factors that could impede its implementation. This study winds up with chapter seven with some concluding remarks and recommendations.

Chapter 2


It is widely acknowledged that women are marginalized in all aspects of life leading to enormous disparity and discrimination in the socio-economic and political spheres of life. Such a continued discrimination has necessitated corrective measures in order to combat the resulting inequalities. To promote gender equality and the development of women, states have paid continuous attention to the formulation of laws, policies and regulations and implement positive measures regarding women’s rights. However, since its inception, the principle of affirmative action has achieved both recognition but also rejection worldwide. Supporters mainly invoke the need for affirmative action in order to reverse the negative effects caused by ages of discrimination and to create an equal opportunity for all including the disadvantaged in societies. Opponents, conversely claim that individuals should be chosen based on merit and no group should be favored over another based on any grounds or status.

This chapter reviews the relevant literature on the subject of affirmative action and intends to establish the relevant theoretical underpinning for affirmative action. The chapter is divided into four sections. Section one provides definitions to affirmative action. The meaning, nature and scope of affirmative action are dealt with in the second section. The third section describes the theories of affirmative action and summarizes the broad range of arguments for and against affirmative action. What makes the debates on affirmative action unique is that both opponents and proponents of the program of affirmative action have sought to justify their respective positions by reference to their adherence to the ideal of equality. The principle of equality and affirmative action is discussed in the fourth section. It overviews the significance and meanings of the notion of equality and discusses the different approaches to equality, namely, formal equality,
substantive equality and equality of opportunity with particular reference to the Ethiopian context.

2.1 Definitions

Programs that are designed for group preferences in order to redress prior disadvantages have been given a variety of names in different countries. As Sowell has documented such names are in the United States of America, as ‘affirmative action’, in Europe, as ‘positive discrimination’, in India, as ‘reservations’, in Sri Lanka, as ‘standardization’, in Nigeria, as ‘reflecting the federal character of the country’, in Canada, as ‘employment equity’, in South Africa, as ‘preferential treatment’ (Sowell, 2004:2). In addition, in many other countries, affirmative action is also referred to as ‘preferential policies’ and ‘compensatory or distributive justice’. Despite differences in names and variations in content, the essence of all policies and reforms introduced to redress gender inequalities would in principle remain the same, basically referring to a wide range of measures aimed at rectifying group inequalities resulting from past discriminatory practices. The US Civil Rights Commission (1977) defines affirmative action as follows:

Any measure, beyond a simple termination of discriminatory practice, adopted to correct for past or present discrimination or to prevent discrimination recurring in the future.

Clearly, this definition calls for active programs rather than mere non-discriminatory laws in order to rectify the effects of prior discriminatory practices and prevent the recurrence of future exclusions thereby enhancing opportunities for disadvantaged groups of society.

Mullen (1988:244) refers to an extensive use of affirmative action programs in both public and private institutions with a view to advance the status of disadvantaged groups of society. He defines affirmative action as:

An attempt to make progress toward substantive, rather than merely formal, equality of opportunity for those groups, such as women or racial minorities, which are currently underrepresented in significant positions in society, by
explicitly taking into account the defining characteristic sex or race which have been the basis for discrimination.

Stanford Encyclopedia of Philosophy (2001) concisely defines affirmative action as:

"Positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded."

This definition focuses on only enhancing the opportunities for targeted groups in the enumerated spheres of the society.

When one refers to the definition of affirmative action in the Black’s Law Dictionary (2004) the existence of discrimination is of paramount importance for enacting affirmative action reforms in order to redress past discrimination and prevents future practice.

"A set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination."

Sabbagh (2012:10) broadly defined affirmative as:

"Any measure that allocates goods such as admission into selective universities or professional schools, jobs, promotions, public contracts, business loans, and right to buy, sell, or use land and other natural resources—through a process that takes into account individual membership in designated groups, for the purpose of increasing the proportion of members of those groups in the relevant labor force, entrepreneurial class, or student population, where they are currently underrepresented as a result of past oppression by state authorities and/or preset societal discrimination."

The above descriptions of definitions demonstrate that no consensus has emerged on a clear-cut definition of affirmative action. The broad scope of affirmative action is evident in the above definitions. For purposes of this study, however, affirmative action can be defined as a set of preferential policies designed to redress prior imbalances and enhance
participation and opportunities, with the ultimate goal of creating an equal society for men and women. Such an operational definition posits to investigate the rationale underlying affirmative action programs, regardless of variations in applications in different countries. Affirmative action policies call for action to be taken to ensure equal opportunities for all persons, thereby expanding access and increasing inclusiveness for disadvantaged groups in societies, notably women.

2.2 Meanings and Nature

The phrase “affirmative action” could have different meanings to different people. There is a lack of consensus on its exact meaning among legal scholars and philosophers and it is consequently far from settled.\(^1\) Literally, the term ‘affirmative’ means to agree, to be positive or to show one’s support and ‘action’ means doing something to achieve a particular purpose or goal. Conceptually, affirmative action has come to be comprehended as a policy that refers to a wide range of measures aimed at rectifying group inequalities resulting from past discriminatory practices. Affirmative action, in principle, is designed to enhance the opportunities of members of ‘disadvantaged groups’ in society which have been previously excluded from access to resources and opportunities due to various socio-cultural reasons (Kellough, 2006:3).

Bacchi (1996:15) describes affirmative action as a phrase that refers to various programs, which are designed to redress the inequality of ‘targeted groups’ of society. Accordingly, affirmative action aims at altering the composition of the labor force and to make the public and educational institutions more representative. Kranz (2002:4) similarly explains affirmative action as the practice that required governmental bodies to act affirmatively to recruit workers or admit students on a nondiscriminatory basis. Kranz further calls for adopting measures where employers may arrange special procedures of recruiting women, minorities and for educational sectors to include race and gender as a criterion in admission to remedy the effects of past discrimination (Ibid). Other scholars such as

Holzer and Newmark (2006:463) explained affirmative action programs as “a set of practices undertaken by employers, university admission offices, and government agencies to go further than non-discrimination policies into action, with the goal of actively improving the economic status of minorities and women with regard to employment, education, and business ownership and development”. The notion of affirmative action refers to concrete measures that aim at eliminating barriers and promote equality.

Despite differences in views and variations in practices, the underlying rationale of affirmative action is mainly based on the principle of equal opportunity. Although affirmative action has the same objective as equal opportunity, the former is an active policy calling for actions while the latter is a passive policy in which no action is taken until there is evidence of explicit discrimination (Crosby & Cordova, 1996). As Crosby, Iyer, Clayton and Downing (2003:95) explain:

In contrast to equal opportunity, affirmative action is an active policy, calling for actions to ensure that equal opportunity actually exists. An underlying presupposition of affirmative action is that structural impediments to true equality do not always take the form of overt discrimination. Even policies that appear to be neutral with regard to ethnicity or gender can operate in ways that advantage individuals from one group over individuals from another group.

Affirmative action policies have already recognized the existing patterns of discrimination, disadvantage and exclusion by providing special benefits to targeted groups of society. In doing so, affirmative action requires institutions to take due consideration of an applicant’s race, sex etc. in admissions to higher education and employment.

2.2.1 Domain of implementation

Broadly speaking, there are two domains where affirmative action programs could be implemented: the public and the private. Most countries have affirmative action programs in the public sector and others have both in public and private sectors. In the United States, South Africa and Ethiopia, affirmative action programs take place both in the
public and private spheres while in India the programs are applied only in the public sector. The legal basis and the requirements imposed by affirmative action programs vary across countries. In some countries like India and South Africa, affirmative action policies and executions are based on constitutionally mandated provisions while the legal basis in other countries like the USA, affirmative action is based on non-constitutionally mandated statutory legislation, Presidential Executive Orders, court-ordered and voluntary programs (Reskin, 1988:7). Some countries have mandatory quota/reservation policies such as those in Malaysia, India and Sri Lanka while “goals and timetables” are set in the USA and South Africa (Sowell, 2004). Thomas (1987:402), defined “goals and timetables” as “a "goal" is a numerical target, usually expressed as a percentage, for the hiring or promotion of persons of a particular group while "Timetables" are the deadlines for reaching the numerical goals”. Likewise, the scope of implementing affirmative action policies has a broad range of coverage depending on the socio-economic and political system of the country. Among others, affirmative action programs include jobs, admission to higher education, financial aid, contracts, credit, housing and the like (Schuck, 2002: 17). In the employment sector, affirmative action extends “beyond recruitment and hiring decisions to include promotions, terminations, in-service training, and other workplace practices” (Ibid: 9). Similarly, higher educational institutions use affirmative action “to select students, balance residential units, award financial aid, employ administrators, recruit and promote faculty, run athletic programs, staff student organizations, award contracts, and conduct other aspects of their institutional lives” (Ibid:10).

2.2.2 Intended beneficiaries

The basis of the criteria used to determine beneficiary’s eligibility varies from case to case as there are no concrete and uniform ways for identification of appropriate candidates. Nevertheless, beneficiaries of affirmative action programs are often selected on the basis of disadvantages they have suffered in the past either directly or indirectly in the social, economical, political and educational spheres and consequently relegated to lower positions in society. Generally speaking, there are various groups of beneficiaries in different countries which could be entitled to affirmative action programs. As
identified by Faundez (1994:12), minorities (ethnic, national or racial), women, disabled people and war veterans are the most common categories. However, this pattern of categorization varies across countries. While affirmative action policies for women have been a major issue in most countries including the United States, it is only a beginning in the sphere of political representation in India (Sabbagh, 2004:1). As stated by Sowell (1990:13-18), Maori in New Zealand, Sephardim in Israel, Bumiputras in Malaysia, people from backward communities in India and aborigines in Australia and African Americans, Hispanics, women and other ethnic minorities in the United States of America are some of the beneficiary groups.

2.2.3 Types of affirmative action

Affirmative action is sometimes divided into two categories: “weak” or “soft” and “strong” or “hard”. A ‘Weak or soft’ affirmative action category involves taking positive steps to enable members of disadvantaged groups acquainted with positions and promote them to apply, but later treats all the applications received entirely in an impartial way (Schuck, 2002:56). These reforms include “attempts to remove structural impediments which affect particular groups, and strategies, such as training schemes, to assist ‘disadvantaged’ groups to compete more effectively” (Bacchi, 1996:16). In other words, members of disadvantaged groups are encouraged to compete for jobs in recruitment, appointment and promotion. For instance, institutions with a weak affirmative action policy would advertise a vacancy in a way to reach the disadvantaged groups either through the media or make funding to support applicants from such groups.

Alternatively, ‘strong or hard’ affirmative action would include reforms which make membership of a designated group and qualification relevant criteria for access to education and employment (Ibid). This implies that preference will be given to candidates from disadvantaged groups when the applications are actually being evaluated. In other words, being a member of a disadvantaged group would be taken into account in evaluating candidates for admission and hiring. For example, an institution that has strong affirmative action reforms may reserve some places for members of
disadvantaged groups and give preference when examining candidates for admission or promotion. All in all, affirmative action programs ensure equal opportunity for members of disadvantaged groups by giving due consideration in the selection process. Such initiatives include announcements, counseling, mentoring, and training programs. Furthermore, it involves a wide variety of outreach programs aimed at members of disadvantaged groups such as job training for career development, raising awareness, enforcement of non-discrimination rules and introduction of empowerment programs (Crosby et al, 2001:140).

The concept of affirmative action has been controversial among legal scholars, philosophers, politicians and historians alike. In particular, the public debates, which have produced a vast literature, involved both legal and moral issues. It should also be noted that scholars belonging to a variety of intellectual traditions have studied the pros and cons related to affirmative action. The next section will deal with the debates in detail.

2.3 The ‘Pros and Cons’ of affirmative action

A wide range of arguments has been provided by opponents and proponents of affirmative action since the inception of affirmative action. The debates on affirmative action revolve around issues pertaining to the necessity of the program, the selection of target groups, the fairness/ unfairness of the programs etc. The purpose of this study is not to come up with solutions on the debates, it is rather to review the contending arguments and determine their relevance and merit so far as the notion of affirmative action goes.

2.3.1 Pro-Affirmative action

2 In economic sphere (Leonard: 1984), (Holzer and Newmark: 1999), (Welch: 1989), (Sowell: 1989). In philosophical sphere (Goldman: 1979), (Sher, 1999), (Thomson: 1977) and (Nagel: 1977). In the legal sphere (Fullinwider: 1980) and (Rosenfeld: 1991). In gender-based affirmative action (Johnson: 1990) and (Bergmann: 1996). In the psychological sphere (Clayton and Crosby: 1994) are some of the scholars in the field.
Many scholars including Thomson and Taylor (1973), Crosby and Clayton (1993) and Bergmann (1997) have vehemently argued in favour of affirmative action programs. Although these defenders of preferential treatment have agreed on prior injustices, they provide different justifications on the measures taken to remedy past unfairness. Generally, they have offered three types of justifications based on remediation, redistribution, and role model. Below, the justifications given for each version of the arguments will be examined.

2.3.1.1 Remediation rationale

The remediation rationale justified affirmative action as a means of compensating groups that have been victimized in the past. This rationale is commonly considered as backward-looking and is an argument for reparations. The underlying factor behind compensating disadvantaged groups is based on the fact that had it not been for the discriminations that have been inflicted upon them; they would not have had the level of status they have now. In this regard, Goldman (1979:65-66) pointed out that “the adoption of any distributive rule implies that when violations occur, perpetrators are to be held liable and victims compensated in order to keep distributions as consistent with the demands of the rule as possible”. Thus, when people’s right to equal opportunity has been violated, compensation would be an appropriate means to remedy the effects of historical discrimination against minority groups and women. It has been suggested that the existence of structural discrimination and social perceptions that relegates women to subordinate positions, entitled women to affirmative action (Peters, 1997:76).

Compensatory or corrective justice requires “society to do what it can to restore the victims' descendants to the positions they would have occupied had the wrongs not been committed” (Schuck, 2002: 23). As argued by Hill (2002:394), compensation aims at restoring unfairly harmed individuals to a position where they have had would there be no injury inflicted upon them. In other words, to reinstate individuals to a situation before the injury occurred. The question whether the preferential treatment of women and
minorities should be justified because of the harm they personally suffered or the damage inflicted against the group to which they belong remains controversial.

Several writers opposing the remediation justification of affirmative action suggested that it would be fair to understand the justification if specific individuals claim compensation for the injury they have suffered in the past from those who benefitted. Goldman, in his book entitled: Justice and Reverse Discrimination, argues that preferential treatment would be fair if it aimed directly at compensating individuals who themselves worth it on grounds of actual prior discrimination or denial of equal opportunity (1979:88). This view holds solely perpetrators of injustice liable to pay the damages for their unjust actions. In other words, compensation should be paid by those who benefited intentionally or voluntarily. In this regard, Fullinwider (1995: 89) declares:

> If I knowingly and voluntarily benefit from wrongs done to others, though I do not commit the wrongs myself, then perhaps it is true to say that I am less than innocent of these wrongs, and perhaps it is morally fitting that I bear some of the costs of compensation. But it is not like this with involuntary benefits.

Furthermore, Jacobs (2004: 121) criticizes the remediation rationale on two grounds: “The first is: the principal beneficiaries are not the immediate victims of past discriminatory and segregated acts. The second is: those who are obliged to bear the burden were neither the actors nor necessarily the beneficiaries of the injustices. It distributes reparations on the basis of group membership, whereas if reparations are to be made, they should be made to individuals who have been wronged”. In other words, affirmative action programs cannot remedy past injustices because their beneficiaries are not the victims and the non-beneficiaries are innocent.

Most affirmative action advocates allege that discrimination is a group offense and preferential treatment is a means to advance the position of the unjustly treated groups implying that individuals ought to be favored not on their own behalf, but on behalf of the group to which they belong (Thomson, 1995: 58-61). Thomson further argues that every woman and minority group members have suffered and every non-minority and
men has benefited at least indirectly from the effects of past discrimination (Ibid). This view imposes an obligation on the entire community to redress past injustice.

Moreover, Taylor and Bayles, (1995: 9-17) defending the remediation justification suggest that compensation should not be to individuals but to groups to which the initial victims belonged. In particular, Bayles argues that since the characteristic which defines the group was essentially involved in the discriminatory practice, reparations must be made available to all those who have this characteristic (1995:16-17). In addition, Taylor (1995:13) maintains that “the obligation to compensate for past injustice does not fall upon any particular individual but upon the society as a whole”. Thus, the policy of affirmative action is meant to benefit unfairly treated individuals as members of a group, not as individuals; they are representatives of a specific group (1995:13). Preferential treatment for disadvantaged groups notably women is provided to rectify the wrongs suffered in the past. Women are discriminated and victim of unfair actions and practices not as individuals but because they are women. Thomson adds that a debt of compensation is owed to women and minorities as a group thus, job preferences for women and blacks as a form of compensation is endorsed for their past exclusion from the academy and the workplace (1995: 61). In other words, since victims of past discrimination were discriminated as a group, society as a whole should compensate the situation. However, Simon (1995:63) criticizes Thomson’s argument on preferential hiring of women and black people in universities on the ground that preferential hiring is not an acceptable method of recompensing victims of social unfairness. In his own words, “although all blacks and women may be members of a victimized group, they deserve compensation qua victim and not qua black person or woman” (Ibid: 64). According to Simon, it does not follow that if some group members are compensated, the group as a whole is compensated.

Additionally, Boxill (1992:180), an author of (Blacks and Social Justice), argues that “…the present-day whites owe reparations to contemporary blacks, not because they are themselves guilty of causing the disadvantages of blacks, but because they are in possession of advantages that fell to them as a result of the gross injustices of their ancestors”. Such views focus on the past prejudice and the current disadvantages in
contrast with future benefits (Ibid). It is a kind of remedy for past systemic discrimination or deprivation of opportunity against women or ethnic minorities.

Peters (1997:76) in her book entitled (Women, Quotas and Constitution: A Comparative Study of Affirmative Action for Women under American, German, European Community and International Law) shared the view that the existence of structural discrimination and social perceptions that relegates women to subordinate positions, entitled women to affirmative action.

2.3.1.2 Integration rationale

These future or forward-looking arguments have been practical views and emphasize entirely on the welfare of society, social harmony and diversity in the future. It focuses on what ought to be done at present for the good of society in the future. The ‘forward-looking’ proponents aim at bringing societal change and gender equality by means of enabling individuals to get a fair share in the various sectors such as access to educational, employment and other resources. This rationale views affirmative action as a means of including members of racial, ethnic and other groups who might otherwise have been excluded from opportunities and to bring about greater integration of different segments of society (Fullinwinder, 1980:18). The underlying justification for affirmative action is to ensure and advance social goals and welfares. Although the basis for affirmative action under this approach is prior wrongful acts, it is intended to attain future objectives. The integration rationale intended to eliminate the existing gaps between group members in the society by adding disadvantaged members of the group into the labour market and educational institutions. In so doing, it not only improves opportunities for its beneficiaries but also advances the interests of the society in general.

According to the integrationist approach, affirmative action is designed for social utility by not only supporting its direct beneficiaries and the members of historically disadvantaged groups in general, but also by furthering societal goals (Leicht, 1999:309). It calls for distributing opportunities for empowerment, self-realization, and personal
advancement. Furthermore, it promotes the common good and general welfare among all racial and ethnic groups, and of both sexes that constitutes societies. It symbolizes an attempt to break domination of some groups at the top. In short, policies of affirmative action according to this approach are suited best and designed to advance the common good and promote the general welfare (Ibid: 311). Affirmative action in principle intends to integrate society by eliminating sex and racial stereotypes; in a way by reducing sexual and racial injustice with an ultimate objective for everyone to participate in the economic, political and social affairs. This, in turn, will increase the well-being of the society.

Strategically the integration rationale aim at mainstreaming opportunities in order to secure democratic values and for the effective participation of the public at large in the economic, political and development activities. In other words, this approach prevents the concentration of opportunities on one group by applying fair treatment to all sections of the public. It refers to the fair division and allocation of resources and benefits and urges that government has a positive duty with considerable social responsibility to distribute resources and benefits and improve the conditions of the disadvantaged (Fullinwinder, 1980:93).

2.3.1.3 Role Model rationale

The role model rationale justifies affirmative action as a means of achieving diversity in terms of racial, ethnic, and gender composition in the social, economic, and political institutions. In this regard, affirmative action programs are intended to enhance and promote representation of people from different ethnic and gender groups in professions and educational institutions.

The role model rationale claims that affirmative action is used as a means to improve the social, economic, and political power of those groups whose interests are not adequately represented in important institutions of society. It further counterbalances the assumptions that relegate women and minorities to a lower position in society. Proponents of this school advance the role model argument in higher education. In this context, the role model argument asserts that to hire or admit females or members from
disadvantaged groups has an inspiring effect on young members of disadvantaged groups to pursue academic and professional careers (Allen, 1995:121).

According to the role model rationale, affirmative action has generated better social benefits to disadvantaged groups including women. For instance, it creates role models in order to encourage the next generation and to be able to break down stereotyped assumptions that relegate women and minorities to lower positions in professions and institutions (Ibid: 288). It has been widely argued that affirmative action by and large provided considerable role models that could encourage the next generations in various positions that are more noticeable and advantageous. In this connection, Fullinwinder (1980:18) suggests that placing blacks in “visible and desirable positions would provide additional role models for young blacks and ultimately might result in providing better services to the black community”.

As mentioned above, scholars have recognized the role model argument as one means to encourage and combat inferiority perceptions that continue to exclude disadvantaged groups, notably women. “Role models” are individuals who inspire others to accept their capability of high achievement. According to Thomson, affirmative action could have an attitude changing effect in that when certain groups were seen performing low-paid jobs, others will presume that they just can perform such kind of jobs (1995:47). Thus, negative attitudes could be changed if the same members of the groups are placed in a position requiring higher level of competence and skill thereby demonstrating their capacity to perform. In view of Thomson (1995:48) this, in turn, has two effects: “It changes the belief of members of disadvantaged groups on how they are capable of performing so that they could see members of their race or sex who are accepted, successful and professionals. In addition, it alters others’ attitude towards members of the disadvantaged groups as past discriminatory practices have made women lose their self-respect and respect by others”. It is evident that the negative perception about women has declined their sense of self-image and has ultimately led to the loss of inspiration. Thomson added, “You won’t try to become what you don’t believe you can become unless you have concrete evidence. What is wanted is a role model” (Ibid). Hence, affirmative action provides role models to encourage other youngsters and to breakdown
stereotyped assumptions that would relegate women and minorities to lower positions in professions and institutions.

According to Stroud (1999:390), affirmative action helps to change not only the negative attitude of others towards certain group members but also one’s aspirations towards the career options, which might have been considered not to be suitable for members to pursue. Further, role models for those in the minority community are important in that they see members of their own groups in those roles (Greenawalt, 1982:64). Otherwise, they are likely to accept their traditional roles and positions in society which are less prestigious and less demanding ones (Ibid). Thus, an important aspect of improving young female motivation and education is to put women into positions where they are not adequately represented so that they can serve as effective role models. The role model argument, therefore, serves to break down negative stereotypes thereby enabling women to demonstrate their capabilities. Thus, women as role models would encourage other women to follow in their footsteps.

In light of the above outline, one could safely conclude that the implementation of affirmative action for women can be justified as a strategy and as means for achieving social utility and role models as opposed to compensation to prior discriminations. In sum, the main justifications for affirmative action originate from two key considerations: the need to redress past disadvantage and imbalances, and the vision of an equal society. Although each of these outlooks is discussed as an alternative to the other, there is nothing inherently conflicting in them and they are not necessarily mutually exclusive either. The two perspectives on affirmative action could provide important insights as to how some forward-looking and backward-looking approaches could be useful tools to redress the gender gap. The backward-looking approach aims at redressing the deep structural inequalities resulting from past discrimination. In this way, it considers visions of the past, in order to sufficiently grasp the severity of the harms done. This approach shows the importance of compensation for the wrongs in the past. Alternatively, the forward-looking approach demonstrates the importance of increasing social utility by giving preferential treatment for disadvantaged groups. It basically focuses on current
inequalities. According to such model, affirmative action alleviates the burden and benefits the whole society by promoting diversity and equal opportunity.

2.3.2 Arguments against affirmative action

Basically, the arguments against affirmative action in general and beneficiary groups of the program in particular could be divided into two categories namely, the reverse discrimination and the merit principle argument. Simon (1977), Cowan (1977) and Sowell (1994) have vigorously argued against affirmative action programs. Below, these arguments will be discussed in detail.

2.3.2.1 Reverse discrimination

The phrase “reverse discrimination” as noted by opponents refers to denial of opportunities to qualified individuals in order to grant for targeted groups in a form of affirmative action. Opponents call affirmative action reverse discrimination in that it is just reversing discrimination by considering the same criteria, which was considered as irrelevant and discriminatory in the past (Nickel, 1995:3-4). For opponents, affirmative action is reverse discrimination as it simply overturns the practice of discrimination against other group members. Thus, it is not different from discrimination. The reverse discrimination argument is that, “if we grant as a matter of compensatory justice special advantages or benefits to persons who have been unjustly treated on the basis of a morally irrelevant characteristics (such as being a woman or being black), we are in effect using a morally irrelevant characteristic as if it were morally relevant and thus still engaging in an unjust treatment of persons” (Taylor, 1995:9). Opponents contend that affirmative action contributes to the development of further inequalities. This argument alleges that special treatment to formerly discriminated groups is unjust because it depends on an irrelevant characteristic and thus continues to discriminate other group members of the society (Nickel, 1995:3-4). It is repeating the fault committed previously by considering the morally irrelevant characteristic as if it were relevant (Ibid).
Opponents further argue that the use of such criteria as a basis for providing reparations for the disadvantaged might constitute wrongful discrimination.

The core issues of the debate revolve around whether using the same criteria that had previously been deemed as irrelevant are morally justified. It has been frequently argued that since the characteristic is morally irrelevant, its use as a basis for providing reparations must also constitute wrongful discrimination. However, proponents on the contrary argue that affirmative action is different from the practice of prior discrimination in that it is not based on the idea that certain group members are inherently inferior. According to Nickel (1995:4), such reparations are not wrong because they are not based on the morally irrelevant characteristic. Nickel further argues that being black, for example, is a morally irrelevant characteristic for discrimination against a person, though if a black man receives special consideration as reparation for past discrimination the basis is not the morally irrelevant characteristic of his being black, instead, it is the morally relevant one of his having been subject to unfair treatment because he was black (Ibid).

Affirmative action is criticized as reverse discrimination as it might do injustice and violates individual rights because it introduces irrelevant criteria and penalizes non-beneficiaries of the policy. Further, it has been claimed by opponents that affirmative action burdened innocent individuals to pay the debt of past legacies (Simon, 1995:67). In other words, preferential treatment would be unfair since such individuals are not responsible for the injury done in the past. Affirmative action would increase animosity between beneficiaries and non-beneficiaries of the policy by creating resentment and does harm even to the beneficiaries of the program by stigmatization (Kellough, 2006:89).

Moreover, opponents allege that beneficiaries of affirmative action programs and the ones who are paying the debts are neither those who have directly suffered the discrimination nor those who had inflicted the damage. Rather the benefit and the burden rest on other members of the groups. However, Thomson, a contemporary moral philosopher, has defended this assertion on the ground that these individuals have directly
or indirectly profited or been harmed by the wrongs inflicted by others (1995: 59). She continues arguing that “even those were not themselves down-graded for being black or a woman has suffered the consequences of the down-grading of other blacks and women: lack of self-confidence and lack of self-respect” (Ibid).

Similarly, Taylor in his article (Reverse Discrimination and Compensatory Justice), holds the whole society liable for past injustice performed against members of the group who were victimized by institutionalized discrimination (1995:14). Due to this, he concludes “society is morally at fault if it ignores the group which it has discriminated against……Whatever owed by individuals to other individuals, institutionalized injustice demands institutionalized compensation” (Ibid). In addition, Nickel (1995:4), in his article (Discrimination and Morally Relevant Characteristics) justified the use of special measures to remedy any individuals who had unjustly discriminated in the past, the basis for such compensation is not because the person belongs to a certain group, but the person was previously subject to unfair treatment because of membership in such group. In sum, the core issues of the debate revolve around whether using the same criteria that had previously been deemed as irrelevant be morally justified. Affirmative action is criticized as reverse discrimination, rather than creating equal opportunity, leads to a form of discrimination against other group members, notably non-beneficiaries of the program which may result in further inequalities in the future. However, affirmative action is different from prior discrimination in that it is not based on the idea that a certain group members are inherently inferior. On the other hand, it has been defended that the policy is just correcting the situation, not discrimination against men or other minorities. It has to do with righting the wrongs committed in the past.

2.3.2.2 The merit principle

Opponents contend that affirmative action policy is fundamentally defective as it violates the rule of hiring by competence and prioritizes group membership over merit. Further, those who oppose the policy of affirmative action claim that positions should be awarded to the most qualified individuals, that is, to those who have the greatest aptitude and skill
for performing the tasks those positions require (Lapenson, 2009: 36). They further consider the individual’s merit as the relevant criteria for determining his/her proper allocation of benefits and burdens. According to this approach, hiring and promotion should be based on merit; people deserve opportunities proportional to their talents. Opponents claim that individual’s ability is the determining factor for the allocation of benefits and burdens irrespective of individual characteristics such as birth, race, colour, sex etc. They underline that allocation of goods or opportunities should be objectively based on one’s merit without taking into account personal characteristics of an individual. Due to this, they state that college admission and hiring should be primarily based on a student’s academic record and qualification of an employee respectively.

Emphasizing the merit principle, Sowell (2004: 175) argues that recruitment, selection and promotion should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. Sowell further pointed out that compromising the merit principle might result in poor performance because inefficient and incompetent people may be appointed by preference (Ibid: 176). In addition, compromising qualification or giving jobs to less qualified persons will restrain efficiency of the institutional system and ultimately affect the public at large (Polyviou, 1980: 360). In other words, it is argued that compromising merit and competence would affect the interest of beneficiaries of the program themselves and the job. In this way, preferential treatment promotes the stereotype that those beneficiaries of the program are unable to achieve success without special protection and creates feelings of inferiority. In addition, it might lead to stigmatization of beneficiaries of the program.

Alternatively, proponents of affirmative action asserted that the concept of merit itself is subjective with no definite meaning and refers to a criterion pre-determined to fulfill certain recognized social values that are subject to variations. The process of selection, which is made by admissions and personnel officers, has an influence on the stereotypical presumption of decision makers (Young,1990:132).
In sum, opponents of affirmative action argue that the program actually violates the rights of innocent individuals and compromise qualifications. They call it reverse discrimination, saying it is a new form of discrimination on different group members of society. Moreover, they claim that affirmative action has undesirable side-effects on individuals. However, affirmative action seeks to promote equal opportunity by redressing present socio-economic and political gaps in all societies.

2.4 The Concept of equality

The concept of equality has been a controversial subject in the legal discipline. The concept of equality has meant different things in different settings. It can mean equality of opportunity freedom from discrimination, equal treatment, equal benefit, equal status and equality of result (Rosenfeld, 1991:139). It is therefore very difficult to give a concrete meaning to the notion of equality.

Almost all modern constitutions addressed the issue of equality. Equality has been extensively given various meanings and definitions since long time. Different conceptions of equality are proposed. The classical idea in which Aristotle viewed equality is represented in his distinction between numerical or arithmetical equality which refers to equality in number, and proportional equality refers to equality of ratios (Clifford, 2008:13). Numerical equality is when persons are treated alike without distinction. It focuses on sameness and presupposes the absence of any discrimination. The generally accepted equality principle that Aristotle formulated in reference to Plato is: “things that are alike should be treated alike”. It is equal treatment under law for all citizens. The modern conceptions generally classified the idea of equality into formal and substantive equality.

2.4.1 Formal equality

Formal equality, which has an important role in many national legal systems, stipulates identical treatment of all individuals regardless of their actual circumstances. It is based on the Aristotelian concept of equality that meant to treat like persons alike and unlike
persons unlike (Scales, 1993). This notion of equality requires that similar cases must be treated similarly “according to one and the same rule”. It reflects a generalized idea that a rule applies to one should apply to all. This view operates on the assumption that persons and situations have already been determined to be similar; it does not provide any criteria for relevance (Singh, 1985:16). If all persons were equal in every respect, formal equality would have been sufficient. Formal equality presupposes that all persons are equal bearers of rights. It is ignorant of the socio-economic disparities among groups and individuals in society. When two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect (Rosenfeld, 1991:14). According to the formal approach, a rule applies to all those who fall within its scope. It does not question the content of the law.

Formal equality presupposes that equality is achieved if the law treats all persons alike. This refers to similar treatment irrespective of background or ethnicity or gender. Holtmaat (2004:2) in her article (The Ideals of Equality and Non-Discrimination: Formal and Substantive equality) describes formal equality as context-independent that applies to all persons regardless of the context. It is characterized by an emphasis on the exclusion of any considerations in decision-making, such as sex or race. She further explains that formal equality ensures that decisions are fair, in the sense of being neutral and based on the notion of merit (Ibid). Formal model of equality refers to applying single standard rules consistently regardless of any distinction. This notion of equality is often criticized as it does not take into consideration personal characteristics of an individual. For instance, in case of gender discrimination, advocates of formal equality would exclude any differences between men and women either biologically or socially. As a result, the formal equality model tends to perpetuate inequality among the sexes for it treats men and women as equals despite unequal access to power and resources. It ignores the real inequality in circumstances.

2.4.2 Substantive equality

Substantive equality requires that differences among social groups be acknowledged and accommodated in laws, policies and practices to avoid adverse impacts on individual
members of the group. A substantive approach to equality evaluates the fairness of apparently neutral laws, policies and programs in light of the larger social context of inequality, and emphasizes the importance of equal outcomes which sometimes requires equal treatment and sometimes different treatment. It is obvious that gender equality is achieved when women and men contribute equally to and benefit equally from political, economic, social and cultural development and society equally values the different contributions they make. In other words, a substantive approach of the right to equality recognizes past discriminatory practices and takes various means to achieve equality in practice. Substantive equality is context-dependent, in which various substantive criteria for differential treatments are built into the equality principle (Holtmaat, 2004:4). Equality cannot simply mean that all people should be equal in all respects. This idea of equality takes into consideration the different criteria of the context such as need, merit and worth (Ibid: 6).

The substantive notion of equality refers to treating individuals in relation to their appropriateness (Newton, 1973:18). A substantive approach to equality considers the actual social and economic conditions that have led to inequalities among groups in society. It demands the differential and separate treatment of those who are unequal in order to ultimately bring equality. It involves an appeal to some reason or criterion justifying differential treatment, which has resulted from the historical factors creating socio-economic inequalities (Ibid). Substantive equality takes into account the specific circumstances of groups and individuals and ensures equality of result or outcome. This approach to equality demands positive measures to be taken by States. In recent years, the traditional view that linked the role of the state only with ‘formal equality’ has undergone radical changes (Ibid). This is due to the belief that the removal of formal barriers per se does not bring about equal opportunity. In this regard, Peters (1999:34) argues that substantive equality favors state intervention in order to equalize situations. She further declares that equality is better ensured by differential treatment to enable the participation and inclusion of all groups in institutions and positions. Men and women may be, therefore, treated differently in order to benefit equally either through affirmative action or other measures.
Against this broad spectrum, the next chapter briefly reviews the historical development of affirmative action in three countries namely, United States, India and South Africa. It examines the origin, relevant legislation and methods of implementation of affirmative action programs. In the United States institutional racism was shaped by the slavery system in which people are treated as property. Racist policies and practices existed as a legal institution. India, the second most populous country in Asia, had a deep-seated classification system based on a person’s caste in society. The caste system refers to a stratified social hierarchy in which people were alienated into separate close communities known as caste. South Africa was ruled by a political system called apartheid, which was based on the segregation of races through legislation. Although these countries represent different continents, cultures and socio-economic developments, the historical background to affirmative action demonstrates a history of injustice and an attempt to end discrimination against disadvantaged groups of society.