
CHAPTER EIGHT

THE REGULATION OF DISCRIMINATION AND AFFIRMATIVE ACTION IN INDIA

8.1 The Constitution of India¹ and Anti-Discrimination Principles

The Constitution of India is almost always described as one of the most rights-based Constitutions in the world.² Interestingly, it was drafted around the same time as the Universal Declaration of Human Rights (UDHR) of 1948. The Indian Constitution (IC) therefore, seeks to capture the essence of human rights in its Preamble, in the sections on Fundamental Rights as well as in the Directive Principles of State Policy. These policies contain many of the provisions that can be found in the UDHR. The IC is based on the principles that guided India's struggle against a colonial regime that had consistently violated the civil, political, social, economic and cultural rights of the people of India. The IC was adopted after some two and one-half years of deliberation by the Constituent Assembly that also acted as India's first legislature. The IC was put into effect on January 26, 1950.

Recognising and acknowledging that the persons belonging to the SC's and ST's or the *dalits*, have suffered intense and extensive social and economic discrimination because of the caste system and being victims of irrational prejudices, legislative measures were needed to overcome this discrimination. On account of these prejudices that they have laboured under, they have suffered from severe handicaps particularly in the fields of education and public services. In view of this position, the framers of the IC incorporated into the Constitution itself provisions for affirmative action or compensatory discrimination programmes. This was done by providing for reservation of jobs for *dalits* in government employment and reservation of seats for them in educational institutions.³ Like the South African government,

¹ The Constitution of the Republic of India of 1950 (The Constitution of India).

² The 395 Articles and ten appendixes, known as schedules, in the constitution make it one of the longest and most detailed in the world. The ten schedules in force cover the designations of the states and union territories; the emoluments for high-level officials; forms of oaths; allocation of the number of seats in the *Rajya Sabha* (Council of States — The upper house of Parliament) per State or territory; provisions for the administration and control of Scheduled Areas and Scheduled Tribes; provisions for the administration of tribal areas in Assam; the union (meaning central government), State, and concurrent (dual) lists of responsibilities; the official languages; land and tenure reforms; and the association of *Sikkim* with India.

³ See Articles 15(4) and 16(4) of the Constitution of India.

the government of India sought to achieve the prohibition of unfair discrimination and the achievement of equality through the provision of affirmative action measures. It was recognised that merely outlawing discrimination would not bring about the desired result of equality.

However, there are still many reservations regarding the need for affirmative action in India. Diwan states that affirmative action measures are required because —

“.....if equality by our Constitution is to have any meaning to all people, it was necessary for us to make provisions for those who were never equal to others and could not be equal to others unless special efforts were made to make them equal—to bring them at the level of others. It is in this background that one should try to understand special provisions enacted in the Constitution for these classes.....”⁴

Further, to ensure the equality of all of its citizens the government of India has taken several steps to prohibit the practice of untouchability, also a form of extensive and widespread discrimination. The IC in its Bill of Rights,⁵ besides guaranteeing to all citizens basic civil and political rights, and fundamental freedoms, has special provisions that are directed at the practice of caste discrimination.

The Constitution of India draws extensively from Western legal traditions in its outline of the principles of liberal democracy, therefore it is not surprising that its compensatory provisions will resemble that of the Western countries. It is distinguished from many Western constitutions, however, in its principles reflecting the desire to end the inequities of traditional social relations and enhance the social welfare of the population.⁶ According to the constitutional scholar Granville Austin, he states that probably no other nation’s constitution “has provided so much impetus toward changing and rebuilding society for the common good”.⁷

Following a British parliamentary pattern, the IC embodies Fundamental Rights, which are

⁴ Diwan P & Diwan P Outlines Of The Constitution of India (1991) at 302 (Diwan).

⁵ Part III of the Constitution of India.

⁶ At <http://www.constitution.org/cons/india/const.html> last visited 30/09/04.

⁷ Austin Granville Working a democratic constitution: the Indian experience (1999) at 14.

similar to the US Bill of Rights, and a SC similar to that of the USA. It creates a “sovereign democratic republic” called India, or *Bharat*⁸ which “shall be a Union of States”. India is a federal system in which residual powers of legislation remain with the central government, similar to that in Canada. The Constitution provides detailed lists dividing up powers between central and State governments as in Australia, and it elaborates a set of Directive Principles of State Policy as does the Irish Constitution.

The IC has clear cut provisions for social justice and benign discrimination. The Preamble makes explicit and in bold letters, the resolve of the system to constitute India into a “socialist and democratic Republic”, with a view to securing, *inter alia*, social economic and political justice, equality, liberty and above all, dignity of the individual. Translating these general principles into concrete legal propositions, Part III of the IC guarantees certain fundamental rights to the individual which envisages positive State action. Among these rights there is the right to equality in its various aspects, including the authorisation of the State to take affirmative action for the benefit of the backward classes, SC’s and ST’s.⁹

A similar kind of concept has been expressed in the Directive Principles of State Policy as contained in Part IV of the IC. The directives require the State, *inter alia*, to promote the welfare of the people by securing and protecting a social order in which justice; social, economic and political, should inform all the institutions of national life; to reduce economic disparities and to make available adequate means of livelihood.¹⁰ These principles can be enforced notwithstanding the general right to equality in Article 14. In fact, to have the government enforce these rights is seen as an extension of the equality right. The Indian Republic therefore, also embraces the concept of substantive equality.

There are also provisions to ensure due representation of the weaker sections (i.e., the SC’s and ST’s) in Parliament and State legislators through reservations of seats.¹¹ It also directs for their induction into State services and provides special administrative safeguards for

⁸ This is named after the legendary king of the *Mahabharata*, an Indian epic story.

⁹ Articles 14, 15, 16 and 17 of the Constitution of India.

¹⁰ See generally The Directive Principles of State Policy in Part IV of the Constitution of India.

¹¹ Article 334 of the Constitution of India.

them. A backward classes commission to make recommendations for improving the conditions of the backward classes and a commission to report on the administration of scheduled areas have also been conceived in the Constitutional text. Special provisions have also been made for such minorities as Anglo-Indians.

Although the Directive Principles are asserted to be “fundamental in the governance of the country”, they are not legally enforceable. Instead, they are guidelines for creating a social order characterised by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the Constitution’s preamble.

(8.1.2) Fundamental Rights

Like the USA, the debate on discrimination policies in India developed against the background of minority rights.¹² The Constitution of India has a Fundamental Rights chapter and to this end the IC has several provisions to protect SC’s and to improve their position in society. The concept of equality and fundamental rights provisions has been developed through Articles 14 to 18 in the IC. The right to equality has been further divided into two parts — The Right to Equality in general¹³ and the Right to Equality in particular.¹⁴ Article 14 provides that all persons shall be accorded equality before the law and equal protection of the law.¹⁵

The situation then arises that since all persons should be equally treated in terms of the law how one can justify positive discrimination.¹⁶ Diwan states that “there are no universal laws of universal application, since social circumstances in all situations are not universal. Men and women are equal but they are not equal in all circumstances and in all situations”.¹⁷ This has led to the doctrine of “reasonable classification” or “protective discrimination”. As is the situation in SA, it is now settled law that the protective discrimination or doctrine of

¹² Saksena H S Safeguards for Scheduled Castes and Tribes — Founding Father’s View (1981).

¹³ Article 14 of the Constitution of India.

¹⁴ Articles 15-18 of the Constitution of India.

¹⁵ *W B v Anwar Ali* (1952) AIR 75 (SC).

¹⁶ Hepple Bob and Erika M S (ed) *Discrimination — The Limits of the Law* (1992) (Hepple and Erika).

¹⁷ Diwan *op cit* 4 at 46.

classification in India is inherent in the right to equality.¹⁸

In India, like the situation in SA, equality means equality of various kinds. It means civil equality, political equality, social equality, natural equality as well as economic equality.¹⁹ The contents of equality are of both positive and negative in nature.²⁰ The ISC has stated that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.²¹

Looking at the Fundamental Rights chapter, the IC prohibits discrimination on the basis of a person's race, sex, religion, place of birth, or social status. Like the affirmative action provisions in the USA for the designated beneficiaries, in India there are several safeguards for the protective discrimination of the SC's, ST's and OBC's. The Constitutional safeguards for these three groups are found in Articles 15(4), 16(4), 29(2) and part XVI of the IC. Specifically Article 15(4) authorises the State to make any special provision for the advancement of any of these socially and educationally backward classes of citizens or for the SC's and ST's. So Articles 15 to 16 provides for protective discrimination in favour of the backward classes, SC's and ST's.

On the one hand, various forms of discrimination are explicitly prohibited in Article 15, while preferential treatment for certain groups is explicitly allowed. Racial or sex discrimination *per se* would violate the fundamental rights guarantees of Article 14,²² 15(1) and 15(2).²³

¹⁸ Mehta S M Indian Constitutional Law (1990) 4ed at 60. See the case of *State (Delhi Administration) v V C Shukla* (1980) AIR 1382 (SC).

¹⁹ Bhandari M K Basic Structure of the Indian Constitution — A Critical Reconsideration (1993) at 211.

²⁰ *Desu Rayudu v Public Service Commission* (1967) AIR 353 (AP).

²¹ *Maneka Gandhi v Union of India* (1978) AIR 597 (SC).

²² The Fundamental Rights Chapter in the Constitution of India — Equality before law —
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

²³ Article 15(2) of the Constitution of India provides as follows —
The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and forms of exploitation.

Article 15 provides for the equality of all India's citizens by stating that —

“The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them.”²⁴

Further, Article 15 prohibits subjection to a disadvantage based on caste with respect to access to shops, public restaurants, etc., or to the use of wells, roads and public places maintained out of State funds. There are also positive duties imposed on the State to redress imbalances due to past injustices against untouchables. Article 15(4) permits the State to make special provisions for the advancement of any socially and educationally backward class of citizens, including the SC's.

Unlike the situation in the US where affirmative action or positive measures are not explicitly provided for in its Constitution, Articles 15(3), 15(4), as well as 16(4) of the IC, expressly allows for discrimination on the grounds of sex, age or “backwardness”.²⁵ Article 15(4) empowers the state to make “any special provisions for the advancement of any socially and educationally backward classes or citizens, or for scheduled castes and scheduled tribes”.²⁶ The provision of this clause should be looked at in the context of the fundamental rights guaranteed under Article 29(2) and the provisions of Articles 340 (relating to OBC's) 341 (relating to SC's) and 342 (relating to ST's).

Further, the IC prohibits discrimination based on the ground of descent under Article 16,

²⁴ Article 15 of the Constitution of India further provides that —
(2) No citizen shall on any grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regards to;
(a) access to shops, public restaurants, hostels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

²⁵ Articles 15(3) and 15(4) of the Constitution of India provides that —
(3) Nothing in this Article shall prevent the State from making any special provision for women and children.
(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

²⁶ This particular provision was incorporated into the constitution through the Constitution (First Amendment) Act, 1951 and has enabled several states to reserve seats for scheduled castes and scheduled tribes in educational institutions, including technical, engineering and medical colleges. It has also paved the way for reservations in the police forces.

which reads as follows —

“No citizen on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”

Discrimination in government employment is specifically outlawed by Articles 16 and 16(4).²⁷ Article 16(4) further permits the State to reserve appointments for members of backward classes not adequately represented in the State services.

Further, Article 15(4) and Article 16(4) permit special provisions for backward classes. These specific articles of the IC recognise beneficial discrimination or protective; compensatory preferential discrimination, or simply affirmative action. Indeed, in the governance of the country the State is enjoined by a directive principle of State policy²⁸ to “promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the SC’s and the ST’s, and to protect them from social injustice and all forms of exploitation”. However it is important to note that in the implementation of these provisions the efficiency of the administration is not to be sacrificed.²⁹ It should be noted that whilst Article 15(4) applies to the State in all of its dealings, Article 16(4) is confined specifically to the field of government employment. Thus, the area of employment, offices and appointments under the State is controlled by Article 16 alone, and preferences in this area must be within the scope of Article 16(4).

Article 17 of the Constitution abolishes the practice of “untouchability” and punishes the enforcement of any disability arising out of the practice.³⁰ This is similar to the provision that abolishes slavery in the US. Pursuant to this power, Parliament enacted the Untouchability (Offences) Act of 1955. Article 17 further protects a person from the discriminatory conduct of not only state but also of private persons. Therefore both private

²⁷ Article (4) of the Constitution of India states that —
any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

²⁸ See Article 46 of the Constitution of India.

²⁹ Article 355 of the Constitution of India.

³⁰ Article 35(a) (ii) of the Constitution of India.

and state employers are enjoined to refrain from discrimination under Article 17.

The Fundamental Rights embodied in the IC are guaranteed to all citizens. It has been argued that these civil rights take precedence over any other law of the land. They include individual rights common to most liberal democracies like SA and the USA, such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion, and the right to constitutional remedies for the protection of civil rights such as *habeas corpus*. In addition, the Fundamental Rights are aimed at overturning the inequities of past social practices. They abolish “untouchability”; prohibit discrimination on the grounds of religion, race, caste, sex, or place of birth; and forbid the trafficking of human beings and forced labour.

(8.1.3) Group Rights

In addition to stressing the right of individuals as citizens, Part XVI of the IC endeavours to promote social justice by detailing a series of affirmative action measures for disadvantaged groups. These “Special Provisions Relating to Certain Classes” include the reservation of seats in the *Lok Sabha* (House of the People) and in state legislative bodies for members of the SC’s and ST’s. The number of seats set aside for them is proportional to their share of the national and respective state populations.

Part XVI also reserves some government appointments for these disadvantaged groups insofar as they do not interfere with administrative efficiency. The section stipulates that a special officer for SC’s and ST’s be appointed by the president to “investigate all matters relating to the safeguards provided” for them, as well as periodic commissions to investigate the conditions of the backward classes. The President, in consultation with state governors, designates those groups that meet the criteria of SC’s and ST’s. Similar protections exist for the small Anglo-Indian community.

The framers of the IC provided that these special provisions are to cease twenty years after the promulgation of the IC. The reason for this seems to be obvious. They expected the twenty-year duration to be sufficient time in which the progress of the disadvantaged groups would have removed significant disparities between them and other groups in society. However this was not to be the case. In 1969 the Twenty-third Amendment extended the affirmative action measures until 1980. The Forty-fifth Amendment of 1980 extended them

again until 1990, and in 1989 the Sixty-second Amendment extended the provisions until 2000 and recently it has been extended for a further ten years. After five amendments, the policy is now set to expire on January 25, 2010. The Seventy-seventh Amendment of 1995 further strengthened the states' authority to reserve government-service positions for the SC's and ST's members.

There are various other provisions in the IC addressing caste discrimination. One such section which aims to eliminate discrimination is Article 21.³¹ Article 21 guarantees one the right to life and liberty. The Indian Supreme Court (ISC) has interpreted this right to include the right to be free from degrading and inhumane treatment, the right to integrity and dignity of the person, and the right to speedy justice.³² Further, Article 23 prohibits the trafficking of human beings and other similar forms of forced labour. Since the majority of bonded labourers belong to SC's, Article 23 is especially significant for them.³³

Similarly, Article 24 provides that no child under the age of fourteen shall work in any factory or mine or engage in any hazardous employment. Article 23 further prohibits the use of forced labour and discrimination on the ground of caste when imposing compulsory service for public purposes. Article 29 (2) prohibits the denial of admission to any educational institution on the ground of caste. Article 325 prohibits disfranchisement on the ground of caste; Articles 330 and 333 which provide for reserving of seats for members of the SC's and ST's in Union and state legislatures according to the scheduled caste population in each constituency and Article 338 mandates the appointment of a National Commission for Scheduled Castes and Scheduled Tribes.

The Commission has been appointed and investigates and monitors all matters relating to the safeguards provided for SC's. Article 338(5)(b) makes it the duty of the Commission to enquire into specific complaints with respect to deprivation of rights and safeguards of the

³¹ Article 21 of the Constitution of India provides that —
No person shall be deprived of his life or personal liberty except according to procedure established by law.

³² Singh S K Bonded Labour and the Law (1994) at 48-51.

³³ The Bonded Labour System (Abolition) Act of 1976 was then passed.

dalits.³⁴ The Constitution further provides that the Union and every State government shall consult the commission on all major policy matters affecting SC's and the ST's.

Further provisions of note include Article 341, which makes possible the legal identification of the SC's or untouchables by means of lists prepared for each State and union territory. The list, when published by the President, is final as to the castes or groups within castes which are deemed to be SC's.

Article 46 comprises both development and regulatory aspects and stipulates that —

“The state shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and forms of exploitation.”³⁵

The provisions discussed above specifically regulate discrimination in the workplace and outside of it.

8.2 The Constitution and Positive Discrimination

Looking at the above anti-discrimination provisions in the IC, it can be seen that India is pursuing affirmative action for the so-called socially and educationally backward classes. This policy consists of various schemes allowing preferential treatment as well as reservations of a percentage of government jobs and of places in educational institutions, being the most important. To indicate the magnitude of this policy, even the central government has reserved twenty-seven percent of all government jobs and places in institutions of higher education for the socially and educationally backward classes. However, these reservations can go up to as high as fifty percent for the SC's and ST's.

8.3 The Constitution and Reservations

Seats are reserved in the proportion of the population of SC's and ST's to the total

³⁴ Approximately 1294 complaints were received in the year 2000. After examining them, action has been taken by requiring competent authorities of the states to take cognisance under the penal acts. This has been done in a majority of cases.

³⁵ However, as this Article falls under the category of Directive Principles and not fundamental rights, it cannot be enforced by the state's courts.

population.³⁶ The seats are “reserved” in the sense that candidates who stand for them must belong to the designated groups.³⁷ These legislative reservations are the only ones that are subject to a constitutional time limit. It was originally provided that such reservations should expire ten years after the commencement of the Constitution.³⁸ However, a glance at the Constitution of India shows that the SC’s and the ST’s have been enjoying the facility of reservation in promotion since 1955.

The ISC in its judgment dated 16th November, 1992 in the case of *Indra Sawhney and Others v Union of India and Others*³⁹ observed that the reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. In view of the commitment of the government to protect the interest of the SC’s and ST’s, the government decided to continue the existing policy of reservation in promotion for the SC’s and the ST’s.⁴⁰ To carry out this the Seventy-Seventh Amendment Act of 1995 inserted a new clause in Article 16 to the effect that Article 16(4A), will provide for reservations in promotion for the SC’s and ST’s.

Protective discriminatory laws can be passed in favour of SC’s and ST’s. Article 15 bars discrimination but Article 15(4) permits the legislature to make special provisions for the members of the SC’s and ST’s. Article 15(4) provision was incorporated into the IC through the Constitution (First Amendment) Act, 1951 and has enabled several states to reserve seats for SC’s and ST’s in educational institutions, including technical, engineering, and medical colleges. It has also paved the way for reservations in police forces.⁴¹

³⁶ See the case of *Pradip Tandon v State of Uttar Pradesh* (1975) AIR 200 (SC) — where the state contended that its reservations for hill and rural areas were “made.....to provide medical service.....to people of those areas”. The court here appears to assert that reservations have to be based on the deservingness of the recipients rather than on some beneficial consequences for a backward class.

³⁷ Galanter M *Competing Inequalities — Law and the Backward Classes In India* (1984) at 374-375 (Galanter).

³⁸ Article 334 of the Constitution of India.

³⁹ *Indra Sawhney v Union of India* (1993) AIR (SC) 447.

⁴⁰ The Constitution (Seventy-Seventh) Amendment Act 1995.

⁴¹ With regard to Article 16(4), the claims of Scheduled Castes and Scheduled Tribes, as per Article 335 of the Constitution of India, shall also be taken into consideration, consistent with maintaining efficiency of administration, in the making of appointments services and posts in connection with the union or of a state.

The most outstanding of all preferential policies is the reservation of seats in elective legislative bodies. The IC specifically provides reserved seats in proportion to their numbers for the SC's and ST's in the *Lok Sabha* (the lower house of Parliament)⁴² and the *Vidhan Sabhas* (lower house of the state legislatures).⁴³ There are however, no reservations in legislatures for OBC's.⁴⁴ All of the other constitutional provisions for preferences are merely authorisations empowering the State to make special provision for disadvantaged groups.⁴⁵ The Constitution also provides for the reservation of seats for the SC's and ST's in every Municipality.⁴⁶ Articles 330-340 focus on seat reservations and special representation for SC's and ST's in the *Lok Sabha* and the Legislative Assembly of every state.⁴⁷

Article 335 extends reservations to all appointments "in connection with the affairs" of the State, which may be broader than the "services under the State" referred to by article 16(4).⁴⁸

(8.3.1) Reservations in Education

Education has long been identified as key to achieving the advancement of the SC's. In line with Article 15(4) of the IC, which empowers the State to make special provisions for the educational development of SC's, the Indian government currently allows for the reservation of fifteen percent of seats for SC's in universities and colleges. This policy covers enrolment in various undergraduate and graduate courses of general, technical, medical and other professional education. Reservations can also extend to the allotment of places in dormitories. State governments observe different rates of reservation, based on the size of

⁴² Article 330 of the Constitution of India.

⁴³ Article 332 of the Constitution of India.

⁴⁴ The Constituent Assembly definitively rejected political safeguards for religious and other minorities. See Galanter *op cit* 37 at 44.

⁴⁵ In particular see Article 243D of the Constitution of India.

⁴⁶ See Article 243T of the Constitution of India.

⁴⁷ Article 330 of the Constitution of India.
Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People —
(1) Seats shall be reserved in the House of the People for —
(a) the Scheduled Castes;
(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and
(c) the Scheduled Tribes in the autonomous districts of Assam.

⁴⁸ Article 335 of the Constitution of India.

their scheduled caste populations.

Along with these measures, Central and State governments have also instituted scholarship or stipend programmes, as well as initiatives to furnish SC's with special tutoring, books, mid-day meals, stationery and uniforms. Created in 1956 by an Act of Parliament, the University Grants Commission (UGC) oversees the implementation of these policies in institutes of higher education.⁴⁹ The UGC has routinely published guidelines to encourage and aid state governments in filling reservation quotas entirely. For example, schedule caste candidates are normally given a relaxation of marks by five percent from the minimum qualifying level. Where reserved seats remain vacant, universities are advised to increase the relaxation of admissions.⁵⁰

8.4 Time Frame for Reservations

Initially, the framers of the constitution provided that the special provisions would cease twenty years after the promulgation of the constitution, anticipating that the progress of the disadvantaged groups during that time would have removed significant disparities between them and other groups in society. However, in 1969 the Twenty-third Amendment extended the affirmative-action measures until 1980. The Forty-fifth Amendment of 1980 extended them again until 1990, and in 1989 the Sixty-second Amendment extended the provisions until 2000. The Seventy-seventh Amendment of 1995 further strengthened the states' authority to reserve government-service positions for Scheduled Caste and Scheduled Tribe members.

Further, Article 334 of the IC lays down that the provisions of the IC relating to the reservation of seats for the SC's and ST's shall cease to have effect on the expiration of a period of fifty years from the commencement of the Constitution. Accordingly these reservations were to have ceased after fifty years,⁵¹ but the Fourth-Fifth Amendment to the

⁴⁹ National Commission for Scheduled Castes and Scheduled Tribes Annual Report — 1996-97 & 1997-98 at 60.

⁵⁰ Ministry of Human Resource Development, Department of Education of India, Annual Report — 1996-97 at 196.

⁵¹ The Constitution of India Article 334.
Reservation of seats and special representation to cease after [fifty years] —
Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to —

Indian Constitution Act 1980 extended this by a further 10 years, and this extension has been perpetuated by the IC for a further decade thereafter.⁵²

According to the Constitution of India's (Seventy-Ninth Amendment) Act 2000 it was stated by the drafters that there is a need to continue with reservations for the SC's and the ST's for a further period of ten years. It was stated that although the SC's and ST's have made considerable progress in the last fifty years, the reasons which weighed with the Constituent Assembly in making provisions with regard to the aforesaid reservation of seats and nomination of members, have not ceased to exist.⁵³

8.5 Analysing the Constitutional Provisions

Looking at the IC's policy on reservation, despite the creation of centrally based commissions to monitor reservations and other schemes, the IC gives great liberties to the individual states to determine the quantity and limits of reservation. The relevant clauses give states the authority to formulate and implement policy to facilitate "the advancement of any socially and educationally backward classes of citizens" but it is decidedly vague. The reason for this is that no concrete definition of "backward" is provided therein either. In addition, though a specific, if, in practice, flexible, time limit is placed on the reservation of seats in the *Lok Sabha* and State legislative assemblies, there is no such clause regarding the future termination of reservations of jobs and promotions.

Although Articles 15(4) and 16(4) states the extent or scope of the policies, the IC itself does not lay down how the Indian policies of protective discrimination are to be implemented. This has led to some legal insecurity and to the direct involvement of the superior courts.⁵⁴ Article 32 of the IC guarantees one the right to approach the ISC directly and by appropriate

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- (a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and
 - (b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of [fifty years] from the commencement of this Constitution.

⁵² Sixty-second Amendment of 1989.

⁵³ Statement of Objects and Reasons appended to the Constitution (Eighty-Fourth Amendment) Bill of 1999 which was enacted as the Constitution (Seventy-ninth Amendment) Act of 2000.

⁵⁴ This refers to the ISC in New Delhi and the more than twenty state-based high courts.

proceedings for the enforcement of any of the fundamental rights.⁵⁵ The IC has further detailed provisions in Part XVI dealing with the “Special Provisions relating to Certain Classes”.

Even though the State is not limited to reservations as a method of preference, affirmative action measures seem to be focussed on reservations alone. Only in the area of government employment is reservation constitutionally specified, but even there reservations may be accompanied by other preferential devices for example fee concessions, the waiver of the age limit etc. Importantly, the *Balaji* case disposed of the idea that a limitation on the extent of reservations must rest upon the construction of the word “reservations” in Article 16(4) and established that such limits are applicable to reservations under Article 15(4) as well.⁵⁶ The question arises on whether or not there are similar constitutional limitations on the quantity of other kinds of preferences. However, the judicial control over the extent of such preferences is far less clear than over reservations.⁵⁷

Further, although there is a constitutional duty to protect the interests of the “weaker sections”, the IC does not explicitly obligate the government to employ any particular method of doing this.⁵⁸ Except for reserved seats in the legislatures, the quantum of preferential treatment is unspecified. The constitution also does not explicitly provide any limitation on the extent of preferences. In spite of the broad and unrestricted language of Articles 15(4) and 16(4), a doctrine of constitutional limitation has emerged in dealing with those preferences which take the form of percentage reservations of government posts and places in educational institutions.⁵⁹

Preferential policies are usually constructed to benefit clearly identified underprivileged persons like the designated groups in SA and the minority groups in the USA. However, for

⁵⁵ Hepple and Erika *op cit* 16 at 45.

⁵⁶ *Balaji v Income Tax Officer* (1962) AIR 123 (SC).

⁵⁷ Galanter *op cit* 37 at 442.

⁵⁸ There is no provision in the Constitution that the State needs to reserve any minimum number of posts in government service seats in educational institutions, nor divert any minimum part of its resources to benefits for backward groups.

⁵⁹ See the case of *Venkataramana v State of Madras* (1951) AIR 229 (SC).

India's socially and educationally backward classes this was not the case. The Constitution of India provides the legal opportunity for preferential treatment for their benefit even before it was clear who the socially and educationally backward classes were. So even though the IC provides for the preferential treatment of the socially and educationally backward classes it does not clearly identify who are the socially and educationally backwards groups.

Article 338 envisages the appointment of a Special Officer for the SC's and ST's. An obligation is imposed on this officer to investigate all matters relating to the safeguards provided for these people under the IC. He is responsible for reporting to the President and for the submission of annual reports.

When the Constitution of India was enacted in 1950, the reservations were to cease after ten years. However, having regard to the conditions of SC's and the ST's, the Constitution has been amended from time to time, and the period of ten years has been extended to twenty years, then to thirty, forty and fifty years. At present it provides that the reservations will now cease after sixty years, i.e., after the year 2010.⁶⁰ There seems to be no end in sight for India's affirmative action policies. This raises two pertinent but problematic questions relating to affirmative action measures. Firstly, if fifty years was not enough to achieve equality in India, then how many more years is needed and secondly, why hasn't equality been achieved in this space of time?

India's constitutional scheme for the protection of SC's, ST's and OBC's from continued exploitation and discrimination by the upper castes and classes is very expressive, as can be seen from the specific contents of its Constitution. The entrenchment of these provisions among fundamental rights must be seen as a clear indication of a full commitment to such policies. However the successfulness of the implementation of such policies is questionable. The next part of this thesis will take a look at some of these problems.

8.6 OTHER LEGISLATIVE PROTECTIONS

To bolster the IC, the Indian Government has passed several laws.

⁶⁰ See Article 334 in the 79th Amendment Act of 1999.

(8.6.1) The Protection of Civil Rights Act

One such law included the Protection of Civil Rights Act. The abolishment of “untouchability” or discrimination was made enforceable through this Protection of Civil Rights Act.⁶¹ The Protection of Civil Rights Act was enacted to enforce the abolition of “untouchability” under Article 17 of the Constitution of India.

In traditional Indian society, the fourfold *varna* theory describes a broad functional division of labour. Though the caste system has not prevented occupational mobility for caste Hindus, many “untouchable” communities have been forced to continue their occupations as leather workers, disposers of dead animals, or manual scavengers, and to perform other tasks deemed too ritually polluting for upper castes. The constitutional abolition of “untouchability” meant that caste Hindus could no longer force *dalits* to perform any “polluting” occupation.

This Act punishes offences that amount to the observance of “untouchability”.⁶² However, due to non-compliance of these laws, in 1973 the Protection of Civil Rights Cell was established to respond to a lack of convictions under the Protection of Civil Rights Act.⁶³ The Act was also vulnerable to abuse as it was easy to make an allegation that someone was called by his or her caste name without needing to provide any proof thereof and was therefore ineffective.⁶⁴

Anti-untouchability propaganda and the Protection of Civil Rights Act attempts to relieve untouchables from the social disabilities under which they have suffered. These measures may not strictly be called compensatory discrimination in the formal sense of the term, but in substance it is special undertaking to remedy the disadvantaged position of the untouchables.

⁶¹ Article 15(2) and 16(2) of the Constitution of India.

⁶² Sections 3-7 of the Protection of Civil Rights (Anti-Untouchability) Act of 1955.

⁶³ Since the promulgation of the Atrocities Act in 1989 the cell has shifted its focus primarily to cases of atrocities. The Human Rights Watch Interview (1998 February, 5) Bombay.

⁶⁴ The Prevention of Atrocities Act 33 of 1989 has attracted similar accusations of misuse, including allegations that cases are filed merely as a means of collecting state compensation, as prescribed under the Prevention of Atrocities Rules, 1995, or to harass upper-caste members of rival political parties.

(8.6.2) The Bonded Labour System Act⁶⁵

Bonded labour is banned under the IC and legislation of 1976.⁶⁶ The term “bonded labour” refers to work in slave-like conditions in order to pay off a debt.⁶⁷ Following India’s ratification of the ILO’s Convention on Forced Labour⁶⁸ legal steps were taken to abolish the bonded labour system.⁶⁹ Subsequently, the Bonded Labour System (Abolition) Act was passed.⁷⁰ The Act provides for the abolition of bonded labour, bonded labour system and bonded debt.⁷¹

The Bonded Labour System (Abolition) Act abolishes all agreements and obligations arising out of the bonded labour system.⁷² It aims to release all labourers from bondage, cancels any outstanding debt, prohibits the creation of new bondage agreements, and orders the economic rehabilitation of freed bonded labourers by the state.⁷³ It also punishes attempts to compel persons into bondage.⁷⁴ Under the Bonded Labour System (Abolition) Act, the definition of “bonded labour system” includes “any system of forced, or partly forced labour under which a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that”.⁷⁵

⁶⁵ The Bonded Labour (Abolition) Act of 1976.

⁶⁶ Article 23 of the Constitution of the India.

⁶⁷ Human Rights Watch/ Asia The Small Hands of Slavery — Bonded Child Labour in India (1996).

⁶⁸ India has ratified the ILO Convention 29 of 1930 (Forced Labour Convention) on 30 November 1954.

⁶⁹ The Bonded Labour System (Abolition) Ordinance was promulgated on October 25, 1975.

⁷⁰ The Act was passed by Parliament in 1976 but given effect to from 25 October 1975, the date when the Ordinance was promulgated.

⁷¹ The Bonded Labour System (Abolition) Act 19 of 1976 (The Bonded Labour Abolition Act) Abolition of Bonded Labour System states that —
(1) On the commencement of this Act, the bonded labour system shall stand abolished and every bonded labourer shall, on such commencement, stand freed and discharged from any obligation to render any bonded labour.

(2)
⁷² See sections 6-8 of the Bonded Labour Abolition Act.

⁷³ Sections 4-6 and section 14 of the Bonded Labour Abolition Act.

⁷⁴ Section 16 of the Bonded Labour Abolition Act.

⁷⁵ The Bonded Labour Abolition Act section 2 states that —
(g) “bonded labour system” means the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with

(8.6.3) *The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act*

The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act (The Manual Scavengers Act) punishes the discrimination of employers doing these types of jobs.⁷⁶ Mahatma Gandhi raised the issue of the horrible working and social conditions of “*bhangis*” or *dalits* more than one hundred years ago in 1901 at the Congress Meeting in Bengal. Yet it took about ninety years to outlaw the practices. The Manual Scavengers Act was promulgated to provide for the prohibition of employment of manual scavengers as well as construction of dry latrines and for the regulation of construction and maintenance of water seal latrines.⁷⁷

However, the employment of manual scavengers persists widely though “illegally”. In 1992, a nation-wide scheme was launched for their rehabilitation and substantial funds were allocated for this purpose, but only a handful of scavengers benefited. The failure of this scheme is evident from the fact that there are more than one million manual scavengers in India. Manual scavengers live in segregated colonies, separate from the other caste Hindus. The banning of manual scavenging did not stop the exploitation of *dalits*.

(8.6.4) *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act*⁷⁸

Thirty four years after the introduction of the Protection of Civil Rights Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was enacted to bring further discriminatory practices to an end. The Scheduled Castes and Scheduled Tribes Act was promulgated to prevent the commission of offences of atrocities against the members of the

The SC’s and the ST’s.⁷⁹ It also contains a list of those persons that qualify for affirmative

the creditor to the effect that —

- (i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by the document) and in consideration of the interest, if any, due on such advance.

⁷⁶ The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act of 1993 (The Manual Scavengers Act).

⁷⁷ The Manual Scavengers Act was notified in the Gazette on June 5, 1993.

⁷⁸ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 33 of 1989.

⁷⁹ The Act also provides for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental

action programmes.

This important law was needed because of the high incidence of recurrent acts of violence against helpless *dalits* throughout the country. Eighteen atrocities are listed, including violence against women, dispossession of a *dalits* land and mischief by fire and destruction of property. Penal Code offences carrying a punishment of ten years imprisonment if committed against a member of a scheduled caste are punishable by imprisonment for life. These offences are considered to be cognisable and non-bailable offences. There are special courts to provide speedy trials and special prosecutors to conduct cases. In 1999 rules were enacted under the Act to strengthen the investigation process and make provision for the payment of compensation to victims.

This Act also contemplates formation of special courts for trial of such offences which are enumerated in the Act. Many district headquarters have a separate special court to try the offences under the 1989 Act. Eighty exclusive special courts have been set up in various states. Other states have conferred upon the existing sessions courts the powers of special courts for trial of offences under the 1989 Act.

It is a fact that discriminatory practices against the *dalits* do persist. An absence of effective enforcement of the legal provisions is one of the main causes. Employment and particularly the government employment promote social and economic advancement and provisions relating to protective discrimination precisely aim at achieving this goal. It must be noted in this context that Articles 15(4) and 16(4) specifically refer to social and educational advancement of disadvantaged groups.

However economic advancement naturally accompanies the social and educational advancement. Under the IC, the protective discrimination programme has been designed specifically to remedy social disadvantages by way of distribution of state advantages. It must, however, be ensured that a fortunate few do not monopolise its benefits for ever. A constant endeavour has to be made that the theoretical justifications are matched by effective implementation.

thereto.

Another Act that was passed which outlaws discrimination is the Protection of Human Rights Act of 1993. This Act establishes the National and State Human Rights Commissions and the Human Rights Courts for the protection of human rights. Human rights is defined in section 2 as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in two international human rights instruments (ICCPR and ICESCR) and enforceable by courts in India.

Even though there are a lot of progressive laws in India that are attempting to eliminate discrimination, discrimination in various forms still exist in the workplace.

8.7 Discrimination in the Workforce

Discrimination, at work and outside work, is widespread in Indian society. Discrimination at work takes many different forms in India because work itself is organised very differently from one sector to another. Only a small part of the workforce is deployed in the “organised” sector. Outside that sector, it is difficult to regulate discrimination, or indeed the conditions of work in general, through legislation. In much of the “informal” sector, workers are complicit in violations of the law either because they are unaware of the provisions or because their livelihood depends on such violations, for e.g., the employment of bonded labourers. Here invidious discrimination is so widespread as to be taken for granted by both employers and employees.

(8.7.1) Invidious Discrimination

Indeed, discrimination on the basis of caste and gender was the rule rather than the exception in India’s traditional hierarchical order. The entire division of labour was caste based and gender based. In the traditional economic order, discrimination on the basis of caste and gender was in conformity with social norms and not against them; men and women and members of different castes were treated not only differently but also unequally. Though discrimination is now forbidden by the IC and the new laws, many of the old practices continue. Some of the more obvious forms of discrimination at work is discussed below.

In India it has been recognised by the courts that discrimination that may seem to be fair and neutral may be invidious in nature. For example, in *State of Bombay v Bombay Education*

*Society*⁸⁰ the validity of the Bombay Government Order directing schools having English as a medium of instruction to admit only Anglo-Indians and citizens of Asiatic descent was challenged on the ground that the Order was repugnant to the rights secured under Article 29(2). The SC held that the Order was invalid because the result of the Order was the denial of admission to all pupils whose mother-tongue was not English. They were discriminated against on the ground of language only.

One of the more prevalent forms of discrimination baring women in the workforce is sexual harassment.

(8.7.2) Sexual Harassment in India

In fact, one of the greatest barriers to employment equity in India is sexual harassment that is faced by its female employees. There is currently no legislation in India preventing the sexual harassment of persons in the workplace. According to the Penal Code of India, two of the sections of the Code have been used in sexual harassment cases. Section 354 creates an offence (two years imprisonment, a fine or both) of assault, or using criminal force against, a woman with intent to outrage her modesty. Under section 509, it is an offence (one year's imprisonment, a fine or both) to use words, gestures or acts or to exhibit any object with the intention to insult the modesty of a woman, or to intrude upon her privacy. Section 209 of the Code might also be used in sexual harassment cases because it includes an offence of, to the annoyance of others, doing any obscene act in any public place or singing, reciting or uttering any obscene song, ballad or words in or near any public place which is punishable by three months prison, a fine or both.

In the case of *Vishaka v State Of Rajasthan*⁸¹ the court noted that the government of India has recognised the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that the enactment of such legislation will take considerable time. For the first time, behaviour that can be considered sexual harassment has been explicitly and legally defined under the SC of India in its Guidelines on Sexual Harassment of 1997. It therefore is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe

⁸⁰ *State of Bombay v Bombay Education Society* (1954) AIR 561 (SC).

⁸¹ *Vishaka v State Of Rajasthan* (1997, August 13) SOL 177.

certain guidelines to ensure the prevention of sexual harassment of women. The following are some guidelines that should be followed when one is dealing with sexual harassment in the workplace.

The court stated that it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required. Further, the definition for this purpose is that sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as —

- (a) physical contact and advances;
- (b) a demand or request for sexual favours;
- (c) sexually coloured remarks;
- (d) showing pornography; and
- (e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise, such conduct can be humiliating and may constitute a health and safety problem, it may be discriminatory conduct. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work, including recruiting or promotion, or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

Further, preventive steps should be taken in that all employers, or persons in charge of a work place, whether in the public or private sector should take appropriate steps to prevent sexual harassment. It was decided that without prejudice to the generality of this obligation they should take the following steps —

- Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- The rules or regulations of Government and Public Sector bodies relating to conduct and discipline should include rules or regulations prohibiting sexual harassment and

provide for appropriate penalties in such rules against the offender.

- As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act of 1946.
- Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

The Court in the *Vishaka* case stated that these guidelines are to be legally binding and must be enforced. In fact until the verdict in *Vishaka's* case there were no official guidelines to deal with this subject.⁸² In this case, the Court opined that sexual harassment at the workplace amounts to a violation of the individual rights guaranteed under Articles 14,⁸³ Article 15,⁸⁴ Article 19(1)(g),⁸⁵ Article 42,⁸⁶ and the citizens duties under Article 51A to renounce practices derogatory to the dignity of women.

Equality of employment can be seriously impaired when women are subjected to gender specific violence such as sexual harassment at workplace. Therefore the court has given the above-mentioned guidelines to prevent sexual harassment at workplace. Such guidelines is said to be applicable to all organisations like, private and public sector, voluntary organisations, and government departments. All employers or persons in charge of the workplace, whether in the public or private sector, should take appropriate steps to prevent sexual harassment.

These guidelines provide protection to women employees only. Therefore male employees, if subjected to sexual harassment, cannot claim protection or relief under these norms. While this judgment has identified the likely victims as women, the perpetrators have not been

⁸² This case relates to the alleged gang rape of a social worker in a village of Rajasthan.

⁸³ The provisions relating to equality before law.

⁸⁴ The provisions relating to the prohibition of discrimination on the ground of sex.

⁸⁵ The provisions relating to the right to practice freely any profession, trade or occupation.

⁸⁶ The provisions relating to humane conditions of work.

identified. Therefore sexual harassment of women employees by women themselves may also amount to sexual harassment. In India there is no provision for monetary compensation when a sexual harassment case is proved, so there is a need for either disciplinary action to be initiated internally or prosecution should be launched in the court of law. It is not a legal issue alone, it is an effort towards creating harassment free workplace which helps the organisation to improve public image as best employer and to attract, motivate and retain the talented work force. Successful implementation will also result in enhancement of employee motivation, loyalty, a sense of belonging and productivity.

8.8 Analysis of Provisions in SA, the USA and India

Like the South African Constitution, the Constitution of India provides a blueprint for an egalitarian society. The Constitution is not based on the premise of hierarchy, but on the premise of equality. Both these Constitutions recognise that you do not just erase or cancel out age-old inequalities simply by adopting new principles in a Constitution. Something more is needed to redress the inequalities of the past. This is what affirmative action or positive discrimination addresses itself to. The object is to reduce the level of inequality in a society which has had a hierarchical order over a very long period of time.

Employment and particularly the government employment promote social and economic advancement and provisions relating to protective discrimination precisely aim at achieving this goal. It must be noted in this context that Articles 15(4) and 16(4) specifically refer to social and educational advancement of disadvantaged groups. However economic advancement naturally accompanies social and educational advancement. Under the IC, the protective discrimination programme has been designed specifically to remedy social disadvantages by way of distribution of state advantages. It must however be ensured that a fortunate few do not monopolise its benefits for ever. A constant endeavour has to be made so that the theoretical justifications are matched by effective implementation. It has been stated that the present model of compensatory discrimination policies in India is a very complicated challenge, which can be said to be unique and *sui generis* in nature. In such a system the only constant would be controversies surrounding such a model.

In 1997, the SC of India issued a ruling explicitly outlawing sexual harassment at the workplace and delineating specific guidelines for its eradication. However because there is no statutory basis for outlawing sexual harassment in India, years after this landmark ruling,

sexual harassment continues to be a scourge on Indian workplaces and an obstacle to gender equality. Perhaps the most important barrier to progress has been the widespread lack of awareness, both on the part of employers and on the part of women, as to what sexual harassment is and what rights and responsibilities are prescribed under the law. In this regard, India could possibly take some lessons from SA in dealing with HIV/AIDS testing in the workplace. However, this is not to say that the South African legislation surrounding sexual harassment is without its own imperfections.

Looking at India's reservation policies, it is admittedly an impressive list of actions that have been taken by the government of India. An important thing to be noted in the Indian context is that the kind of equality and justice with protective discrimination programmes which have been experimented upon during the last half a century or so are of western origin. Looking at the provisions regarding affirmative action in SA and India, importantly, unlike the USA, affirmative action is constitutionally sanctioned by the former two countries. India has had more than fifty-years of experience with regard to the implementation of affirmative action programmes in the form of reservations, whilst SA is still in its infancy.

It is proposed to look at how effective affirmative action has been in India and to see what are some of the lessons SA can learn with regard to its' affirmative action programmes. Affirmative action in India, as is the case with the USA and SA, are meant for designated persons only. In SA there are three designated groups and in the USA there are approximately five different groups. The difference in India lies with the fact that its affirmative action programmes are meant for more than three thousand designated groups called castes. It will be interesting to look at how this factor has impacted on affirmative action programmes and how successful it has been. If for example SA was looking to include more people to benefit under affirmative action programmes it will be noteworthy to take account of how having a lot of different groups and castes can affect affirmative action programmes.

Looking at the diversity of people that affirmative action is meant to benefit in India and bearing in mind that SA is a multicultural and ethnically diverse country, looking at the experiences in India can assist SA if it wants to know how to better achieve equality and diversity in the workforce.

India and the USA specifically provide for quotas. India goes one step further and mandates the use of reservations. In SA the use of numerical goals as opposed to strict quotas is encouraged. This thesis will consider the question of which is the better option to follow in order for a country to achieve equality in the workforce.

Looking at the Indian's use of the reservation systems, it would seem to be achieving some form of affirmative action and equality. This thesis will analyse how effective such a system is and would it be possible for SA to implement such a system here.

Unlike India, the direct and specific beneficiaries of affirmative action measures in the USA and SA need not have been the actual victims of past discrimination in the specific context in which they now benefit. For example, an affirmative action programme in the US or SA may provide that an employer hire a certain percentage of minorities or designated members on a certain time table. These persons applying for the job need not have been personally the victims of those employers past discriminatory conduct in order to benefit under the affirmative action programme. Whereas in India, persons must actually prove their disadvantage or that they have been previously discriminated against. As has been discussed earlier, proving ones disadvantage status poses more problems than answers.

Like the position in the US, the affirmative action programmes in the form of State advantages in India have been designed to end the discriminatory effects of a whole section of the population, due to socio-religious and politico-economic reasons. In a society where there exists forward and backward, higher and lower social groups, the policy is intended to help the historically disadvantaged groups to remedy the handicaps of prior discrimination impeding the access of these classes of people to public administration. The first step in this process is to bring the lower and backward social groups up to the level of the forward or higher social groups. Unless all social groups are brought to an equal cultural plane, even social intercourse amongst the groups will be an impossibility.

There is clearly an absence in the US Constitution, of the enabling provisions like Articles 15(4) and 16(4) which specially authorises the state to take affirmative action for the upliftment of oppressed classes, including social welfare provisions like the one enshrined in Directive Principles of State Policy in Part IV of the IC. The overall sense of the IC offers much support for interpreting equality as permitting protective discrimination, even at the

cost of an individual's right, who has not been a victimiser. In the US on the other hand, the Constitution contains no equivalent language helpful in deciding whether the equal protection clause permits or proscribes protective discrimination to racial minorities. The IC affirms the economic and educational betterment of the weaker section of the Indian society whereas no such guideline is supplied in the text of the US Constitution.

Discriminatory laws in SA apply to both government actors and private individuals, whereas in India discriminatory laws do not compel private individuals to refrain from discrimination. Therefore, private individuals are free to discriminate on the basis of caste, sex, etc. So, free from proscribing legislature, it has been the private employers who have allowed discrimination to fester. Further, the Indian experience shows how difficult it is to define, to detect and to regulate discrimination at work. The USA and Indian experiences have shown that nothing can be more misconceived than the belief that every form of discrimination is invidious discrimination, and also that to overlook certain forms of discrimination leads to perpetuating unfair discrimination, albeit, it is not considered illegal discrimination in the workplace of these countries.

The next part of this thesis will deal with the Indian CC's interpretation of the right to equality and affirmative action for the backward classes. It will also look at how the courts have dealt with quotas and reservation systems with regard to the implementation of affirmative action measures. The conclusion of this thesis will then analyse the best option that SA should follow for implementing more effective affirmative action measures.