AFFIRMATIVE ACTION IN INDIA, AND SOUTH AFRICA – A VIEW THROUGH THE HUMAN RIGHTS LENS

Abhijit B[*]

ABSTRACT

Affirmative Action as a system aims to provide access to essential utilities such as education and employment to those who have been discriminated against and therefore are disadvantaged. Consequently, one of the goals of the system is to bridge the gap between the disadvantaged and those who are not disadvantaged. Affirmative Action is present in various jurisdictions across the globe. It has been used as extension of egalitarian principles to extend equity and social justice in India too and in its most predominant form, is known as the Reservation system in India. Affirmative action policies have also defined aspects of American Constitutional jurisprudence for the better part of the last half a century. Similarly, the post-Apartheid Constitution adopted by South Africa also felt the need to adopt a system of Affirmative Action to further the interests of the victims of Apartheid.

This paper studies Affirmative Action as it exists in India, and South Africa but not through the traditional sense of Constitutional Jurisprudence. The paper attempts to view this tool of social justice through the prism of Human Rights. The paper will try to understand if Affirmative Action itself is considered as a Human Right in these jurisdictions or whether it merely is considered as a means to achieve the ultimate human right goal of equality, which is enshrined not merely in international instruments but also within the national constitutions of each of these countries.

Keywords: Affirmative Action, Human Right, India, South Africa.

[*]PhD Scholar at NLSIU, Bangalore and an Assistant Professor of Law, Senior Scale and Programme Lead - B.A.LL.B. (Hons.) at School of Law, UPES, Dehradun.

INTRODUCTION

Affirmative Action maybe defined as a system that "seeks to increase the representation of women and minorities in employment and education, spaces where they have been historically excluded."[1] Affirmative Action is a system rooted in the concept of distributive justice. Consequently, one of the goals of the system is to bridge the gap between the disadvantaged and those who are not disadvantaged. Affirmative Action is present in various jurisdictions across the globe.

It has been used as an extension of egalitarian principles to extend equity and social justice in India too and in its most predominant form, is known as the Reservation system in India. Similarly, the post-Apartheid Constitution adopted by South Africa also felt the need to adopt a system of Affirmative Action to further the interests of the victims of Apartheid.[2]

Here I attempt an exercise in understanding the Affirmative Action systems as it exists in India, and South Africa. A comparison between India and South Africa makes for an interesting study. This is because both systems have constitutionally mandated reservations and have enactments to further these rights. India, we find these provisions in Articles 15 and 16 amongst others and we see them implemented using a variety of State and Central legislations. In South Africa, Section 7 (2) of the South African Constitution guarantees reservations or quotas and it is implemented by the Employment Equity Act, and the Broad-Based Black Economic Empowerment Act, amongst others.[3] Furthermore, the South African Constitution makers were also influenced by the Indian Constitution's approach to reservations while trying to figure out methods of applying the same to South Africa.[4]

However, through this paper I aim to move beyond viewing just the law and focus on mapping out the jurisprudence surrounding Affirmative Action as a Human Rights. In the following portions, this paper aims to present scholarly perspectives and debates pertaining to the notion that the

[1] Sindy Lopez, "Affirmative Action: Foundations and Key Concepts", *JSTOR*, 28 March 2019, *available at* https://daily.jstor.org/affirmative-action-foundations-key-concepts/ (last visited on 19 April 2024)
[2] TH Madala, "Affirmative Action - A South African Perspective", 52(4) SMU Law Review 1539 (1999)
[3] Nomfundo Ramalekana, "A duty to implement affirmative action/reservations for India and South Africa?", *Oxford Human Rights Hub*, 28 Feb 2020 https://ohrh.law.ox.ac.uk/a-duty-to-implement-affirmative-action-reservations-for-india-and-south-africa/ (last visited on 19 July 2024)
[4] Rulof Burger, Rachel Jafta, & Dieter von Fintel, 'The Effectiveness of Affirmative Action Policies in South Africa' in *Handbook on Economics of Discrimination and Affirmative Action*, (Springer 2020)

entitlement to Affirmative Action benefits should be approached in a manner akin to discussions regarding access to Human Rights.

LITERATURE REVIEW

Constitutional Provisions: The Indian Constitution enshrines the principle of equality under Article 14 and provides specific mechanisms for AA through Articles 15 and 16. Articles 15(4), 15(5), and 15(6) facilitate reservations in educational institutions, while Articles 16(4), 16(4-A), 16(4-B), and 16(6) address reservations in public employment and promotions. Additionally, Articles 243D and 243T ensure political representation in local bodies, and Articles 330 and 332 extend this to state and national legislatures.

The South African Constitution of 1996, a product of the struggle against apartheid, enshrines the Right to Equality in Section 9. This section prohibits unfair discrimination and expressly permits AA measures to achieve substantive equality. The Employment Equality Act of 1999 operationalizes this provision, mandating AA in the workplace, particularly for larger employers.

Judicial Interpretations: The Supreme Court of India has played a pivotal role in shaping the jurisprudence of AA. The court's stance on reservations being a tool to achieve substantive equality is evident from landmark judgments such as NM Thomas and Indira Sawhney. However, in 2020, in Mukesh Kumar v State of Uttarakhand the Supreme Court declared that reservations are not a Fundamental Right, challenging the notion of AA as an inherent human right.

South African courts have shown a progressive approach towards AA. The landmark judgment in Minister of Finance v Van Heerden affirmed that AA is not contrary to equality but a means to achieve it. However, the Dudley v City of Cape Town case marked a setback, reflecting the judiciary's reluctance to elevate AA to the status of a human right.

Scholarly Perspectives: There is a robust debate among scholars regarding the status of AA in India. Some argue that restrictions on AA, such as the 50% cap on reservations, indicate that it has never been a Fundamental Right. Conversely, others believe that the constitutional provisions and judicial interpretations suggest a more fundamental status for AA. The introduction of reservations for Economically Weaker Sections (EWS) through the 103rd Amendment further complicates this debate, reflecting evolving perspectives on social justice.

Ockert Dupper's works on affirmative action in South Africa primarily explore the legal and constitutional dimensions of affirmative action policies aimed at redressing historical injustices and achieving substantive equality. He examines the Employment Equity Act's implementation, judicial interpretations, and the balance between affirmative action and non-discrimination principles. Dupper emphasizes the need for clear, effective policies that promote equality without perpetuating new forms of discrimination. His analyses often highlight the tension between achieving social justice and maintaining meritocracy, advocating for a nuanced approach that considers both historical context and contemporary challenges in South Africa's legal framework.

JL Pretorius's work[5] on the legal evaluation of affirmative action in South Africa critically examines the constitutional and legal framework governing affirmative action policies. They analyze key legislative acts, such as the Employment Equity Act, and significant court decisions that have shaped the implementation and interpretation of affirmative action. Pretorius highlights the balance between promoting equality and avoiding reverse discrimination, discussing the impact of affirmative action on different societal groups. Their evaluation underscores the necessity of clear legal guidelines and judicial oversight to ensure that affirmative action measures are both effective and fair, contributing to the broader goals of social justice and equality in South Africa.

POSITION IN INDIA

In India, Affirmative Action is commonly referred to as 'Reservations.' It's essential to note that while reserved quotas represent a prevalent form of Affirmative Action in India, they don't exhaust the possibilities. Nevertheless, the allocation of reserved quotas remains the predominant and widely adopted method, especially when implemented by the State.[6] In India, reservations are seen being applied in the sectors of Education, Employment and Promotions, and in Political Representation. The State relies on Article 15[7] to provide for reservations in the education sector,

[5] JL Pretorious, "Legal evaluation of affirmative action in South Africa", 26(3) Journal for Juridical Science 12 (2001)

[6] State is being used here in the manner that the Constitutional Law in India defines the term, based on the text of Article 12 as well as it's expansive meaning provided by various judgements of the Supreme Court of India; see *Pradip Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111; *Zee Telefilms* v. *BCCI*, (2005) 4 SCC 649; and *BCCI* v. *Cricket Association of Bihar*, (2017) 6 SCC 741

[7] Article 15 - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

particularly Articles 15(4),[8] 15(5),[9] and 15(6).[10] Article 15 (3)[11] is also used to provide for Affirmative Action as well as Reservation benefits to women in a horizontal manner across all the communities receiving these benefits. Article 16 is similarly utilised to provide for reservations, to the communities mentioned in Article 15, in public employment as well as promotions, particularly through Articles 16(4), 16(4-A), 16(4-B), and 16(6). Reservations in the legislative bodies is seen at the Panchayat and Municipality levels through the provisions made in Article 243D and 243T respectively and at the State and National level through Articles 332 and 330 respectively.

Basically, Affirmative Action and reservations in India is rooted in the principle of equality as outlined in Article 14 of the Indian Constitution. Articles 15 and 16, rather than serving as direct mechanisms for reservations, function as extensions of the Right to Equality. Specifically, these articles establish the Right against Discrimination and the Right to Equal Opportunity, respectively. It's crucial to recognize that the Right to Equality is a Fundamental Right, and the Supreme Court has consistently emphasized that reservations serve as a tool to advance this overarching ideal. This stance has been reaffirmed in the Supreme Court's most recent judgments on the reservation system as well. In *Janhit Abhiyan v Union of India*,[12] the Supreme Court upheld the 103rd Amendment to the Indian Constitution that introduced the above-mentioned Article 15(6) and 16(6) and through them reservations for the Economically Weaker Sections. While doing so the court went against the limit of 50% that it had imposed ages ago,[13] and reiterated multiple times.[14] Similarly, in the NEET PG judgment,[15] while restating the need to implement reservations

[8] Article 15(4) - Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
[9] Article 15 (5) - Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes…
[10] Article 15 (6) - Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,— (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions…
[11] Article 15 (3) - Nothing in this article shall prevent the State from making any special provision for women and children.
[12] 2022 SCC OnLine SC 1540
[13] *MR Balaji* v. *State of Mysore*, AIR 1963 SC 649
[14] *Indira Sawhney* v *Union of India*, AIR 1993 SC 477
[15] *Niel Aurelio Nunes* v. *Union of India*, 2022 SCC OnLine SC 75

even at the level of Post Graduate Medical education, Justice DY Chandrachud (now CJI), stated "Merit does not exist in a vacuum and is affected not only by the opportunities available to a person, but their cultural and social capital as well."[16] These judgements add to a long line of judgments that exhibit a steadfast commitment to the ideal of Equality, which might leads us to the conclusion that Reservations in India are a Human Right, especially because they do also find mention in Articles under Part III.

And yet, the Supreme Court stated in a 2020 judgement that Reservations are not a Fundamental Right,[17] thereby denying the system the protection that human rights enshrined within Part III, as Fundamental Rights, get in India. This judgement of the Supreme Court, has, in my opinion, completely changed the way reservation jurisprudence in India was viewed. It is true that there is literature to state that Affirmative Action was never a Fundamental Right in India and this judgement merely clarifies a position that has always existed.[18] And to support this claim, the various restrictions placed on the system, such as the iterations of Justice Krishna Iyer in *NM Thomas*, wherein he stated that reservations cannot continue in perpetuity, or, the Supreme Court's statement *MR Balaji* that reservations are only an enabling provision, or the aforementioned limit of 50%. And these are very valid arguments to support the point that Reservations and Affirmative Action were never Fundamental Rights or human rights to begin with. However, it must also be noted that a plain reading of the judgments of *NM Thomas* and *Indira Sawhney* could also suggest that the court's vision for Article 16(4) was that of a Fundamental Right.[19] Moreover, if the sole criterion for elevating a right to the status of a Human Right or Fundamental Right were restrictions, then the Human Right of Free Speech in India, protected under Article 19(1)(a), would not have been designated as a Fundamental Right. Despite having at least eight grounds for restriction under Article 19(2), it has been accorded such status. Similarly, exceptions to the elimination of titles, aligned with the Right to Equality—an inherent human right and a Fundamental Right—are constrained by carve-outs for academic and military titles. However,

[16] *Ibid.*
[17] *Mukesh Kumar* v. *State of Uttarakhand*, 2020 SCC OnLine SC 148
[18] Apoorva Mandhani, "SC quota ruling is nothing new — reservation in jobs was never a fundamental right", *The Print*, 12 February 2020, *available at* https://theprint.in/theprint-essential/sc-quota-ruling-is-nothing-new-reservation-in-jobs-was-never-a-fundamental-right/363200/ (last accessed on 19 April 2024)
[19] Anurag Bhaskar, "Reservation As a Fundamental Right: Interpretation of Article 16(4)", 10 Indian Journal of Constitutional Law, *available at* https://ijcl.nalsar.ac.in/wp-content/uploads/2021/11/Bhaskar_IJCL_volume10_2021-3.pdf (last accessed on 19 April 2024)

using this as a basis to challenge the status of the Right to Equality as a Fundamental Right would be illogical.

Even the paramount Right to Life can be restricted through a just, fair, and reasonable procedure established by law. Nevertheless, there is no contention challenging the status of the Right to Life. Based on these considerations, this paper posits that Affirmative Action and Reservations constitute a Fundamental Right in India, and as such, they should be regarded on par with other globally recognized human rights that are enshrined as Fundamental Rights. It is essential we note that the Equal Opportunity Commission, chaired by the late Dr. NR Madhava Menon, hinted at the possibility of viewing Affirmative Action as an extended human right.[20]

The following section will examine the position in South Africa.

POSITION IN SOUTH AFRICA

In the previous section, I have attempted to understand the position of Affirmative Action within the Constitutional framework and jurisprudence of India. While we attempt to decode the position of Affirmative Action in the South African context, it is pertinent to note here that the Constitution of the Republic of South Africa, 1996, holds quite a unique position when compared with India because this Constitution was not the result of decolonisation from a foreign master, but a product of freedom from oppressors and racists within the country. The 1996 Constitution cemented the post-Apartheid ideals of Nelson Mandela.

Section 9 of the South African Constitution establishes the Right to Equality and Equal protection of the laws.[21] Section 9 happens to be the first right listed under Chapter II of the Constitution, which is the Bill of Rights, and it prohibits unfair discrimination by the State as well as by private persons.[22] As these provisions only prevent unfair discrimination, Affirmative Action is given effect in South Africa using this very provision. Furthermore, Section 9(2) also expressly permits positive steps or "action" to be taken to give effect to Equality.[23] To give effect to this provision,

[20]Ministry of Minority Affairs Government of India, "Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission" (February, 2008) *available at* https://www.minorityaffairs.gov.in/sites/default/files/eoc_wwh.pdf (last accessed on 19April 2024)
[21] Constitution of the Republic of South Africa, 1996, s. 9
[22] *Ibid.*
[23] Ockert Dupper, "Affirmative Action in South Africa: (M)Any Lessons for Europe?", 25 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 138 (2006)

the South African Parliament enacted the Employment Equality Act, 1999. This Act facilitates Affirmative Action in the employment sector and was passed with the intention to further the aspirational goal of workplace equality.[24] Chapter III of this Act addresses Affirmative Action and places a responsibility on larger employers, i.e., those having over fifty employees to implement Affirmative Action measures,[25] while also consciously maintaining an equitable balance in the representation of all communities at the workplace.[26]

Therefore, it is clear, that South African Constitutional jurisprudence, like India's, has definitely carved a place out for Affirmative Action. Quite like India, the courts in South Africa have also taken a view favouring Affirmative Action.[27]

Now, to the address the question as to whether Affirmative Action is a matter of right. Just as in the United States, there exist views in South Africa too, to the tune that Affirmative Action is inherently unfair and is therefore a violation of the substantive right of Equality.[28] The early position adopted by the courts in South Africa, as best seen in the judgement of *Abbott v Bargaining Council for the Motor Industry*[29] was also one where Affirmative Action could only be used as a defence to establish a protection against discrimination by employers and not as a sword to claim employment on the basis of the policy. However, this position changed with the paradigm shifting judgement of the Constitutional Court of South Africa in *Minister of Finance and others v Van Heerden*.[30] Through the interpretation lent to the Employment Equality Act, the judgement conveyed that Affirmative Action was neither contrary nor an exception to equality and instead was a means to achieve substantive equality.[31] In *Harmse v City of Cape Town*[32] the Labour Court went to the extent of establishing that the absence of Affirmative Action policies at a workplace could give rise to unfair discrimination claims. Further in *Solidarity obo Christiaans*

[24] Marié McGregor, "Affirmative Action — a defence or a right? A recent decision considered", 11 *The Quarterly Law Review for People in Business* 164 (2004), *available at* https://journals.co.za/doi/pdf/10.10520/EJC52430#:~:text=The%20starting%20point%20is%20the,as%20a%20substantive%20human%20right (last accessed on 19 April 2024)
[25] South Africa Employment Equality Act, 1999, s. 15
[26] South Africa Employment Equality Act, 1999, s.16
[27] *Supra* note 23.
[28] *Supra* note 23.
[29] (1999) 20 ILJ 330 (LC)
[30] 2004 (11) BCLR 1125 (CC)
[31] *Ibid.*
[32] (2003) 24 ILJ 1130 (LC)

and Eskom Holdings Ltd,[33] it was held that it may not be discrimination nor an unfair labour practice for an employer to distinguish between different groups, if it is in terms of an equity plan. These decisions clearly convey a shift in the attitude towards Affirmative Action, conveying that it was viewed a right, in extension of the human right of Equality.

However, South Africa too witnessed a rollback on the steps taken towards establishing Affirmative Action as right, or more specifically a human right within the Right of Equality. Just as in India, the South African judiciary also contradicted its position on Affirmative Action being a Right in the judgement of *Dudley v City of Cape Town*.[34] In *University of South Africa v Reynhardt*,[35] it was held that, where an employer's affirmative action policy provides that when the equity target is reached, selection of a candidate must be on merit alone, it will be unfair discrimination to continue to appoint on racial grounds. It was also held very recently in a May 2024 case that an employment practice to not shortlist any members of the non-designated group amounts to an absolute barrier to employment under section 15(4) of the EEA.[36]

But the willingness exhibited by the judiciary to go the distance and consider elevating Affirmative Action to the status of a human right is inspiring.

FINDINGS, SUGGESTIONS, AND CONCLUSION

Over the course of the sections above, I have very briefly tried to provide a glimpse into the Affirmative Action system in India, the United States of America, and South Africa. In all three jurisdictions, the system has carved out a definite space for itself and with the help of judicial decisions has cemented a place for itself in the Constitutional jurisprudence of the country. However, it is unfortunate that in none of the countries examined has Affirmative Action acquired the position of a Human Right conclusively.

In fact, in the United States, it does not even have the position of an 'enabler' considering that it has even been banned in some of the states. In India, there are contradicting scholarly views on the status of Affirmative Action. It appeared upon the plain reading of some judgements by the Indian Supreme Court that, which is why it was particularly disheartening when the Supreme Court

[33] (2006) 27 ILJ 1291 (Arb)
[34] [2004] 5 BLLR 413 (LC)
[35] (2010) 31 ILJ 2368 (LAC)
[36] *Solidarity obo Erasmus v Eskom Holdings SOC Ltd* (C1001/18) [2024] ZALCCT 18 (24 May 2024)

delivered a judgement in 2020 stating that Affirmative Action is not a Fundamental Right. A similar story can be told about South Africa. There was a clear growth in the language of the judgements of the courts there, whereby the journey of Affirmative Action from being an enabling tool to it almost being declared a human right was seen. But, just as in India, a little after doing so, the Labour Court there, delivered a judgement that reversed the gains that had been made on this count.

Justice Ruth Bader Ginsburg has admiratively described the Indian system of Affirmative Action, India's commitment to the system, and the role of the judiciary in upholding and strengthening the system, while criticising the shortcomings in her own home jurisdiction of USA. The Late Justice did so, while eloquently arguing for the recognition of Affirmative Action as a Human Right in the United States of America. She also raised demands for the recognition of Affirmative Action within the International Human Rights regime. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001, known popularly as the Durban Racism Conference made inroads into lending International Human Rights recognition to Affirmative Action.[37] But the Special Rapporteur for the UN Commission on Human Rights' 2002 report declared that Affirmative Action made innocent people pay the price for past mistakes that they had no role in and therefore, was against the principles of equality. This report singlehandedly undid all the gains that had been made at the Durban Racism Conference.[38]

Based on the findings of this paper it is clear that the Indian position is closest to the potential recognition of Affirmative Action as a Human Right. However, the purpose of this paper is not to indulge in mindless chest-thumping regarding India's jurisprudential prowess. Instead, it is an attempt to understand and hopefully improve the existing system. An 'almost human right', like the position of Affirmative Action in India at present, is still not a human right. I hope, in conclusion, that the Supreme Court reverses the stand it adopted in 2020 and expressly confers upon Affirmative Action the status and protection of a Human Right. While doing so, I also hope that such a move would lead a global charge for a change in status and recognition of Affirmative Action as a Human Right.

[37] Celina Romany & Joon-Beom Chu, "Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions", 36 Conn. L. Rev. 831 (2003-2004)
[38] *Ibid.*