped and then separated from the other groups.<sup>199</sup> Affirmative action measures will bring all groups together in a workplace and for there to be harmony amongst the groups managing diversity may be the only effective solution for coping with the diverse workforce. In fact it has been stated that —

“Differences among people, and particularly, cultural and racial differences, have played an integral part in the development of South Africa as a nation. These differences have in the past been the basis for discrimination and this has led to a lack of understanding and little appreciation for the value of diversity. For this reason the management of diversity and the challenges and problems it poses is at present one of the most important issues facing South African managers.”<sup>200</sup>

It therefore becomes imperative that if equality in the workforce is to be achieved then the importance of diversity and its effective management thereof cannot be understated.

Affirmative action measures are intended for the upliftment of persons who were previously disadvantaged. This part of the definition stresses the conscious attempt to

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<sup>196</sup> Daniel *op cit* 193 at 18.

<sup>197</sup> Fuhr I Managing Diversity (1992) People Dynamics V(10) No.11 28-31 at 30.

<sup>198</sup> Marx M Affirmative Action Success As Measured By Job Satisfaction (1998) at 28 (Marx).

<sup>199</sup> See Chapter Two of Part I to this thesis.

<sup>200</sup> Hugo P & Van Vuuren L J A Cross-Cultural Analysis of Work Values and Moral Reasoning (1996) Journal of Industrial Psychology V(22) No.1 12-18 at 12.

“uplift” previously disadvantaged groups to the same level on which their white counterparts are functioning.<sup>201</sup> Meintjies explains that “this view stresses the need to remove obstacles to advancement as well as the need for extra support and resources for people traditionally excluded”.<sup>202</sup> SA’s history of apartheid can be seen as one of the main reasons why an upliftment strategy is necessary to rectify this imbalance.<sup>203</sup> Therefore only persons identified under the designated groups qualify to benefit under affirmative action programmes as they have been identified as the ones that were the most disadvantaged in the past.

Finally a look at the definitions shows the reader that it is meant to be a developmental process. What this means is that affirmative action can be seen as a process where members of the previously disadvantaged groups are targeted to be the beneficiaries of accelerated development. The beneficiaries are usually employees or applicants with a certain potential that can be developed.<sup>204</sup> It is therefore defined as a strategy aiming to develop disadvantaged individuals in order for them to be empowered to compete on an equal basis.<sup>205</sup>

The definitions surrounding affirmative action stress the need to develop or train affirmative action appointees so that they can function more effectively in the positions they were appointed in. Here affirmative action is a process whereby it is seen as a tool to develop and train disadvantaged persons with potential, enabling them to function in higher level positions in the workplace.<sup>206</sup>

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<sup>201</sup> Adams *op cit* 172 at 3.

<sup>202</sup> Meintjies F *Confronting Discrimination in Organisations Reversing Discrimination: Affirmative Action in the Workplace* (1993) at 65.

<sup>203</sup> Marx *op cit* 198 at 26.

<sup>204</sup> Hattingh B *Affirmative Action* (1994) *Information Technology Review* V(7) 16-19 at 19.

<sup>205</sup> Marx *op cit* 198 at 27.

<sup>206</sup> *Ibid* at 27-28.

The USA started the affirmative action campaign as a means to stop racial discrimination or discriminatory practices against non-whites; SA's historic discrimination against blacks has the apartheid system to blame, whilst discriminatory practices in India owes its origins to the caste system. A look at the different definitions of affirmative action shows that the abolishment of discriminatory practices seems to be the central theme. It is believed that affirmative action will result in employment practices that will end discrimination. However, this thesis will later explore how effective affirmative action has been in ending discriminatory practices and achieving equality in the workplace in all three countries.

So to summarise, affirmative action relates to a policy or a programme that seeks to redress past discrimination through active measures to ensure equal opportunity, as in education and employment, is the policy of consciously setting racial, ethnic, religious, or other kinds of diversity as a goal within an organisation, and, in order to meet this goal, purposely selecting people from groups that have historically been oppressed or denied equal opportunities. In affirmative action, individuals of one or more of these minority backgrounds are preferred, over those who do not have such characteristics. Such a preferential scheme is sometimes effected through quotas. Affirmative action is considered to be a process by which the negative effects of discrimination are proactively countered. Those traits that were considered negative become desirable under an affirmative action plan.

The next part of this thesis will focus on the various provisions that regulate affirmative action and discrimination in the workplace.