

Affirmative Action in the United States, India, and South Africa – Evolution and Foundational Principles

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Abstract

Affirmative Action is a Constitutional tool that aims at redressing the effects of discrimination faced by historically disadvantaged communities. It attempts to do so by using methods that will enhance the chances of these traditionally disadvantaged communities, particularly in education and employment.

Grounded in principles of equity and distributive justice, this study explores the affirmative action concept in three distinct jurisdictions: the United States, India, and South Africa.

This paper studies the theoretical underpinnings of Affirmative Action policies in employment in India, South Africa, and the United States. The paper delves into the origins and foundations of the notions of Caste and race, examining how they have shaped the societies in the United States, India, and South Africa, and subsequently exploring the resulting discrimination stemming therein. With the investigation into the historical foundations of this system in these three jurisdictions, I attempt to understand if such historical context influences the design and implementation of Affirmative Action in each jurisdiction.

Keywords: *Affirmative Action, Caste, Race, India, United States, South Africa*

Introduction

Affirmative Action is a Constitutional tool that aims at redressing the effects of discrimination faced by historically disadvantaged communities. It attempts to do so by using methods that will enhance the chances of these traditionally disadvantaged communities, particularly in education and employment. Grounded in principles of equity and distributive justice, this study explores the affirmative action concept in three distinct jurisdictions: the United States, India, and South Africa.

In the United States, Affirmative Action is the evolutionary result of Constitutional interpretation by the judiciary, aiming to rectify inequalities born from a history of slavery and segregation. India has a Constitutionally mandated and protected affirmative action system, most notably through reservations, as an extensive means of extending equitable justice to address deeply ingrained social injustices rooted in caste-based discrimination. Post-Apartheid South Africa has integrated affirmative action into its Constitution to uplift victims of systemic racial discrimination.

This paper delves into whether Affirmative Action is regarded as a unique human right or a mechanism to achieve the broader goal of equality. Through an analysis of legal foundations, I look into how these jurisdictions view affirmative action within their respective human rights frameworks. Ultimately, this comparative analysis contributes to ongoing discussions surrounding the role of affirmative action in promoting social justice and equality within societies characterized by diverse forms of discrimination, including caste and race-based discrimination.

Affirmative Action in the United States

Why Affirmative Action

The journey of affirmative action in the United States of America begins in the 1600s. It begins with the arrival of the first ships with Black indentured labourers, which has since gone on to be called as the slavers' ships. The American Constitution enacted in the late 18th century is

laden with the tall ideals of equality and liberty. But slavery continued unabated for nearly nine decades more, till the Thirteenth amendment to the United States Constitution. The Fourteenth Amendment to the United States Constitution provided citizenship to the freed slaves and stated that all persons would be beneficiaries of 'equal protection of the law'.

Origins and the Legal Framework

The same Congress also passed the Freedmen's Bureau Act, 1866, which provided various benefits to the freed slaves. The Act established the Freedmen's Bureau which ensured that the freed slaves had land to cultivate and provided assistance for them to till the land and earn a living. Howard University, America's first University that allowed African American students was established by this very Bureau. The Freedmen's Bureau Act is considered widely to be the first time that affirmative action was taken in the United States. The minority judgement of America's first Black judge, Justice Thurgood Marshall in the 1978 case of *Regents of the University of California v Allan Bakke*¹ also supports this view.

The 1896 decision of the Supreme Court of the United States in *Plessy v Fergusson*² was a setback to all the Affirmative Action based gains,³ with a judgment that upheld the segregation laws that had started taking root in the American society. The dissent by Justice Marshall Harlan which stated that the segregation laws were invalid because in "civil rights all are equal",⁴ would later be upheld in *Brown v Board of Education*,⁵ that overruled *Plessy* and marked the beginning of the end of segregation and the separate but equal doctrine.

Post the landmark *Brown* judgement, in *Shelley v Kraemer*,⁶ the Supreme Court of the United States refused to enforce a private contract that contained clauses that were racially discriminatory.

The case of *Regents of the University of California v Allen Bakke* is a landmark insofar as anti-racial discrimination and protective discrimination are concerned. In this case the SCOTUS inter alia held that although discrimination on the grounds of race is impermissible as it falls

¹ 438 US 265 (1978)

² 163 US 537 (1896)

³ Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (OUP 2004)

⁴ Anderson (n3) 4.

⁵ 347 US 483 (1954)

⁶ 334 US 1 (1948)

foul of the Fourteenth Amendment, protective discrimination, in favour of those who were backward and had been left behind is permissible.

The judgement along with the judgement in *Fullilove v Klutznick*⁷ of the SCOTUS was applied to the Indian context in *Indra Sawhney v Union of India*⁸ wherein the Indian Supreme Court stated that decisions of the American Courts in “what applies to the American society also applies *ex proprio vigore* to our (Indian) society”. This, however, was prior to a recent 2023 judgement of the SCOTUS in *Students for Fair Admissions v Harvard*⁹, which abrogated the judgement in *Bakke* and declared that race-based Affirmative Action policies violate the United States’ Constitution.

In his work titled ‘Human Rights, American National Minorities, and Affirmative Action’, Dr YN Kly has argued that Affirmative Action, even when it is based on race is a human right.¹⁰ The minorities in America have a right to be treated equally, further they also have a right to be unique, independent and different. However, it is impossible for these communities to retain all their characteristics and yet achieve the kind of equality that the constitution espouses. This requires a socio-political restructuring of the rights and that can only happen with affirmative action as a human right. Equality is a human right and affirmative action being a process to achieve equality, must also by necessary implication be a human right.¹¹ Dr Kly, also uses this argument that it is a human right to nullify the arguments of the detractors of affirmative action. He says that a human right can never cause discrimination. This, he says, is because human rights, inherently respect the rights of all others, even those who may not be its beneficiaries.¹²

Affirmative Action: How?

Affirmative Action in hiring, is usually based on three principles; (i) the benefits that come with the diversity of such hiring, (ii) compensatory justice for past wrongs committed, and (iii) distributive justice to ensure that no group is left behind anymore.¹³ These guiding

⁷ 448 US 448 (1980)

⁸ AIR 1993 SC 477

⁹ 600 U.S. 181 (2023)

¹⁰ YN Kly, ‘American National Minorities and Affirmative Action’ (Fall 1995) 25 *The Black Scholar* 61 (Taylor and Francis Ltd)

¹¹ *Ibid*

¹² *Ibid*

¹³ Paul Brest and Miranda Oshige, ‘Affirmative Action for Whom’ (May 1995) 47 *Stanford Law Review* 855

principles are an attempt to effectively provide legally and constitutionally conferred benefits in the absence of the possibility of a quota system. The absence of quotas and guiding principles such as or in the nature of the aforementioned principle has led to the creation of some unique systems.

The system of setting 'timetables' and 'goals' is a one such practice, where employers look to achieve certain percentages with respect to hiring and promotion of members of communities that are beneficiaries of affirmative action. The employer attempts to gauge the under-representation or under-utilisation of women, and Blacks for example. Under-utilization is "having fewer members of the group in the category actually employed than would reasonably be expected from their availability".¹⁴ Adhering to these goals leads to an increase in the proportion and percentage of minorities at the workplace.¹⁵ There are even service providers in the United States, that help employers diversify their workspace and promote an inclusive culture. McKinsey and Company is one such service provider. This company conducts surveys and advises its clients on meeting their hiring goals and promotion timetables.¹⁶ McKinsey also has operations in India. This must be looked at as an opportunity by the burgeoning Indian private sector where reservations are not applicable.

The Rooney Rule is a very unique rule that employers apply to the process of hiring. This is named after Mr Dan Rooney the former owner of an American Football Team named Pittsburgh Steelers. The rule requires any football team that is playing in the NFL to interview at least one African-American candidate for the role of Head Coach, every time there is an opening. The league retains the power to penalise teams who breach this rule.¹⁷

This rule is now being expanded in its application. Facebook, for example is said to be using a "diverse slate approach" in its hiring system. This is essentially a variant of the Rooney Rule that has been modified to apply to their company. Of course, unlike the teams in the NFL, there is nobody to hold them accountable. But when large companies announce such policies

¹⁴ Alan H Goldman, 'Affirmative Action' (Winter 1976) 5 *Philosophy and Public Affairs* 178 (Wiley)

¹⁵ *Ibid.*

¹⁶ Overview, 'Delivering through Diversity' (*McKinsey & Company*) <<https://www.mckinsey.com/about-us/diversity/overview>> accessed 20 November 2024

¹⁷ Douglas C. Proxmire, 'Coaching Diversity: The Rooney Rule, Its Application and Ideas for Expansion' 2008 *American Constitution Society for Law and Policy* <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Proxmire_Issue_Brief.pdf> accessed 20 November 2024; the author here has analysed the application of the Rooney Rule to the NFL. He then goes on to make a bold suggestion of extending the application of the rule beyond sports and to private corporate players.

to the public, they open themselves up to public scrutiny and castigation, if they are found to have failed to keep their promises.¹⁸

Even in the absence of express provisions, the SCOTUS has exercised its powers very wisely and has time and again upheld the constitutional values of equality and equal protection in favour of affirmative action.

As seen here, despite the absence of quotas, the United States tries to ensure that the presence of affirmative action policies translate into benefits in the realm of education as well as the realm of employment.

Opposition and Controversies

One of the loudest and most popular opinions against the race based affirmative action system, is the class-based alternative. The proponents of this race-blind system say that since the aim of the system is to mainstream the marginalised, the poor irrespective of race, will be able to be a part of the mainstream despite their race.¹⁹ Large sections of the people who receive the benefits of the race based affirmative action system are the affluent, thereby preventing the poorer members of their own communities from benefitting.²⁰ Therefore, the poor members of the Black community and the Hispanic community will be able to avail benefits of this tool of social justice.²¹

However, the defenders of the race-based system used at present argue that the compensatory mechanism espoused by affirmative action works because it is from race that the discrimination an individual may have faced due to their belonging to a group can be gauged.²² That is to say, the economic backwardness of the racial minorities is tied into the historical race-based discrimination. Furthermore, if financial status becomes the sole factor to ascertain affirmative action benefits being granted, then there is a definite risk of an

¹⁸ Ibid

¹⁹ Brest and Oshige (n13)

²⁰ Richard D Kahlenberg, 'Class-Based Affirmative Action' (1996) 84 California Law Review 1037 <<https://www.jstor.org/stable/3480988>> accessed 20 November 2024; the article while examining a class based affirmative action system, also analyses the race based system, it's supposed failures, and the policy responses by the government in the United States.

²¹ Ibid

²² Brest and Oshige (n13)

overwhelming majority of appointments and selection going to the poor from the majority community, which defeats the goal of diversity that is sought to be achieved.²³

Affirmative Action in India

A large portion of the reservation system, it could even be said that the largest portion of reservations in India is based on caste. A significant portion has also contributed to the upliftment of women. Since the reservation system is a social justice tool, to remedy some social problem, a need to identify and understand the problem that is to be remedied herein and its history exists. One of the problems here is the rigid caste or varna system that has been an integral part of the cultural and social set up in our country for over two millennia.

History and Origins

The origins of Affirmative Action in India are tied into the hierarchical caste system and the consequent discrimination. The origins of the caste system can be traced back to the *Rig Veda*, which says that the primal being called *Brahman* or *Purush* destroyed itself or himself and from the various parts of the body arose different castes. The *Brahmins*, who are the priestly castes, are categorised by their knowledge and hence arose from the head. The *Kshatriyas*, being the warriors are categorised by their strength and therefore arose from the arms or the hands. The *Vaishayyas* defined by their business acumen were products of the thighs because money or the economy supports the society just as the thighs do the body. And finally, the *Shudras* arose from the feet, which define hard work and labour.²⁴

It is pertinent to note that there isn't even a whisper of a suggestion communicating the intention to discriminate based on caste. Neither the *Rig Veda* nor the treatises, commentaries, and other scholarly works that have been written across all these years, suggests that the intention of such classification was to discriminate, let alone dehumanise based on caste. It was probably written with the intention to create occupation-based communities that would support the individuals within that community and thereby the societal set up.

Early Attempts at Affirmative Action

²³ Ibid

²⁴ Ibid

The caste system continued unabated, until the arrival of the Europeans, particularly the British, who were Christians and did not hold much regard for the Indian practices. Their attempts at reforming the social and cultural aspects of the Indian way of life, also naturally involved reforms attempted towards ending caste-based discrimination. A change in mindset was also seen within the Indian population.

An early example was the reforms initiated in the education system of the Bombay Presidency. In 1858 it was declared that government schools were to compulsorily accommodate students from all communities. But the rule wasn't enforced strictly. It was only a 1923 law which threatened withdrawal of funds to schools that weren't inclusive that led to the accommodation of students from the backward classes also.²⁵ The Bombay government also initiated a series of schemes, scholarships, and also established schools for the backward classes that attempted to mainstream these oppressed classes.²⁶ Amongst the princely states, there were targeted reforms initiated in states like Mysore, Travancore, Baroda and Mysore.²⁷ In Mysore, the Miller Committee was appointed by the Maharaja in 1918 to study the condition of the depressed classes and the efforts of the Justice Party even led to reservation of seats for non-*brahmins* in the Legislative Assembly in Madras as a part of the Montagu-Chelmsford reforms.²⁸ The elections that followed these reforms led to a formation of ministry by the Justice Party in Madras They passed a G.O. that reserved seats for non-Brahmin castes in colleges and in government jobs, thereby creating one of the first acts of reservation by a democratically elected government in India. This G.O. of course would be famously challenged and struck down by the Madras High Court and this order upheld in appeal by the Supreme Court in the case of *State of Madras v Champakam Dorairajan*.²⁹

Closer to independence, in 1932 an arrangement known as the Poona Pact was concluded. Hereunder the backward classes, including the Scheduled Castes and Tribes would have

²⁵ Department of Social Welfare, *Report of the committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents* (Government of India 1969); The report studied the various aspects of untouchability and the problems surrounding economic and educational upliftment of the Scheduled Castes, and suggested measures to address these problems.

²⁶ V.A. Pai Panandiker (ed), *The Politics of backwardness: Reservation Policy in India* (Konark Publishers New Delhi 1997); As the name suggests, the book traces the evolution of the caste-based reservation system that has now come to become an integral part of the law and the politics in India.

²⁷ *Ibid*

²⁸ Bipan Chandra, Mridula Mukherjee, Aditya Mukherjee, Sucheta Mahajan and KN Panikkar, *India's Struggle for Independence* (Penguin Books 1989)

²⁹ AIR 1951 SC 226

reserved seats in the legislatures. By 1942, Dr. Ambedkar also secured reservation for the depressed classes in central government jobs.

Reservations and the Constitution

Equality is a concept that is fundamental to the legal set up in India. Article 14 provides for equality before the law and along with Article 15 and Article 16 broadly establishes the equality jurisprudence under the Indian Constitution. Article 15(4) is an exception to the rule of equality³⁰ espoused under Articles 14, 15(1) and 15(2) read separately as well as collectively. Giving formal equality to everyone in India is not merely impossible, it is also patently harmful. Formal equality if extended to everyone in India will cause more harm than good to those historically oppressed communities who have been left behind³¹. In *Chattar Singh v State of Rajasthan*³² and also in *NTR University of Health Sciences v G Babu Rajendra Prasad*,³³ it was held that the aim of the reservation provisions under Article 15(4) is to mainstream into the society the Scheduled Castes and Scheduled Tribes, who have been left behind by years of discrimination, and insofar as the provisions pertaining to socially and educationally backward classes are concerned the aim is to remove those factors that cause such backwardness. Therefore, it is safe to say that reservations are merely one form of the Affirmative Actions that are envisaged under this Article.

Article 16 of the Indian Constitution says that there shall be equality of opportunity for all Indians³⁴ and nobody shall be discriminated against, or denied public employment merely because of their sex, caste, religion, race, place of birth etc.³⁵

Public employment is said to be a property of the public. It belongs to the people for whom it has been created and therefore discriminating against one community or preferring one community on the pretext of administrative efficiency is arbitrary and unreasonable. Administrative efficiency also is important,³⁶ no doubt, but that cannot be used as a sword to keep people out.

³⁰ *State of Punjab v Hiralal* AIR 1971 SC 1777

³¹ Durga Das Basu, *Commentary on the Constitution of India*, vol 3 (Justice SS Subramani ed, 9th edn, Lexis Nexis 2014)

³² AIR 1997 SC 303

³³ AIR 2003 SC 1947

³⁴ Constitution of India, Art 16 (1)

³⁵ Constitution of India, Art 16 (2)

³⁶ *State of Maharashtra v Chandrabhan*, AIR 1983 SC 803

Articles 16 (4), 16 (4A), 16 (4B), and 16 (6) are responsible for reservations in employment and promotions in India.

Article 16 (4A) which enables reservations for members of the Scheduled Castes and Scheduled Tribes was only inserted in 1995 vide the seventy-seventh Amendment. It is pertinent to note that unlike Article 16 (4), this Article is restricted in its applicability to only the Scheduled Castes and Scheduled Tribes. The Eighty-fifth Amendment to the Indian Constitution enacted in the year 2001, inserted the terms consequential seniority to this provision, so that promotions may be based on the seniority acquired as a consequence of reservation-based promotions. This provision was enacted with retrospective operation and was given effect from the date on which the Seventy-seventh Amendment came into force.

Divergence and Detractions

The Indian system of reservations isn't free from criticism or its share of detractors. A primary point of criticism is of course the meritocracy argument, something seen in the United States, and South Africa too. In the case of *Dr Jagdish Saran v Union of India*,³⁷ Justice Krishna Iyer eloquently put forth his view on meritocracy. "Merit must be the test when choosing the best, according to this rule of equal chance for equal marks... To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise" he said in that case. He was unwilling to depart from the principle of merit in other cases also³⁸ such as *State of Kerala v NM Thomas*³⁹ wherein he pointed out that efficiency as stated under Article 335 and national interest will suffer if Scheduled Castes and Scheduled Tribes are chosen through reservations for the highest posts. The rule of equality cannot be destroyed by the exceptions created in the form of the reservation system, so much so that the fundamental rights of others are violated⁴⁰.

However, it is pertinent to note here that the Supreme Court itself in *Indra Sawhney* noted how that the reservation system is not anti-meritocracy, but merely creates an alternative system of meritocracy, where the less fortunate also can compete with the fortunate.

³⁷ (1980) 2 SCC 768

³⁸ Parmanand Singh, 'Some Crucial Problems of Tension Between Equality and Compensatory Discrimination in Mahendra P Singh (ed), *Comparative Constitutional Law Festschrift in honour of Professor P.K. Tripathi* (2nd edn, EBC 2011)

³⁹ AIR 1976 SC 490

⁴⁰ Singh (n38)

There have also been arguments wherein detractors of the system have said that reservations perpetrate and further the caste system. The anti-Mandal protests and the 2006 anti-reservation protests are just some of the examples of the social movements against the reservation system.

However, the Indian legislative and judicial framework has adopted a positive and proactive approach towards the system, from as early as the 1950s in the back and forth between the Supreme Court and Parliament during and after the *Champakam Dorairajan* judgement. To conclude, it may be said that unlike in India, where the State has always backed affirmative action policies, and has tried to establish its constitutionality.

Affirmative Action in South Africa

Affirmative Action in South Africa has emerged as a pivotal policy tool in the nation's journey towards social justice and equality. Shaped by the historical legacy of apartheid, this policy seeks to address systemic inequalities, empower marginalized communities, and transform the socio-economic landscape. In this section I attempt to provide very briefly, an analysis of the origins, objectives, implementation mechanisms, impact, challenges, and debates surrounding Affirmative Action in South Africa, drawing upon relevant scholarly sources to offer a well-rounded perspective.

Historical Underpinnings

Affirmative Action in South Africa sees its origins in the terrible history of Apartheid, which systematically disenfranchised and discriminated against non-white communities. The Apartheid government passed discriminatory laws and policies intending to exclude the majority Black population from equal participation in all spheres of life, including education, employment, and political representation.⁴¹ In the aftermath of the policies of this era, a comprehensive and deliberate intervention to rectify historical injustices was felt necessary. The institutionalised discrimination against the majority Black population in education, employment, and other social spheres necessitated a deliberate intervention to redress these imbalances.⁴²

⁴¹ Vincent T Maphai, "Affirmative action in South Africa -a genuine option?" (1989) *Social Dynamics* 1

⁴² *Ibid.*

Rationale and Legal Framework

The primary focus of Affirmative Action in South Africa is on dismantling the structures of inequality and provide redress for the ill-effects of the discriminatory Apartheid policies. It aims to level the playing field by actively promoting the inclusion of historically disadvantaged groups, particularly Black South Africans, in areas where they are unrepresented or underrepresented (due to legal frameworks that forced their exclusion). The objectives include economic empowerment, social integration, and the creation of a diverse, representative society. Baically the attempt is to provide the erstwhile marginalised communities to acquire economic and social capital. Legislations to this effect aim to be a multifaceted, economic empowerment encompassing, social integration tool, striving to create a diverse and representative workforce.

The implementation of Affirmative Action in South Africa is manifested primarily through the Employment Equity Act of 1998, which is a cornerstone to promoting equal opportunities and eliminate discrimination in the workplace. The Broad-Based Black Economic Empowerment (BEE), which is a significant policy framework, encouraging businesses to adopt practices that promote ownership, management, and skills development within the Black community provides an able and necessary supporting framework.

Affirmative Action has catalysed a profound transformation in South Africa's economic and social landscape. The policy has led to increased representation of Black South Africans in various sectors, contributing to a more inclusive and diverse workforce. Moreover, BEE initiatives have facilitated the emergence of Black-owned businesses, fostering economic empowerment within historically marginalized communities. By breaking down barriers to entry, it has facilitated the upward mobility of individuals who were historically marginalized, contributing to a more inclusive and diverse workforce.

But Affirmative Action extends beyond the workplace to encompass broader societal integration. The policy recognizes the paramount importance of education for redressal of historical oppression and social upliftment. Initiatives promoting increased access to quality

education for historically disadvantaged groups are seen as integral to breaking the cycle of poverty and inequality.⁴³

Challenges, Criticism and Responses

Despite its noble intentions, Affirmative Action in South Africa has its challenges. Arguments that the policy perpetuates racial tensions, lead to reverse discrimination, or result in token appointments have been consistently raised against it.

Balancing the imperative of redress with the principles of meritocracy is another ongoing challenge. Striking the right balance requires nuanced policy adjustments and a commitment to addressing the socio-economic complexities that underlie historical inequalities. Arguments that the policy may compromise merit-based selection processes, leading to the appointment of individuals based on demographic considerations rather than qualifications or skills. However, scholars emphasize the need to redefine meritocracy within the context of historical redress, highlighting that a narrow interpretation may perpetuate existing disparities.⁴⁴

Looking Ahead

Despite significant challenges the focus in South Africa has been to look beyond quantitative targets. Sustainable success lies in creating a society where individuals are not merely beneficiaries of a policy but active participants in a shared vision of inclusivity. Strengthening education, skills development, and fostering genuine dialogue are critical components of ensuring that Affirmative Action becomes a catalyst for enduring change.

Affirmative Action in South Africa stands as a testament to the nation's commitment to dismantling the legacy of apartheid and building a more equitable society. While challenges persist, the policy has undeniably played a pivotal role in reshaping the contours of opportunity, enabling a broader spectrum of citizens to contribute to the nation's progress. The ongoing journey towards equality requires a dynamic and responsive approach, rooted in the principles of justice, inclusion, and shared prosperity.

⁴³ Jeremy Seekings and Nicoli Nattrass, *Class, Race, and Inequality in South Africa* (Yale University Press 2006)

⁴⁴ Penelope Andrews, "Affirmative Action in South Africa: Transformation or Tokenism" (1999) *Articles & Chapters* 1256 https://digitalcommons.nyls.edu/fac_articles_chapters/1256 accessed 20 November 2024

In conclusion, Affirmative Action in South Africa embodies earnest attempts at social transformation. The policy has undeniably contributed to a more inclusive and representative workforce. But the delicate balance between redress and meritocracy, the impact on business competitiveness, and the broader implications for societal integration require continued attention and nuanced policy adjustments. But the paramount status of Affirmative Action as a tool on the path to justice and equity will have to remain so, if a positive socio-economic transformation is to be achieved.

Analysis and Conclusion

To conclude, Affirmative Action is used as potent instrument to address and redress historical injustices in the United States, India, and South Africa. Each nation's strategy is based on its own social and legal structures, which in turn are a reflection and result of their own civic struggles.

In the United States racial discrimination emanating from their long history with slavery has served as the foundation for implementing an Affirmative Action policy. The Affirmative Action policy implemented in the United States was of course a result of private action in many cases, which was later legitimized in a limited capacity by decisions of the SCOTUS (*Alan Bakke*⁴⁵ for example). However, the *Harvard*⁴⁶ judgment has effectively put an end to any further development of this important tool of social justice in furtherance to this judgment and considering Donald Trump's impending second term after his recent victory, Affirmative Action along with other Diversity, Equity, and Inclusivity (DEI) initiatives are expected to be adversely affected.⁴⁷ This seems quite likely too because in the past his administration has worked towards eliminating Affirmative Action, as well as DEI initiatives and has threatened to withdraw federal funding from institutions that teach what is perceived as "radical civics" and critical race theory.⁴⁸ Given these recent developments, and the given how unlikely a

⁴⁵ *Regents of the University of California v. Alan Bakke*, 438 U.S. 265 (1978)

⁴⁶ *Students for Fair Admissions v Harvard*, 600 U.S. 181 (2023)

⁴⁷ Brit Morse and Emma Burleigh, 'Donald Trump's election win will create a DEI reckoning that forces companies to either stand up for their policies or step away' (*Fortune*, 08 November 2024) <https://fortune.com/2024/11/08/donald-trump-election-win-dei-reckoning-legal-challenges-divide-defend-policies/> accessed 20 November 2024

⁴⁸ Sanjay Sharma, 'Inclusivity in Higher Education: Where do Trump and Harris Stand while it comes to diversity and equity in college campuses' (*Times of India*, 05 November 2024) <https://timesofindia.indiatimes.com/education/news/inclusivity-in-higher-education-where-do-trump-and-harris-stand-while-it-comes-to-diversity-and-equity-on-college-campuses/articleshow/114986683.cms> accessed 20 November 2024

change of the position is the reasonably foreseeable future, it is probably important to acknowledge that the United States' system serves as an interesting study on how not to build an Affirmative Action system.

The position in South Africa however is unique in the sense that Affirmative Action here is a product of racism that was entrenched by colonialism. The predominant beneficiaries of the system here are the Black population, who form the racial majority in South Africa. But this system is generally available to the benefit of all non-white racial minorities. The Broad Based Black Economic Empowerment has actually strengthened the economic structure of South Africa with a growing middle class with access to plenty of opportunities that were otherwise unavailable to them due to racism.⁴⁹ The South African President also signed into law in 2023, the Employment Equity Amendment Act.⁵⁰ This Act basically attempts to diversify the opportunities available to the racial minorities by setting numerical equity targets for employers and numerical sectoral targets to be achieved by each of the sectors within the economy.⁵¹ Clearly it is still a work in progress because even a government agency like the National Research Foundation of South Africa was only able to achieve Level-1 rating under the BBBEE this year, more than 25 years after its establishment.⁵² However, the intent in the South African setup is clearly seen with the measures that have been taken recently and that continue to be taken.

The South African Constitution has strongly been influenced by the Indian Constitution and so has its Affirmative Action policy. In India, quite unlike the United States and quite like South Africa, we have a comprehensive and expansive Affirmative Action policy. The system in India is in a constant state of churn, with various aspects being debated, discussed, and reformatted every now and then. This is the direct result of legislative, executive, and judicial action. Let us take for example, just the last few years. Since 2018 alone, we have seen plenty of judgments which have either required the legislature to adapt to the change proposed or

⁴⁹ 'Affirmative action becomes divisive issue in South African elections' (*France24*, 29 May 2024)

<https://www.france24.com/en/tv-shows/focus/20240529-affirmative-action-becomes-divisive-campaign-issue-in-south-african-elections> accessed 19 November 2024

⁵⁰ Nkateka Mabasa, 'South Africa's controversial 'race quota' law stirs debate' (*AlJazeera*, 28 July 2023)

<https://www.aljazeera.com/news/2023/7/28/south-africas-controversial-race-quota-law-stirs-debate> accessed 19 November 2024

⁵¹ *Ibid*

⁵² Sibusiso Biyela, 'South Africa's NRF hits Black empowerment milestone' (*Research Professional News*, 14 November 2024) <https://www.researchprofessionalnews.com/rr-news-africa-south-2024-11-south-africa-s-nrf-hits-black-empowerment-milestone/> accessed 19 November 2024

necessitated by the judgment or has been a response to an act of the legislature or the executive. Consider the judgement in *Jarnail Singh v Lachmi Narayan Gupta*.⁵³ This judgement restated an observation by the Supreme Court made in *Nagaraj*,⁵⁴ wherein, reservations in public employment and subsequent promotions were required to be made subsequent to the States obtaining quantifiable data regarding the backwardness of castes. In 2024, the judgement of the Supreme Court in *EV Chinnaiah v State of Andhra Pradesh*⁵⁵ was overturned in *State of Punjab v Davinder Singh*, and the States were allowed to subclassify within the SC and ST reserved seats, provided that such classification was based on quantifiable data. This now forces the states to move beyond the Kaka Kalelkar Committee and Mandal Commission reports. In effect the judgement extended the same reasoning and observations that it had already made in *Jarnail Singh* and *Nagaraj* here. The 103rd Amendment to the Indian Constitution which permitted inserted provisions permitting reservations for the Economically Weaker Sections, was upheld as valid in *Janhit Abhiyan v Union of India*,⁵⁶ which was a stark departure from the established position of *Indira Sawhney v Union of India*.⁵⁷ This Amendment and the consequent judgement upholding it also provide a route to the legislature and the executive to accommodate communities like the Maratha community, the reservations for whom had been granted by the State of Maharashtra and struck down by the Supreme Court in *Jaishree Laxmanrao Patil*.⁵⁸ These are just a few examples of instances from just the last few years indicating how vibrant and thriving the Affirmative Action system is in India.

The instances detailed above are a clear indication of the commitment that India has exhibited towards upholding its Affirmative Action (especially reservation) policies. The same is true for South Africa too. However, the position of Affirmative Action in the United States has always been less than ideal, and with the conservative nature of present SCOTUS, it was only a matter time before the system was rendered ineffective or even precarious. The United States is an actually a great example for India to follow in terms of what not to do when it comes to Affirmative Action.

⁵³ AIR 2018 SC 4729

⁵⁴ (2006) 8 SCC 212

⁵⁵ (2005) 1 SCC 394

⁵⁶ (2023) 5 SCC 1

⁵⁷ (2000) 1 SCC 168

⁵⁸ AIRONLINE 2021 SC 240

Even though Affirmative Action has made progress toward attaining equity and societal integration through education and employment, there are controversies and challenges that the system is made to confront. Meritocracy, reverse discrimination, and the possibility that these laws could unintentionally widen social gaps are common points of contention among critics. However, supporters stress that in order to create more equitable opportunities and lessen enduring inequalities, affirmative action is crucial.

The future will require these nations to refine the policy to align with shifting societal requirements while guaranteeing that these policies are equitable, inclusive, and adaptive. Therefore, continuous modifications and changes are essential to achieve a balance between rectification and equity, fostering opportunities for everyone. Although Affirmative Action has its difficulties, it remains an essential tool in the pursuit of social justice and human dignity.