Affirmative action for women in higher education and the civil service: The case of Ethiopia
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Chapter 3

3. An Overview of Affirmative action in the United States of America, India and South Africa

This chapter overviews the historical development of affirmative action in three countries, namely, the United States of America, India and South Africa. While the USA and India were chosen because of their early introduction of affirmative action policies in their respective countries, South Africa was chosen as it has recently introduced the policy, following the end of apartheid. The historical context of each country sets the basis for affirmative action programs. The countries under review are composed of multicultural communities with various ethnic settings. However, such communities are disproportionately represented in the socio-economic and political spheres leading to social exclusion and institutional discrimination. Such institutionalized discrimination and underrepresentation has urged the need for the implementation of affirmative action in the countries under review due to a long history of material deprivation and social exclusion. Although the phrase “affirmative action” has originated in the 1960s in the United States; India was probably the first country to have implemented the program of affirmative action since the 1920s. India has called for reservation in order to rectify historical injustices. It is, indeed, the case that race in the USA, the caste system in India and apartheid in South Africa form the foundation of societies on which affirmative action programs in the three countries would be based. Moreover, the mode of implementation of affirmative action programs varies; in the USA not constitutionally grounded polices take the form of preferential treatment, while constitutionally sanctioned mandatory reservation is enforced for eligible candidates in India. In order to rectify the caste system oppression in India, the government has adopted strict quotas in political and public employment spheres for members of targeted groups. Similarly,
South African’s affirmative action policies are constitutionally endorsed. In the section to follow, a brief description and background of the three selected cases will be provided.

3.1 The United States of America

3.1.1 Background

The origin of affirmative action in the United States of America dates back to the racial history through slavery and civil rights era. The historian, Philip F. Rubio, argues that to fully understand the historical development of affirmative action in the United States, one must trace its origins back to the early slavery period in the United States and the resulting relationship between the dominant whites and the minority groups in America. In describing the long roots of affirmative action in America, Rubio (2001:3) writes as follows:

…..affirmative action sums up the story of the United States: the struggle for justice, equality and self-determination and whether African Americans will or even should be able to enjoy chosen labor and increased life chances. It represents the history of white supremacy, privilege, and guilt versus black protest, militancy, and demands for compensation and reparations; black reality against white denial; formal equality versus remedial preferential treatment; and the debate over integration, assimilation, segregation, and separation. The black-led struggle against discrimination has been the primary impetus for people of color, women, and other oppressed groups also to demand political and social equality.

In the USA, the political, economic and cultural discrimination against African Americans practiced at workplaces and educational institutions provided the basis for affirmative action programs to take place. It has to be noted that the introduction of affirmative action is directly linked to the civil rights movement in the USA, which was a political, legal and social struggle by African Americans to gain full citizenship rights and to achieve racial equality (Rubio, 2001:70). In particular the anti-slavery movements which focused on the abolishment of slavery and demands for racial equality and justice leads to the commencement of the American civil war from 1861 to 1865 in the United States. Thereafter, in 1863, President Abraham Lincoln issued the Emancipation
Proclamation that mandated the liberation of slaves in areas under the control of the federacy (Kranz, 2002:6). Likewise, in 1865, the so called Freedman’s Bureau was established for the protection and advancement of newly emancipated slaves in the Southern part of the United States (Rubio, 2001:46). The Bureau supervised all relief and educational activities relating to refugees and the freedmen. It was also involved in various social activities such as the establishment of public schools and hospitals, monitoring civil authorities and resolving domestic disputes (Davis, 1993:7). Following the end of the Civil War in 1865, the US Congress proposed a series of anti-slavery amendments to the US Constitution. Thereafter, the Federal Constitution was amended with a clear mandate to address the issue of racial discrimination and the status and rights of the newly emancipated African Americans. The Thirteenth Amendment to the Constitution that was ratified in 1865 abolished and prohibited slavery throughout the United States. Similarly, the Fourteenth Amendment, which was ratified in 1868 provided for the equal protection of all its citizens including the freed black slaves. Besides, the Fifteenth Amendment that was ratified in 1870 provides full voting rights prohibiting discrimination on account of race, colour or previous condition of servitude.

Thereafter, the so-called “Jim Crow” laws were enacted in the 1880s by the Southern States authorizing segregation between blacks and white communities (Rubio, 2001:70). The “separate but equal” doctrine allows the separation of citizens by race in schools, transportation, public accommodation etc., as long as the services provided for one race were equal to those provided for the other (Rubio, 2001:71). This practice clearly mandated the use of separate facilities for whites and the black people, thereby depriving the latter from opportunities in employment and education. Moreover, the judiciary gave credence to the “separate but equal” doctrine in 1896 with the decision of Plessy v Ferguson 163 U.S. 537 (1896). This was the landmark US Supreme Court case that legitimizes segregation against African-Americans and approved an Act of the General Assembly of the State of Louisiana providing for separate railway carriages for the white and colored races. The first section of the Louisiana Railway Accommodations Act 1890 endorses:
All railway companies carrying passengers in their coaches in this state shall provide equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: Provided that this section shall not be construed to apply to street railroads. No person or persons shall be admitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to.

In the civil rights movement of the 1950’s and 1960’s, individuals and organizations challenged segregation and racial discrimination with a variety of activities including protest marches, boycotts, and refusal to abide by segregation laws. One of the major achievements of the civil rights movement was the *Brown v. Board of Education* 354 U.S. 483 (1954) decision in which the Supreme Court reversed the segregationist practice of “separate but equal” doctrine as unconstitutional. In this landmark case, the Supreme Court upheld that segregation of children in the public schools solely on the basis of race, denies to black children the equal protection of the laws guaranteed by the Fourteenth Amendment. Education in public schools is a right which must be made available to all on equal terms. The decision declares legal school segregation unconstitutional.

In addition, in 1955, Rosa Parks, an African American, who refused to give up her seat to a white passenger on a city bus in Montgomery, Alabama, was arrested and fined for breaking the laws of segregation (Anderson, 2004:52). This incident sparked the Montgomery Bus Boycott struggle under the leadership of Martin Luther King, Jr., to challenge racial segregation laws (Ibid). Moreover, the civil rights movement came to the national attention in the 1960s. The March on Washington for Jobs and Freedom that was initiated by A. Philip Randolph and took place in Washington, D.C. in 1963 called for civil and economic rights for African Americans (Kranz, 2002:7). During this march, Martin Luther King, Jr., the prominent leader in the civil rights movements, delivered his historic “I Have a Dream” speech. Among other things, the march had an impact for the passage of civil rights legislation. The next section will deal with the consequential legislation in contemporary USA.

### 3.1.2 Legislation
In the civil rights context, the term “affirmative action” has first emerged in the 1961 Executive Order 10925 by President Kennedy. Section 301(1) states:

The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

Executive Order 10925 not only required federal contractors to employ workers on a nondiscriminatory basis but also to take “affirmative action” in view of providing equal opportunities in employment for racial minorities without regard to the race of the applicants. Yet, gender was not included in the list of forbidden discriminatory practices. Though, Executive Order 10925 failed to define the term “affirmative action”; it required the contractor to take affirmative action in employment, upgrading, demotion or transfer; recruitment or advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship (Executive Order 10925: Section 301(1)).

Furthermore, the 1964 Civil Rights Act, which was signed by President Lyndon Johnson, became an important legislation in the civil rights context. This Act prohibited racial and sex discrimination in public accommodations and employment. Title VII section 703 (a) of the 1964 Civil Rights Act stated:

It shall be an unlawful employment practice for an employer- (1) to fail or refuse, to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

This Act set the stage for more practical measures than simple non-discriminatory provision, which prohibits treating people differently on the basis of their race, sex etc. Section 706 (g) states that a court may order “such affirmative action as may be appropriate” following intentional or unintentional discriminatory practices. Title VII of the Civil Rights Act of 1964 also established the Equal Employment Opportunity
Commission (EEOC), with the authority to impose sanctions for violations and empowered government agencies to cancel contracts with unions and businesses that violated equal employment opportunity provisions. Likewise, President Lyndon Johnson made a speech in 1965 at the commencement ceremony of Howard University in Washington DC, for more aggressive and result-oriented policies. He declared that:

"........But freedom is not enough. You do not wipe away the scars of centuries by saying........Now you are free to go where you want, and do as you desire........You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You’re free to compete with all the others,’ and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through the gates. This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result (Anderson, 2004:88).

Johnson set the stage for more aggressive, result-oriented policies in his speech. Moreover, the 1965 Voting Rights Act outlawed discriminatory voting practices against African Americans in the US. Thereafter, Executive Order 11246 was introduced on September 24, 1965 by President Johnson as a way of redressing the persisting age old discriminatory practices to give effect to Title VII of the 1964 Civil Rights Act. Section 202(1) reads as follows:

"The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Executive Order 11246 requires organizations that would enter contracts with the federal government to take affirmative measures in order to ensure the equal treatment of all employees regardless of their races, colors, religions or national origins. In particular, Executive Order 11246 requires an organization to monitor the underrepresentation of target groups (Blacks, Native Americans, Latinos and Asian Americans) in the workforce and determine the availability of qualified workers (Crosby et al., 2003:96). Later in
1967, Executive Order 11246 was amended by Executive Order 11375 to include gender as a ground for redressing discriminatory practices, which provided the initial legal basis for affirmative action for women in employment (Clayton & Crosby, 1992:14).

Accordingly, Executive Order 11375 requires federal contractors to ensure that members of the vulnerable groups would be employed in fair numbers and treated fairly during employment, and to file periodic compliance reports to that effect. Executive Order 11375 abolished the Committee on Equal Employment Opportunity, instead delegated power to the Office of Federal Contract Compliance Programs (OFCCP), located in the Department of Labor, for the purpose of more effective monitoring and enforcement of the policy directive (Davis, 1993:11). OFCCP is mandated to monitor and enforce the policy directives on the implementation of affirmative action programs. OFCCP further investigates complaints and is authorized to cancel contracts or debar firms and companies from selling goods and services to the federal government (Ibid). However, “if a federal contractor fails to meet its own goals, little or no punitive action would be taken by the OFCCP as long as the contractor was in a position to demonstrate a good-faith effort toward reaching the goals” (Crosby et al., 2003:96). Such compliance reviews, which are carried out periodically either through desk audit or on-site review, make an analysis of the workforce, then, determines whether beneficiaries of affirmative action programs are sufficiently represented in the workforce (Rubio, 2001:140).

President Richard Nixon, who took office in 1969, had transformed the program of affirmative action into an active effort to recruit and promote minorities and women in order to overcome their underrepresentation in employment and educational institutions (Davis, 1993:11). Shortly thereafter, President Nixon added enforcement measures to Executive Order No. 11246 by issuing Revised Order No. 4 in 1971, which is commonly known as the “Philadelphia Order”. Under the Philadelphia Order, Nixon developed the new concept of ‘underutilization’ and ‘availability’ that required government contractors to set up ‘numerical goals’ and ‘timetables’ for hiring members of minority groups and women to be able to measure the progress of hiring and promotion (Ibid). Contractors were instructed to take the term “minority groups” to refer to “Negroes, American Indians, Orientals, and Spanish Surnamed Americans.”
The concept of “underutilization” meant “having fewer minorities or women in a particular job classification than would reasonably be expected by their availability.” “Goals” were not to be “rigid and inflexible quotas” but “targets reasonably attainable by means or applying every good faith effort to make all aspects of the entire affirmative action program work” (Ibid:12). Revised Order No.4 requires all federal contractors and sub-contractors with 50 or more employees or a contract worth $50,000 or more to uphold affirmative action plans that would lead to proportional representation of women and minorities in the workforce (Kellough, 2006: 37). To that effect, race, ethnicity, and sex would be taken into consideration in employment, college admissions, and government contracting decisions (Ibid). As Bergmann (1996: 85) explained statistical disparity proves the persistence of gender and race segregation in institutions. Advocating for the use of goals and timetables, Bergmann further emphasized that “in the absence of numerical goals and timetables for meeting them, it is difficult to determine whether managers have done a good job or to hold anyone responsible for failures” (Ibid).

Moreover, two equal employment opportunity programs are adopted: the Rehabilitation Act of 1973 that required the application of affirmative action by the Federal Civil Service and by government contractors for qualified disabled persons; and the Vietnam-Era Veterans’ Readjustment Assistance Act of 1974, which required government contractors to utilize affirmative action for veterans of the Vietnam War³ were enacted while Gerald R Ford was the president. These acts require federal contractors to develop, maintain, and update affirmative action plans for the equal opportunity employment of disabled persons and veterans of the Vietnam era. Alongside, the US Supreme Court has addressed the issue of affirmative action in employment sector and university admissions in a series of cases. Below, some of these cases are described.

### 3.1.3 Court Cases

One of the landmark cases in the US, the case of *Regents of the University of California v. Bakke* 438 U.S.265 (1978) set the precedent for affirmative action in higher education. The petitioner, *Allan Bakke*, claimed the policies, which set-aside 16 out of 100 seats for minority applicants, were discriminatory and violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act (Bakke, 438 U.S. at 315-16). Although the court struck down the admission policy of the University of California, Davis School of Medicine, the Court held that race and ethnicity could be considered as a factor in higher education admissions policies provided that the institution has the compelling interest of elimination of ‘serious and persistent underrepresentation of minorities in medicine, which could be seen as a result of past societal discrimination’ (Bakke, 438 U.S. at 317). In this case, Justice Lewis Powell argued that affirmative action programs would be permissible for a university’s admission in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file” (Bakke, 438 U.S. at 317).

Moreover, in the case of *United Steelworkers of America v. Brian Weber*, 443 U.S.193 (1979), the Supreme Court held that a collective bargaining agreement that voluntarily set aside quota for craft-trainee position for black employees did not contravene Title VII of the Civil Rights Act, for the Act did not denounce affirmative action programs in the private sector (Weber, 443 U.S. at 197). Accordingly, private employers are permitted to use racial preferences in hiring and promotions as a means to correct past discrimination.

The first case on affirmative action for women in employment was decided by US Supreme Court in 1987 in *Johnson v Santa Clara* case (Johnson, 480 U.S. at 616). In this case, the Supreme Court addressed the question of whether the transportation agency violated Title VII of the Civil Rights Act of 1964 by taking into consideration the sex of an employee for a promotion (Johnson, 480 U.S. at 619). The Agency set out a plan for preferential promotions for women wherever they were “significantly underrepresented in traditionally segregated job classifications” (Johnson, 480 U.S. at 616, 621). In view of this, the Agency decided that a female applicant ought to be promoted by considering her sex among other relevant factors. However, Johnson, a male employee of the
organization, brought a suit against the Agency after he was denied of a promotion to a road dispatcher. Johnson alleged that a female employee applicant, Diane Joyce was selected in spite of having less qualification for the promotion. According to the Supreme Court, a prior finding of discrimination was not necessary so long as there was an apparent imbalance reflecting underrepresentation of women in traditionally segregated job categories (Johnson, 480 U.S. at 628). The Court generally held that gender could legitimately be considered as a positive factor in recruitment for jobs under a voluntary affirmative action plan because of an imbalance in the percentage of women in a workforce. The court, therefore, held that the plan did not violate Title VII of the Civil Rights Act of 1964 (Johnson, 480 U.S. at 635). Consequently, Diane Joyce was promoted to a position of a road dispatcher in accordance with the affirmative action plan of the Agency in place of Johnson. This case brings an important contribution to women’s rights to equality by allowing employers to implement voluntary affirmative action plans.

Affirmative action has been a subject of contentious debate in the US since its inception. The proponents of affirmative action argue that it is an essential means to remedy the long legacy of racism in American society. Proponents further argue that affirmative action promotes the professional careers of people from groups that have historically been oppressed or denied equal opportunities and prevent future discrimination or exclusion from occurring. Opponents by contrast, contend that it is reverse discrimination. Opponents further claim that it is simply making another wrong for the government to use race or sex in conferring benefits such as government contracts, jobs, or admissions to schools. In other words, opponents view preferences as inconsistent with the ideals of individualism and merit. However, in the 1990s, there has been a shift in the approach towards affirmative action. There was a view that affirmative action is no longer needed as members of beneficiary groups are no more as disadvantaged as they have been in the past. The anti-affirmative action campaign spearheaded all over the country mainly in higher education. Opponents moved to eliminate affirmative action altogether by way of popular referendum. They believe that affirmative action has already served its objectives. The mid-1990s has brought organized efforts against affirmative action in admission to higher education in the US. In the US, affirmative action is considered as a temporary measure that ends once equality has been achieved. It
has to be ended when past imbalances are rectified. Below, the legal and legislative challenges will be examined.

3.1.4 Challenges

Although the public debate on affirmative action has emerged since its inception; the mid-1990s brought both legal and legislative challenges against affirmative action policies in the US. The on-going debates finally led to the elimination of affirmative action in higher education in different states of the US. Among these was, Proposition 209, adopted in California in 1996. The initiative amended the California Constitution to prohibit state government institutions from considering race, sex or ethnicity in public employment, contracting or education. Section 31 is added to Article 1 of the California Constitution. Section 31 states “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” (California Civil Rights Initiative: 1996). Generally, the statewide referendum banned the use of affirmative action programs in the public sector. Moreover, in Texas, affirmative action was made illegal in the courts. In 1996, race-based admission practices at the University of Texas law school were struck down in *Hopwood v. State of Texas*, 518 US 1033 (1996) in which the court banned the use of race or ethnicity as an admission criterion in the recruitment provision of financial assistance or retention of college students. However, after the *Hopwood* decision, the State of Texas initiated the “Top 10 percent Plan” which ensures that students who graduated in the top 10% of their high schools have guaranteed automatic admission to Texas A & M and University of Texas (An Act of the State of Texas: 1997).

After the passage of Proposition 209, similar initiatives were proposed in different states requesting the prohibition of affirmative action. In 1998, in Washington, the states’ voters enacted Initiative I-200 that ban racial and gender preferences by state and local government (Washington State Civil Rights Initiative 200). Though Initiative I-200 was
not a constitutional amendment, it added to Washington’s state law (Kaufmann: 2007). Section 1, paragraph 1 declares “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, colour, ethnicity, or national origin in the operation of public employment, public education or public contracting” (Ibid). Likewise, in 2000, the Florida legislature passed the “One Florida” plan, which ends admission programs based on affirmative action in the state university system. The program also included the Talented Twenty Percent Plan that guarantees the top twenty percent admission to the University of Florida system (National Conference of State Legislatures).

In 2003, the US Supreme Court upholds and limits race based affirmative action policies in public universities. The University of Michigan is involved in the two legal cases. In the case of *Grutter v. Bollinger* (02-241) 539 U.S. 306 (2003), the Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School as a means of promoting student diversity. In this case, *Barbara Grutter*, who filed a suit claiming that the Michigan Law School’s policies that aim to achieve diversity through the consideration of race and ethnic origin, are discriminatory and violate the Fourteenth Amendment of the U.S Constitution as well as Title VI of the Civil Rights Act (Grutter, 539 U.S. at 306). The Supreme Court upheld that the affirmative action admissions policy of the University of Michigan Law School was constitutional and appropriate “to further a compelling interest in obtaining the educational benefits that flow from a diverse student body” (Grutter, 539 U.S. at 306).

Conversely, in the case of *Gratz v. Bollinger* (02-516) 539 U.S. 244 (2003) the US Supreme Court ruled that the university’s point system's that awarded 20 points to underrepresented minorities “ensures that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional. In this case, Petitioner *Gratz* and *Hamacher*, who applied for admission to the University of Michigan’s University, were denied admission. Among other things, the University has considered African-Americans, Hispanics, and Native Americans to be “underrepresented minorities” (Gratz, 539 U.S. at 244). In selection of applicants, the University’s admissions guidelines automatically awarded 20 points of the 100 needed to guarantee
admission for every applicant from underrepresented groups. Petitioners filed the case alleging that the university’s use of racial preferences in admissions violated the Equal protection clause of the Fourteenth Amendment. The court determined that remedying past discrimination is a compelling state interest however; the university’s use of race in admissions policy is not narrowly tailored to achieve educational diversity.

In general, the consideration of race as a factor in admissions by public institutions of higher education was justified to provide a compelling state interest by the court’s decision in *Grutter v. Bollinger* 2003. However, the court held the consideration of race as unconstitutional by the majority opinion of *Gratz v. Bollinger* 2003. Following *Grutter and Gratz* cases, on November 7, 2006 Michigan voters approved the Michigan Civil Rights Initiative known as “proposition 2” to eliminate affirmative action in public education and employment, which subsequently amended Michigan’s constitution to prohibit the use of race and gender in admission and hiring (Questions and Answers Regarding Proposal 2, Available at: http://www.diversity.umich.edu/legal/prop2faq.php). Furthermore, in November 2008, Nebraska voters passed Civil Rights Initiatives 424, a constitutional ban on government institutions from giving preferential treatment to people on the basis of ethnicity or gender (National Conference of State Legislatures). However, Colorado voters became the first in the nation to reject the proposed ban on state affirmative action programs on 8 November, 2008 (Ibid).

Subsequently, in 2010, Arizona voters approved proposition 107 to ban the consideration of race, ethnicity or gender by state government, including public colleges and universities. The State of Arizona outlawed affirmative action in 2010 when voters approved proposition 107. The Constitution of Arizona is proposed to be amended by adding section 36 as follows: Section 36A “This State shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.” (Arizona Department of State: 2010). Moreover, in 2011, the New Hampshire legislature outlawed racial preferences in public colleges (National Conference of State Legislatures). Taken together, seven states have entirely banned affirmative action in public university admissions. It is undoubtedly clear that the aftermath of such initiatives that ban affirmative action will have an impact on women
who have experienced significant gains in education and job opportunities in state and local governments.

In sum, affirmative action in the US aims to rectify the historical effects of institutional injustice and enhances racial, ethnic, gender or other kinds of diversity as a goal within an organization. Moreover, an affirmative action program is targeted to address an apparent racial or gender imbalance in traditionally segregated job categories and created as a temporary strategy to bring about equality and encourage inclusion. Affirmative action in the USA, therefore, targeted women and other beneficiary groups because they deserve compensation for past and continuing injustices. However, affirmative action has not been free from rejection since its inception. Its supporters justified affirmative action as a remedy for prior effects of slavery, segregation of the Jim Crow laws and racial discrimination in every aspect of society. Opponents, by contrast, allege for a society where every person is treated as an individual and evaluated on his or her own merits. Claims of unfair treatment and reverse discrimination have become basis in the ongoing debate. Opposition to the application of affirmative action programs remains strong in many areas of the country.

The mid-1990s has brought organized efforts against affirmative action in admission to higher education in the US. The on-going debates finally led to the elimination of affirmative action programs in different states of the US. Some opponents argue that progress has now been made and affirmative action is no longer necessary. Those who support this view claim that discrimination against minorities and women is no longer a problem. However, ending affirmative action in California, Texas, Florida and Washington has had negative ramifications for beneficiary groups as it decreased underrepresented minority enrollment at higher institutions (Hinrichs, 2010: 21). This, in turn, may have a negative impact for beneficiaries by narrowing their opportunities to attend higher education.

3.2 India
In order to understand the historical development of preferential policies in India, it is important to understand the roots of social inequality that has been deeply entrenched in the institution of caste. This section will review the historical basis for this system and the rationale of preferential policies being given to the weaker sections of society in India.

### 3.2.1 Background

The Indian Society is composed of various ethnic groups with diverse cultures and ways of life. It is a multi-ethnic and multi-religious society. The main rationale for India’s affirmative action had to be sought in the caste system in which people were divided into separate closed communities. The caste system refers to a stratified social hierarchy and the term caste is used to specify a group of people having a specific social rank. The Indian term for caste is *jati* (Galanter, 1984:8-9). The overwhelming majority of the populations of the Indian society is religiously divided and composed of Hindus (83 percent), followed by Muslims (11 percent), Christians (2.3 percent), Sikhs (1.9 percent) and finally Buddhists (0.9 percent) (Ibid: 10). The Hindu majority is distinctively subdivided by a caste system or the *varna* into four categories. These are the Brahmins, who are mainly priests and scholars; the Kshatriyas, rulers and soldiers, the Vaishyas, traders and merchants and Sudras the agriculturalists (Zwart, 2000: 236). The caste system links the division of labour with hierarchy. Generally, these four groups were separated in various matters including marriage, contract, division of labour and hierarchy.

Anyone who does not belong to one of these castes is an outcast. These outcaste people are considered to be the *dalits* or the “untouchables” to the four castes (Sowell, 2004:25). Galanter, (1984:15) in his book “*Competing Equalities: law and the backward classes in India*”, listed down the grounds of disabilities associated with untouchability. These are, denial or restriction of access to public facilities, such as schools, offices, courts, to temples, relegation to dirty or menial occupations, residential segregation, separation in

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4 Untouchability means pollution by the touch of certain persons by reason of their birth in a particular caste or family.
utilizing public facilities, restrictions of movement near the areas of higher castes. The untouchables of Indian society work only in jobs considered to be degrading; cleaning the sewages, clearing away dead animals, disposing of garbage, laundering, leather working etc (Ibid). The Untouchables, who were in the lowest rank, were therefore not allowed to associate with or use the same facilities of the higher castes backed up by severe penalties for any violation (Sowell, 2004:25). This was because of their impure status. Untouchability which has its roots in the India’s caste system was a social context of age-old discrimination which necessitated progressive legislation and introduction of affirmative action in India.

The origin of affirmative action or “reservations” as it is known in the Indian context could be traced back to the late 19th and early 20th centuries when India was a British colony (Weisskopf, 2004:10). Weisskopf in his book: (Affirmative Action in the United States and India), explained that affirmative action originated with the development of the anti-Brahmin movement in the 19th century protesting against the monopolization of power by Brahmins who had dominated influential positions of the government (2004:10-11). The anti-Brahmin movement was a struggle to establish “reserved” seats, for non-Brahmins in public services and educational institutions. The Brahmins had often access to opportunities for advancement through education and government services.

Consequently, reservations for non-Brahmins were first introduced in the 1920s in public service positions and higher educational institutions in some provinces (Weisskopf, 2004:10). In 1921, in the Princely State of Mysore and in 1925 in Bombay, the acts of reservations were introduced. Further, a quota system was introduced in 1926 for Muslims, Christians, Anglo-Indians, Parses, Depressed Classes, Aborigines and other communities (Ibid:10). In this way, quotas for non-Brahmins were initiated as a response to the movement that sought for positive measures designed to remedy the discrimination that has existed over the centuries against disadvantaged members of the community.

The vast reservation policies were introduced in the 1930s in the political sphere, although major constitutional reforms had begun in the late 1920s to establish a federal assembly as well as provincial assemblies where the different groups were represented
The British had offered the creation of separate electorates, that is, “a representation of a particular group by a legislator chosen by an electorate composed solely of members of that group” to four minority groups: Muslims, Christians, Sikhs, and Anglo-Indians (Ibid; 1984:45). However, the creation of separate electorates for the untouchables (then known as Depressed Classes) was strongly contested by Mahatma Gandhi, the leader of the Indian nationalist movement. Gandhi made all his efforts for the eradication of untouchability and as well as unity between Hindus and Muslims with the goal of independence from Britain. In his efforts to bring untouchables back into Hindu society and the political mainstream, Gandhi renamed untouchables as “Harijans” (People of God) (Sowell, 2004:25). Alternatively, Dr. B. R. Ambedkar, leader of the Dalit movement and who was born an “untouchable”, has strongly recommended for the same arrangement of separate electorate for the untouchable community. Ambedkar, a distinguished scholar doubted that upper-caste Hindus would ever treat the Harijans as equals. He, therefore, demanded for a system of separate electorates that would have allowed the “Untouchables” to select their own representatives (Galanter; 1984: 30). After an intense struggle on the issue, the two leaders reached a compromise agreement, under which the untouchables of India would be part of the general electorate but would still have reserved legislative seats (Ibid: 32). A compromise between the leaders of caste Hindu and the depressed classes was reached on a conference convened in Bombay on September 24, 1932, popularly known as Poona Pact which unanimously adopted the following resolution:

This Conference resolves henceforth, amongst Hindus no-one shall be regarded as an Untouchable by reason of his birth, and that those who have been regarded hitherto will have the same right as other Hindus in regard to the use of public wells, public schools, public roads and all other public institutions. This right shall have statutory recognition … it shall be the duty of all Hindu leaders to secure, by every legitimate and peaceful means, an early removal of all social disabilities now imposed by custom upon the so-called Untouchable class, including the bar on right of admission to temples (Poona Pact and its agreement, 2011).

The following is the text of the agreement arrived at between leaders acting on behalf of the Depressed Classes and of the rest of the community, regarding the representation of
the Depressed Classes in the legislatures and certain other matters affecting their welfare (Ibid):

1. There shall be seats reserved for the Depressed Classes out of general electorate seats in the provincial legislatures as follows:- Madras 30; Bombay with Sind 25; Punjab 8; Bihar and Orissa 18; Central Provinces 20; Assam 7; Bengal 30; United Provinces 20. Total 148. These figures are based on the Prime Minister’s (British) decision.

2. Election to these seats shall be by joint electorates subject, however, to the following procedure-All members of the Depressed Classes registered in the general electoral roll of a constituency will form an electoral college which will elect a panel of four candidates belonging to the Depressed Classes for each of such reserved seats by the method of the single vote and four persons getting the highest number of votes in such primary elections shall be the candidates for election by the general electorate.

3. The representation of the Depressed Classes in the Central Legislature shall likewise be on the principle of joint electorates and reserved seats by the method of primary election in the manner provided for in clause above for their representation in the provincial legislatures.

3.2.2 The Constitution

After India became an independent nation in 1947, the Constitution, which was adopted in 1950 has abolished "Untouchability" and made its practice a criminal offence in order to secure further equality amongst its people (Article 17).

The Constitution of India guarantees the right of all its citizens to justice, liberty, equality, and dignity. The preamble reads as follows:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of
status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

Furthermore, the constitution provides provisions for fundamental rights that also made the basis for reservations for disadvantaged groups. Specifically, the Constitution guarantees the right to equality to citizens as well as non-citizens and provides equality of opportunity in the matter of public employment (Articles 14-16). Moreover, the constitution prohibits discrimination on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partially out of State funds or dedicated to the use of the general public (Article 15). Such prohibition of discrimination not only applies to states but also extends to private individuals.

Most importantly, the Constitution has introduced reservation programs to ensure that the oppressed castes would have access to higher education and better jobs. This system of “reservations”, or quotas, gives untouchables and other underprivileged groups, proportional representation in legislatures, government jobs, and educational institutions. A wide range of preferential policies were provided for three categories of people, namely, “Scheduled Castes”, “Scheduled Tribes” and “weaker sections” or “Other Backward Classes” (Articles 15&16). The first category is “Scheduled Castes”. The term “Scheduled Castes” is defined as “castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution” (Article 366(24)). The second category is “Scheduled Tribes”. The term “Scheduled Tribes” is defined as “such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution” (Article 366 (25)). The Constitution provides a special protection to protect the backward classes from being exploited.⁵ The third category is Other Backward Classes. Although the Constitution

⁵ The Constitution of India, 1950: Article 341 Scheduled Castes-
neither defines “Other Backward Classes” nor does it provide the criteria for their identification, it is the constitutional obligation of the government to promote the welfare of the Other Backward Classes (Articles 15(4), 16(4) and 29(2)). The common criteria for classification of Other Backward Classes is socially and economically backwardness than the rest of the citizens. Courts examined the criteria laid down for the determination of backward classes. The Indian Constitution provides for the appointment of a commission to investigate the conditions of Backward Classes.

Accordingly, the first “Backward Classes Commission” was set up by a presidential order on January 29, 1953, under the chairmanship of Kakasaheb Kalekar, commonly known as

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(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause(1) any caste, race, or tribe or part of or group within any caste, race or tribe but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

Article 342 Scheduled Tribes-

(1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause(1) any caste, race, or tribe or part of or group within any caste, race or tribe but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.


7 The Constitution of India, 1950: Article 340 of says:

(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.
the Kalekar Commission to determine the criteria to be adopted in selection of people who should be treated as socially and educationally backward classes, prepare a list of such classes and investigate their conditions (Zwart, 2000: 240). This Commission submitted its report on March 30, 1955 on identifying four criteria to determine backwardness. These are: low social position in the caste hierarchy, lack of educational progress; inadequate representation in government services; and inadequate representation in the fields of trade, commerce and industry. Among other things, recommendations of the Commission include treating all women as ‘backward class’, reserved 70% seats in all technical and professional institutions for qualified students of backward classes and reservation of seats in all governmental and local body services; the basis of representation of Other Backward Classes should be Class I: 25% of vacancies; Class II: 33.5% of vacancies; Class HI &IV: 40% of vacancies (Galanter, 1984:172). Nevertheless, identification of groups who would be qualified for the benefit of reservations was problematic for a prolonged period of time (Sowell, 2004:14).

In 1978, the second Backward Classes Commission, under the chairmanship of B.P. Mandal, popularly known as the Mandal Commission, was appointed to determine the list of groups qualifying as beneficiaries and set the recommendations for the advancement of “backward” classes not sufficiently represented in educational institutions and public employment (Zwart, 2000:242). Accordingly, the Mandal Commission recommended that Other Backward Classes be granted employment reservations in government posts and educational institutions (Weisskopf, 2004:14).

Galanter (1984:43) classified India’s preferences into three basic types. First, there are reservations, which allotted or facilitate access to valued positions or resources. The most important instances of this type are reserved seats in legislatures, reservation of posts in government service, and reservation of places in academic institutions. Second, there are programs involving expenditure or provision of services for example, scholarships, grants, loans, land allotments, health care, and legal aid to the beneficiary groups. Third, there are special protections. These distributive schemes are accompanied by efforts to protect the backward classes from being exploited and victimized.
3.2.3 Reservations

Basically there are three kinds of benefits for beneficiaries of affirmative action programs in India. The first is political reservation. In the sphere of politics, the Indian constitution allocated a special measure in the form of reservations, designed to secure the improvement of the Scheduled Castes and Scheduled Tribes, by reserving a percentage of seats for members of these groups in legislative assemblies. For the purpose of enhancing political participation, the Constitution provides for reserved seats in proportion to their numbers for the Scheduled Castes and Scheduled Tribes in the Lok Sabha, (the House of the People or lower house of parliament of the Union). Similarly, seats are reserved in Vidhan Sabhas, lower houses of the legislative assemblies of the states in favor of Scheduled Castes and Scheduled Tribes in proportion of their population in that particular state (Article 332). However, no seats are reserved in the upper houses, central or state (Article 330). Likewise, there are no reservations in legislatures for the Other Backward Classes (Galanter; 1984:44). Such reservations in legislatures were subjected to a time frame limit. Originally, it was ten years after the promulgation of the Constitution (Article 334). However, the period has been extended every ten years by successive amendments to the constitution.8

In addition, India has introduced reservations for women in Panchayat9 and Municipality. More specifically, not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (1950, Article 243 D (3)). Moreover, in the Panchayats at each level, not less than one-


9 Article 243(d) of the Constitution of India,1950, "Panchayat" means an institution (by whatever name called) of self-government constituted in every State, at the village, intermediate and district levels in accordance with the provisions of this Part.
third of the total numbers of offices of Chairpersons are to be reserved for women (Ibid: 
Article 243 D (4)). Likewise, in Municipality, not less than one-third (including the 
number of seats reserved for women belonging to the Scheduled Castes and the 
Scheduled Tribes) of the total number of seats to be filled by direct election in every 
Municipalities to be reserved for women and such seats to be allotted by rotation to 
different constituencies in a Municipality (Article 243 T (3)). Reservation of offices of 
Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and 
women in such manner as the legislature of a State may provide by law (Article 243 T 
(4)).

The Women’s Reservation Bill which was first introduced in 1996, though it has been 
debated in parliament several times since then, has remained enmeshed in controversy 
because of lack of political consensus. After a long and controversial discussion, the 
Women’s Reservation Bill was passed in March 9, 2010 by the upper house, 
Rajya Sabha, and is still pending in the lower house, Lok Sabha. 
(http://articles.timesofindia.indiatimes.com/2010-03-09/india/28137030_1_unruly-
scenes-women-s-reservation-bill-constitution-amendment-bill). This Bill provides one-
third of reservation of the total available seats for women in the lower house of 
Parliament, the Lok Sabha, and in state and local governments. Advocates of the Bill 
assert that the Bill leads to gender equality in parliament. It enhances political 
participation and results in the empowerment of women as a whole. Women, therefore, 
get more participation in politics and society. Opponents, in contrast, contend that the Bill 
would deny adequate representation of men leaders’ in the political power. It can be 
suggested that in order to enhance women’s representation and access to decision making 
bodies, the Bill gets passed in the lower house.

The second is job reservation in government posts. The reservation of posts for 
Scheduled Castes and Scheduled Tribes in jobs or government services is the other 
preferential scheme in the field of employment since 1950s. The Constitution provides 
for reservation of seats in government employment. Article 16(4) states:
Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

It is significant that Article 16 (4) permits reservation in government service for backward class of citizens at the initial stage of recruitment and later stage of promotion. However, unlike mandatory reservation provisions in legislative assemblies, the above provision neither confers a right on individuals nor obliges a government to reserve seats in public services. It confers a discretionary power on the state to take suitable action. Furthermore, the Constitution provides that the claims of members of Scheduled Castes and Scheduled Tribes shall be taken into consideration in the making of appointments to services and posts in connection with the affairs of the union or of a state (Article 335). However, it is noteworthy that the phrase “consistently with the maintenance of efficiency of administration”, is included to prevent any inefficiency in the administration by such special provision for Scheduled Castes and Scheduled Tribes. Even if reservations are provided in promotions, a provision for lower qualifying marks or lesser level of evaluation is not permissible in the matter of promotions.10

Finally, there is a reservation in educational institutions. In the field of education, the Indian amended Constitution of 1951 under Article 15 (4) declares that the state is not prevented in the Constitution from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Educational preferential arrangements in this context included scholarship programs, provision of meals and hostels for Scheduled Castes and Scheduled Tribes students (Galanter, 1984:56).

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10 Eighty-second Amendment Act, 2000, Article 335: “Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the union or of a State.”
3.2.4 Institutional framework

With regard to monitoring the implementation of reservation policies, the Constitution created a ‘Special Officer’, commonly known as the Commissioner to investigate the implementation of measures intended to safeguard the interests of Scheduled Castes and Scheduled Tribes and submit periodical reports to the Parliament (Article 338). Parliament also obtains reports from the central and state governments and the National Commission for Scheduled Castes and Scheduled Tribes, from the Union Public Service Commission at the center and State Service Commissions in the states (World Bank Report, 2001:10). The central Ministry of Personnel, Public Grievances and Pensions frame guidelines about how to implement and monitor affirmative action in public service (Ibid:11). Accordingly, individual ministries, departments and public agencies follow those guidelines and issue necessary executive directions (Ibid).

In addition, there are various bodies responsible to monitor the implementation of affirmative action programs in India (Ibid: 14-15):

- Parliamentary committees such as the Joint Committee on Welfare of Scheduled Castes and Scheduled Tribes. The Parliamentary committee to ministries and public enterprises also assess and report on the implementation of reservation policies.
- Standing Committee on Personnel sends study groups to ministries and public enterprises to assess implementation.
- The central Ministry of Personnel examines execution of affirmative action in organizational departments. The inspections assess the department’s compliance in implementing orders for the reservation for Scheduled Castes and Scheduled Tribes, the correct maintenance of rosters, and the procedures for filling vacancies reserved for these groups. Each department inspects agencies subordinate to it. For instance, to monitor women’s representation in the public service, a Focal Point was set up in the Ministry of Personnel that conducts review of rules and regulations to reduce gender bias in the civil service.
- The National Women’s Commission also promotes women’s advancement at all levels of public service and interferes in cases of discrimination.
Moreover, various bodies are held responsible to handle complaints regarding affirmative action programs. In case of grievance, any employee aggrieved about the implementation of affirmative action in public services can complain to (Ibid: 15):

- The Head of the department, or directly to the Ministry of Personnel.
- To the National Commission for Scheduled Class and Scheduled Tribes, the Commission for Backward Classes or the National Commission for Women.
- To the central or state administrative tribunals and High Courts for legal remedy.

The courts have also played a major part in interpreting constitutional provisions concerning reservations in public service. To mention, one of the leading cases on reservation policy before the Supreme Court was the *MR Balaji v State of Mysore case* (1963), *AIR 649 (SC)*. In this case, the issue was an order of the State of Mysore reserving 68% of seats in all Professional Colleges and Technical Institutions for Scheduled Class and Scheduled Tribes, the Commission for Backward Classes. The State of Mysore scheme reserved a total of 68% of places in engineering and medical colleges 15% for scheduled castes; 3% for scheduled tribes; and 50% for backward classes (Galanter, 1965: 259-60). The Court held that the reservation of sixty-eight percent by the State of Mysore was not consistent with Article 15 (4) of the Constitution; and under no circumstances can the reservation exceed fifty percent. The Court held that the caste of a group of persons may be a relevant factor, but not the sole criteria for determination of backward class. The Court further ruled that poverty, occupation and habitation are also factors contributing to social backwardness. Consequently, the Court struck down the law mandating 68% reservation as it was based solely on caste without regard to other relevant factors. The Court declared that a formula must be evolved which would strike a reasonable balance between the interests of the weaker sections of society and the interests of the community as a whole (Ibid: 273). The Court held that:

If admission to professional and technical colleges is unduly liberalized, the quality of our graduates will suffer. That is not to say that reservation should
not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of the society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centers to deserving and qualified candidates of other communities. A special provision contemplated by Article 15 (4), like reservation of posts and appointments contemplated by Article 16 (4) must be within reasonable limits (SC, 469-470).

In addition, the case of State of Kerala v. Thomas ((1976) 2 SCC 310), is a landmark case that critically analyses Article 16 (4) of the Constitution. This case involved the validity of an arrangement in favour of the Scheduled Castes employees by exempting them from taking the departmental test for promotion in services. The Government made it obligatory for an employee to pass the special departmental tests for promotion of a lower division clerk to the next higher post of upper division clerk. However, Rule 13A of the Kerala State Subordinate Services Rules 1958 provides that no person shall be eligible for appointment to any service or any post unless he possessed such special qualifications and has passed such special tests as may be prescribed on that behalf in the Special Rules. Provision 2, to this rule gave temporary exemption from passing the departmental tests for a period of two years for Scheduled Castes and Scheduled Tribes candidates. Accordingly, the State Government introduced Rule 13AA giving further exemption of two years to members of Scheduled Tribes and Scheduled Castes. As a result of this rule, thirty four out of fifty one posts were filled up by members of Scheduled Castes and Scheduled Tribes without passing the test. Thomas, a lower division clerk who was not promoted despite his passing the test, questioned rule 13AA as it violates the fundamental rights guaranteed to him under Article 16 (1). The High Court upheld that Rule 13AA was discriminatory and violates Article 16 (4). Nevertheless, the Supreme Court of India held that a State does not violate the constitutional guarantee of equality of opportunity when the state promotes members of Scheduled Tribes and Scheduled Castes who have failed to pass tests required by all other employees for promotion. The Court further argued that the State is free to choose any means to achieve equality of opportunity for

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11 Article 16 (4) stipulates that “nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”.

12 Article 16 (1) states that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”.

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these backward classes; as the Constitution itself does not put any limitation on the power of the Government under Article 16 (4) (SC 998-1000).

In brief, the Indian Constitution firmly affirms the economic and educational betterment of the weaker section of the society. The Constitution further provides for reservation policies for Scheduled Castes, Scheduled Tribes and Backward classes, who had been subjected to systematic and extensive social and economic discrimination through the caste system. In India, reservation policies that were introduced several decades ago apply in the political sphere, in government posts and educational institutions. Similarly, the history of apartheid and segregation of people necessitated affirmative action programs in South Africa. The next section deals with the case of South Africa.

3.3 South Africa

3.3.1 Background

South Africa was under the system of apartheid (1948-1994) that sought to regulate human relations along racial lines based on the policy of segregation of races. Such an institutionalized regime of racial segregation had been one of the defining features of apartheid in South Africa (CIA Fact book, 2013). To that effect, numerous apartheid measures had been introduced that limited access to jobs and economic resources by blacks. People’s political rights, property rights, freedom to work, the right to education and family rights were severely restricted through these laws and regulations. These discriminatory laws touched every aspect of social life. Some of the apartheid laws are:

- The Prohibition of Mixed Marriages Act No. 55 of 1949. This Act prohibits marriages between white and other races;
- The Immorality Amendment Act No. 21 of 1950. This Act bans extra-marital sexual relations between white people and people of other races;
- The Population Registration Act No. 30 of 1950. This Act requires residents to be registered according to their racial group. It required people to be identified and
registered as one of the four distinct racial groups: white, coloured, Bantu (Black African) and Indian (Asian);

- Separate Representation of Voters Act No.46 of 1951. This Act sought to remove coloured voters from the common voters’ roll in the Cape;

- The Women’s Enfranchisement Act of 1930. Under this Act, only white men and women had the right to vote and to be elected to the Houses of Parliament;

- Bantu Education Act No. 47 of 1953. This Act provides racially separated educational facilities for blacks in education. This Act established an inferior education system for blacks, devised a separate set of educational materials intended to produce manual laborers to work in low-level jobs;

- Extension of University Education Act No. 45 of 1959. This Act provides for the establishment of separate tertiary institutions along racial lines; and

- The Industrial Conciliation Act No. 28 of 1956. The Act prohibited the registration of any new 'mixed' unions and imposed racially separate branches and all-white executive committees on existing 'mixed' unions. The Act also banned political affiliations for unions and legalized the reservation of skilled jobs to white workers. In addition, black workers were neither permitted to belong to a registered union nor make strikes (http://www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s.).

Consequently, people would then be treated unjustly based on their racial backgrounds in their participation in social, economic and political life as well as educational opportunities. This, in turn, created social inequalities that were ingrained and reflected in all spheres of social life. In short, apartheid in South Africa marginalized people not only from political power but also from participation in any spheres of life including economic resources. Needless to say, apartheid had an overwhelming effect on the social, economic, political and cultural life of black South Africans and women in particular.

Apartheid was widely condemned throughout the world and denounced by the international community as unjust and a crime against humanity.13 Besides, the struggle of the people within South Africa has made a major contribution to bring the era of

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apartheid to an end. Domestically, community struggles over the apartheid legislation continued throughout the 1950s. Notably, Nelson Mandela (one of the founding members of the ANC) had strongly opposed and fought against the apartheid system to achieve freedom and equal rights for every South African. Alongside, the women’s struggle against both gender inequality and racial oppression gained momentum. Women’s organizations were established to mobilize women and promote gender equality and development amongst women. In particular, the Founding Conference of the Federation of South African Women adopted the Women’s Charter in 1954. The aim of the Organization was to unite women in common action for the removal of all political, legal, economic and social disabilities and to obtain, inter alia, the right to vote, equal family rights and educational and economic opportunities (Women’s Charter, 1954). Meanwhile, in the 1990s, due to the international pressures and the internal anti-apartheid struggle, South Africa embarked upon peaceful transition to majority rule. In 1994, the ANC-led government won victory in the country’s first universal suffrage and Nelson Mandela was elected president (CIA Fact book, 2013). Since then, South Africa began to redress the imbalances created during the apartheid era.

3.3.2 Legislative framework

The Interim Constitution of South Africa which came into force in 1994 established a new democratic order based on the recognition of human rights, democracy and peaceful co-existence and development opportunities irrespective of colour, race, class, belief or sex. The 1994 Constitution further called for “measures designed to achieve adequate protection and the advancement of people who were disadvantaged by past discriminations” (Section 8 (3) (a)). Finally, after two years of extensive public debate,

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14 In 1912, the South African Native National Congress was formed in Bloemfontein. It was renamed the African National Congress (ANC) in 1923. It had as its main goal the elimination of restrictions based on color and to give all South Africans equal rights. In the early 1960s, following the massacre in Sharpeville which resulted in 69 death and 180 injured protestors. Subsequently, the ANC and the Pan-African Congress (PAC) were banned. Nelson Mandela and many other anti-apartheid leaders were convicted and imprisoned for life on charges of treason. During these periods the struggle for liberation continued underground.
the new constitution of South Africa was promulgated in 1996. The 1996 Constitution established a new democratic order based on “human dignity, the achievement of equality and the advancement of human rights and freedoms” (Chap. I). The Constitution further embodies the fundamental human rights under Chapter Two of the Bill of Rights.

This Bill is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom (Section 7 (1)).

The Constitution guarantees everyone the basic rights and freedoms and protects the civil, political and socio-economic rights. Moreover, the Constitution guarantees that “everyone is equal before the law and has the right to equal protection and benefit of the law” (Section 9 (1)). However, it is recognized that injustices of the past have already led to unfair social inequalities and these inequalities cannot be addressed by the formal notion of treating everyone equally; undeserved inequalities call for rectification. It is evident that to promote social equity and to redress inequalities, specific measures and strategies are necessary. Therefore, in order to treat all persons equally and provide genuine equality, the Constitution has provided for affirmative action measures under Section 9 (2). It reads:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, the Constitution allows for the promulgation of legislative and other measures to protect or advance persons disadvantaged by unfair discrimination.

The Constitution mandated to move further beyond formal equality to substantive equality by acknowledging the differences and treating people differently on the basis of these differences. Affirmative action measures are, therefore, perceived as a legitimate means of achieving substantive equality to those previously disadvantaged by unfair discrimination. The constitution further prohibits unfair discrimination and specifically lists the following grounds “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (Section 9 (3)). It also provides that national legislation must be enacted to prevent or prohibit unfair discrimination (Section 9(4)). To give effect to these
constitutional rights, the government enacted a series of statutes that restructure institutions of higher education and the workplace.

The Higher Education Act of 1997 formed the basis for addressing educational equity in Higher Education. The Preamble states categorically, inter alia, that the Act should contribute towards “redressing past discrimination, ensuring representivity and equal access, pursuing excellence and promoting the full realization of the potential of every student, tolerance of ideas, and appreciation of diversity”. In order to achieve its objectives, the Act requires every public higher education institution to establish an institutional forum. The purpose of this institutional forum is to advise the council of the particular institution on race and gender equity policies, the selection of candidates for senior management positions and dispute resolution procedures (South Africa Higher Education Act 1997: Section 31(1) (a)). With regard to admission, the Act specifically requires that the council of a public higher education institution “determines the admission policy, the entrance requirements in respect of particular higher education programs, the number of students who may be admitted for a particular higher education program and the manner of their selection” (South Africa Higher Education Act 1997: Section 37). Furthermore, the council should “publish the admission policy and make it available on request and provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way” (Ibid). Moreover, in order to redress past inequities and imbalances in higher education, the government enacted the Education White Paper No. 3 in 1997. This white paper outlines a comprehensive set of initiatives for the transformation of higher education. The Education White Paper proclaimed the need for higher education to be transformed to meet the challenges of a new non-racial, non-sexist and democratic society committed to equity, justice and a better life for all (Section:1.6). Alongside, the white paper provides a basis against which Higher Education transformation could be monitored, assessed and expedited. The system of quotas was not employed to achieve equity and redress in higher education. Instead, institutions were required “to develop their own race and gender equity goals and plans for achieving them, using indicative targets for distributing publicly subsidized places rather than firm quotas” (Section: 2.28).
Most importantly, the 1998 Employment Equity Act (EEA) provides the implementation framework of affirmative action. EEA aimed at workplace reform through employment equity programs as strategies to rectify past racial discriminatory practices. The purpose of the EEA is to advance the right to equality, to abolish unfair discrimination in the workplace and guarantee employment equity through implementing affirmative action measures (Section 2). EEA defines affirmative action measures as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer” (Section 15 (1)). In this context, designated groups who were eligible for affirmative action measures include black people, (Africans, coloureds, Indians), women and people with disabilities (Section 1). Affirmative action measures include the “identification and elimination of barriers with an adverse impact on designated groups; the promotion of diversity; making reasonable accommodation for people from designated groups; retention, development and training of designated groups (including skills development); and preferential treatment and numerical goals to ensure equitable representation, but exclude quotas” (Section 15 (2&3)). Every “designated employer”\textsuperscript{15} has the obligation to undertake affirmative action measures for people from designated groups (Section 13). However, an employer was not required to appoint persons who were not “suitably qualified” for a job. The requirements to determine whether an applicant is suitably qualified include formal qualifications; prior learning; relevant experience; or the capacity to acquire within a reasonable time, the ability to do the job (Section 20 (3)). In other words, employers must make sure that designated groups have equal opportunities in the workplace without compromising merit. The

\textsuperscript{15} Republic of South Africa, Employment Equity Act No.55 of 1998: Section 1.

Designated employers means-

a) An employer who employs 50 or more employees;
b) An employer who employees fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this Act;
c) A municipality, as referred to in Chapter 7 of the Constitution;
d) An organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
e) An employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.
central theme of affirmative action in this context is to ensure that the previously disadvantaged groups are fairly represented in the workforce of a particular employer. In addition, in making decisions on job suitability an employer is not allowed to unfairly discriminate against a person solely on the grounds of lack of relevant experience (Section 20 (5)). In brief, these measures were to be taken by employers in order to ensure that members of disadvantaged groups were adequately represented in the workforce and would have equal opportunities to compete in jobs. It must therefore be borne in mind that affirmative action can only be used as a justification ground for equitable representation of qualified persons from the designated groups. Affirmative action programs in South Africa cover a wide range of activities in educational and employing institutions. However, unlike in India, the Constitution does not provide for quotas in the allocation of posts or places in favour of disadvantaged groups in South Africa.

3.3.3 Institutional framework

In order to transform the public service into an efficient and effective instrument, the government published the White Paper on affirmative action in April 1998 (Jain et al, 2003:110). This white paper set out a framework for creating a representative public service and provides guidance on the steps for national departments and provincial administrations to take in developing their affirmative action programs (Jain et al, 2003:110). More specifically, this policy document outlines the accountability, monitoring, reporting, and coordinating responsibilities of various role players (Section: 1.1). This white paper, which focuses primarily on human resource management in South African public service, targets three groups, namely black people (African, coloured, and Indian people), women and people with disabilities (Section:1.7 &1.4). Moreover, the White Paper on affirmative action in the public service suggests that affirmative action should be an integral element of every aspect of the organization’s management practices (Section: 3.1). Affirmative action is thus the responsibility of every manager, supervisor and human resource practitioner, who will be required to implement affirmative action plans and be held responsible for these (Section: 3.1). Alongside, national departments
and provincial administrations should develop and manage their own policies to reflect their own particular circumstances as far as they are in line with this white paper (Section: 3.2). The responsibility and accountability for drawing up and implementing affirmative action plans in the public service rests with the individual national departments and provincial administrations (Section: 4.8). Within these institutions, individual managers will ultimately be held responsible for the success of affirmative action (Swanepoel et al; 2005:182).

In addition, the Department of Public Service and Administration has an important coordinating role. It supports the national departments’ and provincial administrations in various ways. More specifically, it has the following roles:

- Conduct a Public Service-wide communication campaign explaining the goal, objectives and principles set out in this White Paper;
- Develop practical guidelines for developing affirmative action programs;
- Establish a network of affirmative action practitioners;
- Abolish or amend rules and regulations which unnecessarily restrict affirmative action activities and initiatives;
- Evaluate and report to the Parliamentary Portfolio Committee on Public Service and Administration on the effectiveness of the policy set out in this White Paper;
- Assist national departments and provincial administrations with the development of these transverse programmes; and
- Assist, co-ordinate or facilitate individual departments and provincial administrations in the developing of special affirmative action measures needed to address specific forms of disadvantage that cut transversely across departments and administrations (Section: 4.3-4.7).

Furthermore, South Africa has parliamentary oversight and department monitoring regarding the implementation of affirmative action programs. The South African parliament reviews the progress of affirmative action in public service. Besides, national departments’ and provincial administrations have the duty of reporting to the Public Service Commission, the Department of Labour and the Portfolio Committee on the Public Service and Administration (Section: 4.9). These institutions are supposed to
monitor the progress and report to parliament on the effectiveness of the policies (Section: 4.10). In case of non-compliance, the Department of Labour and the Parliamentary Portfolio Committee on the Public Service and Administration have the authority to take action against defaulting departments and administrations (Section: 4.9).

Likewise, courts in South Africa have also addressed issues of affirmative action in a series of cases. One is the case of Harmse v city of Cape Town (2003) ZALC 53. In this case, Harmse, the applicant referred a dispute with his employer to the Labour Court claiming that he had been discriminated against in violation of section 6 of the Employment Equity Act 55 of 1998, which provides that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice. The applicant further alleged that the employer unlawfully discriminated against him by failing, in considering his application for short listing, to apply Section 20 of the Act, which requires the designated employers to implement employment equity plans. The Court reached the decision that affirmative action was a right for an employee from a designated group (paragraph 33 and 44). If an employer fails to take affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within the designated groups not to be unfairly discriminated against (paragraph 47). Affirmative action therefore, can found a basis for unfair discrimination cause of action for an employee, if an employer fails to promote the achievement of equality through taking affirmative action measures (Ibid). The Court justified this reasoning by stating that if affirmative action were not a right, it would leave employees who were unfairly discriminated against without a remedy if the employer failed to promote substantive equality in the workplace. This case suggested that an employee has an individual right to affirmative action.

The other is the case of Dudley v City of Cape Town (2004) 5 BLLR 413 (LC). In this case Dudley, a black woman, who applied for the position of Director in the City Health, was unsuccessful. Instead, a white male was appointed. In challenging this appointment, the applicant alleged that she had been unfairly discriminated against on the basis of race and/or sex in terms of Section 6 (1) of the EEA. She further contended that the
employer’s failure to appoint her constituted a breach of the employer’s affirmative action obligations in terms of the Employment Equity Act. The City of Cape Town opposed this allegation arguing that their failure to advantage a member of a designated group did not constitute unfair discrimination. The court makes a distinction between Chapter II and Chapter III of EEA (Paragraph 71-79). The Court held that Chapter II, which prohibits unfair discrimination, was directly enforceable by any aggrieved individual or group of employees. Chapter III, however, imposes obligations which only be implemented within the context of a collective environment. The Court held that designated employees, even though suitable for appointment to promotional posts, are not unfairly discriminated against merely because their employer happens to appoint a non-designated employee. Consequently, the Court held that an employee who complains of unfair discrimination must lodge a grievance at the Department of Labour and the Director-General of Labour must refers the dispute to the Labour Court (Paragraph 57). The Court accordingly held that the employee lacked locus standi to bring the application directly to the Labour Court (Paragraph 82). The Court therefore ruled that the Employment Equity Act did not establish an individual right to affirmative action; affirmative action is a group-based obligation and not an individual right.

The above described cases demonstrate that the Court in Dudley v City of Cape Town reached the opposite conclusion to the finding in Harmse v city of Cape Town. This shows that there is inconsistency in the interpretation of affirmative action measures in South African courts. In some instances, the judges have considered affirmative action measures as an individual right while in other instances, the judges have considered affirmative action measures as group-based obligation. These decisions show, among other things, the different understandings of the judges concerning the nature of affirmative action. The role of the courts has had important implications for affirmative action.

In sum, the history of South Africa has laid the foundation for affirmative action in the workplace and education sector. Needless to say, apartheid had an overwhelming effect on the social, economic, political and cultural life of black South Africans and women in particular. Looking at the history of discrimination, affirmative action becomes a
necessary means to level the playing fields in the education and working environments. It has been noted that after decades of segregationist policies non-discriminatory legislation per se is not enough. In the post-apartheid era affirmative action program is adopted to rectify prior discriminatory practices and promote the economic advancement of disadvantaged groups, notably blacks. Proper monitoring and evaluating systems are in place to ensure compliance with the laws regarding affirmative action programs.

3.4. Conclusion

The historical basis of affirmative action in the three case studies under review is characterized by three main systems of social stratification: slavery, a caste system and apartheid. Slavery in the US was a form of forced labour in which Africans were brought to America as slaves. The racism of the United States has been largely based on the institutionalization of slavery. Similarly, until 1994 South Africa was ruled by an apartheid system in which the government enforced a separation of races with its policy. This existed as a legal institution in which people are segregated along racial lines. Likewise, caste system or varna of India has had a different course altogether based on a stratified social hierarchy. Varna is a type of social structure which divides people on the basis of inherited social status for the distribution of functions in society. People from certain varna were ostracized.

Such historic inequalities and injustices have led to the adoption of affirmative action policies with the aim of protecting the previous disadvantaged, distributing equally the resources and eradicating the imbalances of the past. Although the contents of such policies differ in the three systems according to the socio-economic needs of the country, the basic commitments of quest for just and equal socio-political order remain the same. In brief, affirmative action in the US, India and South Africa historically evolved in similar ways. Recognition of the legacies of the past discrimination was followed by the implementation of remedial policies.

However, there are a number of differences among the three countries under study in implementing affirmative action. Firstly, in India and South Africa, affirmative action is
constitutionally mandated whereas there is an absence of such provision in the US Constitution. Secondly, the perpetrators of injustices under the caste system of India were their own people belonging to the same race while in the US and South Africa the perpetrators of injustices under the slave system and apartheid were from a different race. Thirdly, in India, affirmative action takes the form of reservations for Scheduled Tribes, Scheduled Castes and Other Backward Classes in government services, educational institutions and legislative bodies while in the US and South Africa, affirmative action plans include numerical goals and preferential treatment of disadvantaged groups in jobs and educational institutions. Finally, in the US, the rights protected by the Equal Protection Clause are individual and thus require the state to treat every person as an individual, not as a member of a class. The denial of individual rights on the basis of group characteristics such as gender, race, religion, national origin is, however, treated as the rights of an individual. Conversely, in India the Constitution provides for group rights in so far as it speaks of special provisions for women, Scheduled Castes, Scheduled Tribes and for any socially and educationally backward classes of citizens. It is used to provide justice for the groups by creating a quota or reservation to discriminated individuals of the excluded groups. The same applies to South Africa. Affirmative action is intended to protect group rights by benefiting individual members belonging to the same group.

On the basis of facts, it may be concluded that where a system is perceived to be unjust and discriminatory, affirmative action is seen as a legitimate tool of compensation to redress such past injustices. As has been demonstrated in this study, the genesis and evolution of affirmative action policies and programs in different socio-cultural contexts often resulted from a social environment characterized by injustices and oppressive practices in which the former becomes a practical tool to redress and benefit disadvantaged groups. However, given the institutionalized nature of such discriminatory practices, voluntary efforts per se to include the previously excluded are insufficient and remain more of a matter of discretion for authorities than a policy issue for implementation. Affirmative action programs, therefore, intends to provide opportunities for previously excluded segments of society in order to achieve equitable socio-economic distribution and participatory political life.
The above described cases have demonstrated that although Ethiopia belongs to a different cultural and political setting, it can be compared and contrasted, because these societies had experienced unbearable system of patriarchy which necessitated a fundamental change. It can also be conceptualized that countries with such oppressive systems are very likely to come up with progressive and meaningful affirmative action policies in order to remedy the past than countries with semi-liberated or mild political systems. These countries introduced affirmative action policies as a consequence of the magnitude and level of oppression. Although there was no structured discriminatory rigid system as that of USA, India and South Africa, Ethiopia is a traditionally patriarchal society whose systems and cultures oppress women which generate a need for affirmative action programs. The next chapter discusses the position of women in Ethiopia, in a historical perspective.