THREE MODELS OF AFFIRMATIVE ACTION THROUGH THE LENS OF SEPARATION OF POWERS: SOUTH AFRICA, CANADA AND INDIA

By Arpita Sarkar

LL.M. SHORT THESIS

COURSE: Protection of Constitutional Rights

PROFESSOR: Mathias Moschel

Central European University

1051 Budapest, Nador utca 9.

Hungary

Acknowledgement

I wish to express my heartfelt gratitude to Prof. Mathias Moschel, my thesis supervisor who has been a constant source of encouragement and inspiration since the time of inception of this idea. I also wish to thank Central European University Library and Max Planck Institute for Comparative Public Law and International Law for kindly assisting me in using their resources.

With this, I dedicate this thesis to Prof. (Dr.) Mahendra Pal Singh and Hon'ble Mr. Justice V. Gopala Gowda, who taught me the importance of equal concern and equal respect for all; and to my family- my parents, Samarpita, Parth and Siddharth.

Table of Contents

ABSTRACT

Affirmative action provides equal opportunity to persons from marginalized communities irrespective of, and taking into consideration, the weaknesses induced by oppression over time. The constitutionality of affirmative action therefore, is not the subject matter of study in this paper. Rather, premised on the constitutionality of affirmative action, this study intends to explore the different models, based on the organs of the State that are involved in identifying communities eligible for affirmative actions. There is no single answer to the question as to which organ of the State is most eligible to discharge this duty. This study on the other hand proves by exploring the constitutional and legal provisions in South Africa, Canada and India, that despite the three different organs of the States taking active role in these jurisdictions, the affirmative action has attained significance in all three constitutional democracies. Though all the three organs of the State functions in co-ordination with each other regarding implementation of affirmative action programs, it depends largely on the nature of the separation of powers principle practised under different constitutional set-ups to determine which organ of the State shall take the leading role in identifying disadvantaged communities for affirmative actions. History and social structure also play a significant role in conferring authority on different organs of the State to implement this objective. In Canada, the historical dominance of the legislature in discharging the function of implementing the equality clause has made it the main organ for implementing affirmative action programs and also for identification of communities. Local level dominance of communities known as the 'upper castes', on oppressed communities however, makes the legislature an unsuitable organ for deciphering the disadvantaged communities in India. The Constitution has therefore, explicitly conferred this authority on the Executive. The shift to conferment of authority of judicial review on the courts by the Constitution of Republic of South Africa 1996, has resulted in generation of robust jurisprudence on rights based constitutional claims which includes affirmative action. This study concludes that when constitution explicitly confers authority on different organs of the government for implementation of a right, then the same should be followed without amending the constitution as per convenience. Even when the constitution does not provide explicit authority on any organ, the constitutional set-up in itself develops a procedure for implementation of these rights. In such cases however, some level of deference and understanding among the different organs of the state becomes imperative to avoid conflict.

Introduction

Affirmative action is a process through which States make special considerations for advancement of backward classes in the society either by reserving certain number of seats for the oppressed and vulnerable communities or by making other special considerations such as lowering the eligibility requirements for these communities in different institutions.[1] Affirmative action has been introduced in very small number of democratic constitutions of the world with the purpose of establishing social, political and economic equality among its people. It is expected to cater to those sections of the society, that have been oppressed through culture, social structure or religion or those who have been discriminated against on the basis of their race, sex, ethnicity or geographical isolation. Affirmative action provides equal opportunity of representation to persons from marginalized communities irrespective of, and taking into consideration, some weaknesses induced by oppression over time. Post World War II, many countries made a shift to democracy and began writing their own constitutions which put equal emphasis on rights as on the structure of government and separation of powers. However, not many among them have adopted affirmative action in the equality jurisprudence of their Constitutions.

The United States of America has one of the world's oldest constitutions with explicit provisions for equality before law through its 5th and 14th amendments. However, it has still witnessed waxing and waning of affirmative action schemes through decisions of the US Supreme Court since it is not explicitly mentioned in the Constitution. The Indian Constitution in contrast, explicitly provides for affirmative action since its coming into force in 1950. The

[1] AR Lakshmanan and others Ed., *Durga Das Basu Shorter Constitution of India* (Fourteenth edn, Lexis Nexis 2015) 191

other major countries which have introduced affirmative action into their equality jurisprudence are South Africa, Brazil, Malaysia and Canada.

The legal engagement with affirmative action has mostly been in the form of either its justification[2] or its criticism[3]. Much has been said about its functions[4] and failures[5]. There has also been arguments on the validity of such constitutional practice in a democratic society where every person is treated as political equals.

This paper does not intend to argue on the legality or fairness of affirmative action. Rather, this study is based on the presumption that affirmative action is a clarification or extension and an integral part of substantive equality jurisprudence under the Constitutions. This claim is not true for all democratic constitutions.[6] However, the established position of law for the jurisdictions on which this study is premised, i.e., India, South Africa and Canada, is that affirmative action is a significant part of equality clause and are not exceptions.

Other jurisdictions associated with affirmative action namely, United States, Brazil and Malaysia have been deliberately kept outside the scope of this study since affirmative action does not find explicit mention in the provisions of their Constitutions. It is true that affirmative action practises in these jurisdictions can be easily placed in one of the models of practise which this study intends to explore without finding explicit mention in the Constitutions. But since the purpose of this study is to explore the constitutional practices and provisions of each

[2] MP Singh , 'Ashok Kumar Thakur v Union of India: A Divided Verdict on an Undivided Social Justice Measure' [2008] 1(2) NUJS Law Review 193- 21

[3] JL Pretorious, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence', [2010] 26 South African Journal on Human Rights 536-570

[4] M Mushariwa, 'UNISA v. Reynhardt [2010] 12 BLLR 1271 (LAC): Does Affirmative Action Have a Life Cycle?', [2012] 15 (1) Potschefstroom Electronic Law Journal 412- 428

Frank I Michelman, 'Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa', [2004] 117 (5) Harvard Law Review 1378-1419

[5] MarkA Drumbl and JohnDR Craig, 'Affirmative Action in Question: A Coherent Theory for Section 15(2)' [1997] 4(1) Review of Constitutional Studies 80- 123

[6] *Federation francaise de gymnastique*, [2008] Conseil d' Etat, req. n. 359219

jurisdiction to decipher which organ of the State takes leading role in implementing affirmative action, South Africa, Canada and India constitute the chosen jurisdictions.

It is mere coincidence that these three jurisdictions share the same colonial past. Canada became an independent nation much before the enactment of its Charter of 1982 which constitutionally recognized affirmative action. Similarly, though South Africa was decolonized much earlier, the apartheid system legitimising institutionalised segregation on the basis of race by the white minority resulted in the drafting of anti- apartheid democratic constitution only in 1996. Consequently, affirmative action in South Africa was constitutionally recognized only in 1996. As for India, affirmative action was recognized at the beginning of the Constitution coming into force. But it still remains largely unimplemented due to the complexity of the political, social and institutional set up and some of the subsequent Constitutional amendments and violation of separation of powers principle.

Affirmative action is not premised on the acknowledgement of a colonial past. It is rather based on the acknowledgement of internal institutional correction of social structure and compensation for past discriminations. The constitutionality of affirmative action is not the point of study in this paper. Rather, premised on its constitutionality, this study intends to focus on the different models of affirmative actions based on the organs of the State involved in identifying communities eligible for affirmative actions.

It is imperative to mention here that in some jurisdictions, the constitutionality of affirmative action schemes exist independently of issues relating to the designated groups or disadvantaged groups who are entitled to avail themselves of affirmative action. Therefore, in certain jurisdictions, the constitutionality of an affirmative action scheme can be challenged on its own merits devoid of any challenge on the issue of the groups or communities that are to benefit from such schemes. A study on the jurisprudence of the Supreme Court of India on affirmative

action schemes provide proof on this point.[7] In some other jurisdictions however, affirmative action schemes are intrinsically connected to the persons or groups who are entitled to benefit from such scheme. The constitutionality of some affirmative scheme also depend on whether the person or groups that are benefitting from the scheme are actually disadvantaged. The jurisprudence of the constitutional court of South Africa can serve as an example on this point.

Having said this, this study presumes constitutionality of affirmative action, and explores which organ of the State is best suited in each jurisdiction, based on constitutional provisions and practises, to identify the communities that are eligible for affirmative action. Therefore, the vantage point of study is confined to identification of the disadvantaged communities in relation to affirmative action. This study does not explore which organ of the State is best equipped to decipher and uphold the constitutionality of affirmative action schemes.

There is no single answer to the question as to which organ of the State is most eligible to perform this duty. It depends largely on the nature of the separation of powers principle practised under different constitutional set-ups. History and social structure also plays a significant role in conferring authority on different organs of the State to implement this objective.

In Canada, the historical dominance of the legislature in discharging the function of implementing the equality clause has made it the main organ for implementing affirmative action programs. The Supreme Court on this issue, is largely deferential to the decisions of the legislature. Local level dominance of communities known as the 'upper castes', on oppressed communities however, makes the legislature an unsuitable organ for deciphering the

[7] *Ram Kumar Gijroya v. Delhi Sub. Service Selection*: Civil Appeal No. 1691 of 2016; The main issue in this case was whether a person who appears for a government examination under 'disadvantage group' category, can submit his/ her certificate of disadvantaged group after the last date mentioned in the government advertisement. This case did not concern about who are disadvantaged groups but remained confined to the single question of whether certificate can be submitted after the last date mentioned by the government.

disadvantaged communities in India. The Constitution confers the Executive organ of the State with significant authority on identification of communities to be notified for affirmative action programs. The Supreme Court of India however, remains the monitoring body to ensure the constitutionality of affirmative action schemes and the percentage of quotas[8] for affirmative actions with marginal interference with respect to identification of communities.[9] The apex court only interferes with respect to identification of communities for affirmative action when there is an encroachment on the separation of powers doctrine.[10]

The first chapter of this study aims at studying affirmative action based on the judicial model where judiciary takes the leading role in identifying communities eligible for affirmative action. For the purpose of this model, South Africa is taken as an example to explore how the constitutional court significantly shapes the jurisprudence on affirmative action. Though there has been only one major case before the constitutional court of South Africa directly relating to affirmative action[11], this organ of the State has played the most significant role in shaping affirmative action jurisprudence in South Africa. The legislature, for its part, has explicitly provided in clear terms, those communities who are to benefit from affirmative actions. But, the constitutional court has taken upon itself to decide on a case by case basis each claim brought before it, on facts and circumstances.[12]

The second chapter explores affirmative action programs based on the legislative model. Canada serves as one of the best examples, to explore this model of separation of powers for identification of designated groups for affirmative actions by the legislature. Before the

[8] *See Indra Sawhney v. Union of India* AIR 1993 SC 477 wherein the Supreme Court of India set the limit for reservation quotas at 49.5% of total seats in a given place.
[9] The interference by the Court is restricted to ensuring that the procedure laid down for notification of communities for the purpose of affirmative action, is followed. See for example Ram Singh v. Union of India.
[10] See *E.V. Chinnaiah v. State of Andhra Pradesh* (2005) 1 SCC 394 for example wherein the apex court held that sub- categorization of certain designated groups notified by the President of the Republic, for the purpose of some affirmative action scheme, is not constitutional.
[11] *Minister of Finance, The Political Office Bearers Pension Fund v. Frederik Jacobus Van Heerden* [2004] 6 SA 121 (CC)
[12] ibid

enactment of the Canadian Charter in 1982, and the constitutional recognition of equality clauses including affirmative actions, programs on non- discrimination were carried out by the legislature with minimal roles played by the Executive and a somewhat negative role played by the judiciary through its narrow interpretations of equality.[13] With the enactment of the Charter, the legislature has played the leading role in identifying communities for affirmative action with the Supreme Court of Canada largely playing the deferential role to the legislature.[14]

The final chapter deals with the role played by the Executive organ of the State in identifying designated groups for affirmative actions. A careful reading of the Indian Constitution reveals that affirmative action schemes are implemented mostly through executive orders. Moreover, the Commissions appointed under the Indian Constitution for Scheduled Castes hereinafter SCs and Scheduled Tribes hereinafter STs, are under the supervision of the Executive Head, that is, the President of the Republic. Though the Commission for Other Backward Classes hereinafter 'OBCs' are appointed by the Central Government, that is, the federal legislature, the constituting body of the commission which makes decisions, are not part of legislature. Therefore, though the central government plays some role in identification of OBCs, they are ordinarily bound by the advice of the commission which is not part of legislature, in spite of the members are appointed by the legislature.

The study of the three models of affirmative action from the perspective of identification of designated groups, is not conducted with the objective of claiming the superiority of one model over the others. Rather, it aims at showing how the structure of the constitutional set-up of societies encourage different models of affirmative action.

[13] See for example *Bliss v. Canada (Attorney General)* [1979] 1 SCR 183 wherein it was held by the Supreme Court of Canada that equality rights do not extend to laws which are enacted to extend benefits to the public.
[14] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* 2011 SCC 37, [2011] 2 SCR 670

This study concludes that when enforcing fundamental rights enshrined in the Constitutions such as affirmative action, one needs to pay careful attention to the entire framework of the provisions mentioned in the Constitutions in relation to the issue. When a constitution provides for detailed responsibilities on the different organs of the State for enforcement of affirmative action, such as the Constitution of India, it is imperative to ensure such division of responsibility remains in place as per the constitutional provisions, for the smooth implementation and discharge of constitutional duty by the different organs of the State. Any usurpation of power by other organ of the State even through constitutional amendment should be strictly avoided.

When on the other hand, a constitution confers affirmative action through its provision in more general terms, there is more scope for history and general constitutional set-up of separation of powers doctrine, to shape the mechanism of its enforcement. A careful study on the South African and Canadian jurisdiction shows that when affirmative action is enshrined in Constitution in more general terms, then it gets implemented by that organ of the State which has taken active and leading role in shaping the rights discourse and sometimes even, shaping the Constitution and its principles.

Chapter I: Judiciary model of affirmative action practices: The South African example

Introduction

The institutionalized regulation of human relations on racial lines had resulted in social, political and economic inequalities in South Africa, which continue to the present. Legal, systematic and official nature of segregation (or Apartheid as it is called), existed even after independence from colonial past and called for equally rigorous measures to bring equality among people.

Affirmative action is enshrined in Constitutions across the world, not only for the purpose of correction of past discriminations, but also for correction of continuing discrimination in the society. South Africa is neither the first nor the only country which has affirmative action in its Constitution as furtherance of substantive equality.[15] Yet, it forms a distinguished subject matter of study because of the ways and means by which affirmative action is implemented in this country. To understand the essence of affirmative action in South Africa, one has to understand the history, even if briefly, behind its existence in the Constitution of Republic of South Africa, as it stands today.

The Union of South Africa was established as a dominion under the British crown in 1910 following the Westminster model.[16] The Westminster model brought along with it the concept of parliamentary sovereignty. For the next forty years, the White-only parliament abused the principle of sovereignty of parliament to turn colonial dispossessions into legislative apartheid which validated racial disaggregation.[17] The parliamentary sovereignty also carried the principle of non-interference by the judiciary which could strike down legislations violating

[15] The two other countries which shall be the subject of this study that is, India and Canada practise affirmative action since 1950 and 1982 respectively.

[16] Wessel le Roux, 'Descriptive Overview of South African Constitution and Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Vijeon (eds.), *Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, (PULP 2013) 139

[17] Supra note 16 140

rights. Subsequently, the Republican constitution of 1961 and the Tri-cameral Constitution of 1980 also persisted non-interference by judiciary in invalidating legislations violating rights. Hence, the struggle for equal rights and liberation took the form of armed struggle which subsequently resulted in negotiations among the then existing white- government and the members of liberation movement in 1991.[18] This came to be known as Conference for Democratic South Africa (CODESA) which led the way to the interim Constitution and subsequently the final Constitution in 1996 which was validated by the Constitutional Court of South Africa in two stages to ensure its adherence to the constitutional principles agreed upon at the first stage.[19]

Though the chain of events mentioned above was not as simple as it appears here, it provides the basis for understanding affirmative action under the Constitution of South Africa in two significant ways. Firstly, the chain of event shows some of the primary objectives behind writing a democratic constitution by the anti-apartheid government of South Africa. This includes principles of dignity, equality and political sovereignty of all its people. Secondly, the chain of event also shows the sudden shift in the importance of judiciary of South Africa, from a non- interfering body to the major player in certifying the provisions of the final Constitution.[20]

This chapter primarily aims at exploring affirmative action through the prism of the judicial decisions which has played the most important role in developing its jurisprudence. The concept of non- discrimination and affirmative action are deeply entwined in the South African Constitutional jurisprudence. Same is the case for the almost non- separable relationship between affirmative action schemes and the beneficiaries who are to avail this scheme. The main objective of this chapter is to explore the significant role played by the judiciary in

[18] Supra note 16 141
[19] Supra note 16 142
[20] ibid

developing jurisprudence on the concept of disadvantaged groups for affirmative action. The judiciary has played the most significant role on this issue unlike the other organs of the State despite mention of disadvantaged groups in many legislations.

It is also pertinent to note here that affirmative action as a core issue has been discussed in only one instance before the Constitutional Court.[21] Decisions by the Labour Court[22] and the Supreme Appeal Court[23] also contributed to the development of the jurisprudence. However, for the purpose of this study, the decisions of the Constitutional Court on issues of deciphering disadvantaged groups in the context of affirmative action and non- discrimination cases, shall be explored.

The objective and constitutional basis for affirmative action in South Africa

Affirmative action under the anti- apartheid South African Constitution includes preferential treatment but excludes quota system.[24] Nelson Mandela, the first President of post-apartheid South Africa pointed in the memorandum to the Employment Equity Bill, 1998, the objective behind affirmative action in South Africa. He stated that:

> "The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not...asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so black skin should be the basis of privilege in the future. Nor...is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisaged to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons but to see to it that those who have been denied qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination are at least given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality."[25]

[21] Supra note 11

[22] *Independent Municipal and Allied Trade Union v. Greater Louis Trichardt Local Council* (2000) 21 ILJ 1119 (LC), *Fourie v. Provincial Commissioner of the SAPS (Northwest Province)* [2004] 9 BLLR 895 LC

[23] *Solidarity obo Barnard v. South African Police Service* [2014] 2 SA 1 (SCA)

[24] Mpfariseni Budeli, 'Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994', (Twenty Years of South African Constitutionalism, New York Law School 14th November, 2014) 12

[25] *Explanatory memorandum to the Employment Equity Bill*, (1998) 19 ILJ 1345. See also Human L., Affirmative action and the development of people: a practical guide Kenwyn: JUTA (1993) 3 as cited in supra note 24

The Constitution of Republic of South Africa, through Section 9 provides for the equality clause. The relevant clauses of Section 9 which are imperative for the purpose of this study state:

9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
…..

Clause 1 of Section 9 provides for a general provision on equality which is applicable to all its citizens. This clause declares equality in its formal form. Clause 2 on the other hand, obliges the State to take positive actions in the form of legislative and other measures for the advancement of people who have been disadvantaged by discriminations. At the same time, clause 3 of Section 9 obliges the State to not discriminate on the enumerated grounds among persons.

While the equality clause of the Constitution explicitly mentions the enumerated grounds for non- discrimination under s. 9(3), it does not mention persons or categories of persons who are disadvantaged by discriminations and requires the State to take legislative or other measures for improving their conditions, under s. 9(2).

However, as mentioned earlier, any question on affirmative action is strongly entwined with the persons or groups of persons who are entitled to avail these schemes. Therefore, in spite of not being mentioned in the constitution, when implementation of affirmative action programs are validated by the court of law, there is an inevitable discussion on the persons or group of persons who are availing such schemes.

It is also pertinent to mention the relationship between s. 9(2) and s. 9(3) of the Constitution briefly to understand how the two constitutional provisions on affirmative action and non-discrimination respectively, which were so deeply entwined once, have become independent provisions.

The relationship between s. 9(2) and s. 9(3) of the Constitution can be divided into two distinct phases. The period between coming into force of the Constitution in 1996 till the landmark decision in the case of *Minister of Finance, The Political Office Bearers Pension Fund v. Frederik Jacobus Van Heerden*[26], decided by the Constitutional Court, can be marked as the first phase. The second phase comprise of the period post *Van Heerden* decision. *Van Heerden* decision shall be discussed in subsequent part of this chapter since it forms an important case study in itself. However, the development of the relationship between s. 9(2) and s. 9(3) can be described here briefly.

Before the *Van Heerden* decision, an affirmative action qualifying under s. 9(2) also had to pass the test under s. 9(3) which guaranteed non- discrimination on enumerated grounds. Among different reasons behind the shift in the position of law, the concurring opinion of Mokgoro J. provides an interesting reason. According to his concurring opinion, the presumption of unconstitutionality of an affirmative action program under s. 9(2) which requires further justification under s. 9(3) shall create a deadlock between the three branches of the government.[27] That is to say, that while the legislature makes affirmative action schemes to further its constitutional obligations under s. 9(2), the subsequent test of non- discrimination based on presumption of unconstitutionality might result in deadlock between the legislature and judicial branch of the State. This is turn shall adversely affect the process of transformation.[28] Therefore, the presumption of unconstitutionality was done away with in *Van Heerden* decision.

The legislative basis for Affirmative Action in South Africa

The affirmative action clause in South African Constitution shares its similarity with the similar provision in the Canadian Charter in that both explicitly mention legislation as one of the

[26] [2004] 6 SA 121 (CC)
[27] Supra note 11 (Mokgoro J.)
[28] Ibid

significant means of affirmative action by the State. Though it is not a unique concept to implement affirmative action through legislations, for both South African and Canadian jurisdictions, the legislations also explicitly mention the disadvantaged groups for whom they are enacted. The Employment Equity Act, is considered as one of the major instrument of affirmative action in South Africa. For the purpose of this study however, the Employment Equity Act and other legislative provisions on affirmative action shall be analysed only in the context of their provisions on the persons or group of persons who are made entitled to affirmative action programs. Explicit mention through legislative provisions for the groups of persons become important particularly in the light of the fact that the Constitution of South Africa through its provisions do not provide for a list or category of such persons but mentions a broad category of persons disadvantaged by unfair discriminations.[29]

Employment Equity Act, 1998 as amended on 2014, provides for a definition of disadvantaged communities for the purpose of employment. The Act defines the beneficiaries of affirmative action as 'designated group'.[30] In terms of this designated groups, the beneficiaries of affirmative action are Black people, women of all races and persons with disabilities. Black people for the purpose of this Act appears in the definition clause and means African, coloured and Indian who are citizens of the Republic of South Africa by birth, descent or naturalization before 27th April 1994.[31] Black people also include those African, coloured and Indians who were entitled to acquire citizenship prior to the due date but have been precluded from doing so because of the apartheid policy.[32] Black people further include South Africans of Chinese origin for the purpose of Employment Equity Act and Black Based Economic Empowerment

[29] The Constitution of The Republic of South Africa 1996, s 9(2)
[30] The Employment Equity (Amendment) Act 2014, s 1
[31] ibid
[32] Supra note 24 14

(BBEE) program.[33] In effect, this category of beneficiaries of affirmative action comprise of the majority of the population.

Persons with disabilities for the purpose of Employment Equity Act includes those persons with long term or recurring mental or physical impairment which substantially limits their prospects of entering into or advancement of employment.[34]

The Broad Based Black Economic Empowerment Amendment Act (B-BBEEAA) of 2013 provides for a narrower and focussed form of representation of people from Black community for the purpose of building the economy of the country. The definition of Black people focussed on by the B-BBEEAA is narrow compared to the Employment Equity Act since it focusses mainly on women, worker, youth, persons with disabilities and people from rural areas, within the definition of Black community for the purpose of this Act.[35] Among others, the main objectives of the Broad Based Black Economic Empowerment Act is to increase the number of people from Black community that owns, manages and control enterprises. Another important objective also involves attaining an equitable representation of Black people at different levels of work forces.[36] This Act therefore, can be read along with the Employment Equity Act, as instruments for identification of disadvantaged groups for the purpose of implementing affirmative action.

There is another piece of legislation which has played significant role in the field of equality. The Promotion of Equality and the Prevention of Unfair Discrimination Act of 2004 prohibits various forms of discriminations on the grounds of race, sex and disabilities. Also, through Section 16 of the Act, High courts are recognized as 'Equality Courts' for the purpose of hearing complaints under this Act. But this piece of legislation does not deal with affirmative

[33] Ibid. See *Chinese Association of South Africa v. The Minister of Labour* 59251/ 2007 , <http://www.saflii.org/za/cases/ZAGPHC/2008/174.pdf > accessed 15 March 2016
[34] Supra note 24
[35] The Broad Based Black Employment Equity Amendment Act 2013, s 1(c)
[36] ibid

action. It on the other hand, deals with non-discrimination as enshrined under s. 9(3) of the Constitution. Therefore, this Act shall not be considered for the purpose of this study. In any case, this Act does not provide for definition of any group of persons for the purpose of non-discrimination.

In spite of detailed mention of communities eligible for affirmative action in the Employment Equity Act and the BBBEE Act, the South African model for affirmative action claims are significantly court driven. The Constitutional Court has developed a contextual jurisprudence on affirmative action which distinguishes South Africa from the other jurisdictions.

Claiming legitimacy for the judicial model for affirmative action in South Africa

It had been briefly discussed earlier, that the judiciary gained sudden legitimacy of review with the coming into force of the interim constitution and subsequently, the Constitution of 1996. Before the interim constitution came into force, the model of Parliamentary sovereignty existed in the Republic which abstained courts from deciding upon rights based legislation. The model of Parliamentary sovereignty cannot alone be held responsible for the abstinence of courts. Even after the judicial review of legislations was introduced by the Constitution, there were scepticism regarding the role of the judiciary. This is because the Constitution did not abolish the apartheid judiciary when it came into force but rather reposed trust in the same to be mending its way to be a rights upholding organ of the State.[37] This faith by the Constitutional Republic can be best reflected on the fact that judicial review of legislations were permitted from the lower to the higher level of the judiciary including the High Courts and the Supreme Court of Appeal thereby reflecting acceptance of plurality of opinion among existing judges of

[37] Supra note 16

apartheid regime.[38] However, there were apprehensions regarding the role that a continuing apartheid judiciary comprising still of white minority judges, shall play in upholding rights promoting legislations and invalidating rights violating legislations. This apprehensions even extended to issues of affirmative action where the apartheid courts comprising of continuing judges from previous regime, were supposed to uphold legislations and other schemes that aimed at representation of the persons from disadvantaged communities. To put simply, the absence of any lustration laws post establishment of constitutional democracy, raised these doubts.

A significant role played by the Constitutional Court at both the stages of drafting and certification of the Constitution, ensuring its adherence to principles however, eased this scepticism with time. The decision of *S v. Makwanyane*[39] during the period of the interim constitution, provided assurance to the Republic to place trust on the judiciary.[40] Through this case, the Constitutional Court declared its allegiance to the democratic principles which were agreed upon as part of the Constitution of South Africa. This case and subsequent cases might have paved the way for placing trust on the Courts for issues such as affirmative action as well.

For affirmative action issue, as we will see subsequently in this chapter, the Courts have remained a consistent stakeholder. Sachs J., in his concurring opinion in *Van Heerden* case, mentioned about judicial restraint.[41] He was of the opinion that in cases of both, promotion of equality under s. 9(2) and prevention of unfair discriminations under s. 9(3), courts must show due restraint from interfering with measures taken on this issue. According to Sachs J., the court should not be an arbitrator to decide on whether such measures could have been less

[38] ibid
[39] 1995 (3) SA 391 (CC). In this case, the Constitutional Court of South Africa held that capital punishment is inconsistent with the human rights principles that are expressed in the interim constitution of South Africa.
[40] Roux cite page
[41] Supra note 26 (Sachs J.)

intrusive etc.[42] However, he was still of the opinion that when the courts feel that such measures are introduced to unfairly and disproportionately burden the interest of the advantaged sections of the community, then the court must interfere.[43]

The judicial restraint that Sachs J. mentions in his concurring opinion, has not functioned in the South African model as will be evident from the majority opinion in the Van Heerden decision. On the other hand, the South African Courts have developed a jurisprudence where same standard of scrutiny is not applied for all race based classifications.[44] This is regardless of whether such classification aims at advancing discrimination or preventing it.[45]

Since certain aspects of Van Heerden decision has already been mentioned in this study, it is imperative to make a close study of the case.

Minister of Finance, The Political Office Bearers Pension Fund v. Frederik Jacobus Van Heerden **2004 (6) SA 121 (CC): The landmark judgment that established the current position of law on affirmative action in South Africa**

It is not correct to mention that *Van Heerden* decision is the only decision on affirmative action in South Africa. Even under the interim Constitution, affirmative action was adjudicated upon.[46] Under the final Constitution as well, affirmative action has been adjudicated upon by the Constitutional Court as well as the lower judiciary such as the Labour Court and the Supreme Court of Appeal.[47] The *Van Heerden* decision still remains a landmark in the legal

[42] ibid
[43] ibid
[44] Saras Jagwanth , 'Affirmative Action in a Transformative Context: The South African Experience' [2004] 36(3) Connecticut Law Review 725- 746 734
[45] Ibid
[46] See for example *Public Servants Association of South Africa v. Minister of Justice and Others* 1997 (3) SA 925 (T)
[47] See for example, *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC)

history of affirmative action cases in South Africa which laid down that any scheme under s. 9(2) of the Constitution, shall be conferred with the presumption of constitutionality.

The main issue in Van Heerden case was the difference in contribution in pension schemes for those who were members of Parliament before 1994 and those who became members of Parliament after 1994. The division between the two groups can be attributed to the transition from apartheid to anti- apartheid regime. Therefore, many people who became members of Parliament after 1994, comprised of persons who were from the Black communities and also those persons from the white communities who earlier did not participate in the election on political conscience against the apartheid regime.[48]

Moseneke J. delivered the majority opinion in this nine judge bench decision and laid down certain important principles on affirmative action in South African context. The concurring opinion of Mokgoro J. reveals that there has been a disagreement on whether the case in hand was to be decided under s. 9(2) providing for affirmative action, or under s. 9(3) providing for non- discrimination. While the majority decision written by Moseneke J. decides this case under s. 9(2), the concurring opinion by Mokgoro J. reveals that the facts could have been tested for non- discrimination under s. 9(3). In contrast, agreeing with all, the concurrent and majority opinions, Sachs J. states in his judgment that there cannot be a partition among these two clauses of equality and they are to be read in consonance with each other.[49] To understand the position of law among this difference of opinion between majority and concurring opinions, the decision of the majority which establishes the position of law, is taken into consideration.

The majority decision, by laying down the three steps test, clarified the situations in which any claim for discrimination has to be tested under s. 9(2). For the other circumstances, according to the majority, discriminations claim has to be tested under s. 9(3) providing for non-

[48] Supra note 26 (Moseneke J.)
[49] Supra note 26 (Sachs J.)

discrimination.[50] The test comprise assessment in the first step on whether the measure in question targets persons or categories of persons who are disadvantaged by unfair discriminations. The second step requires testing whether the measure in question protects or advances the interests of such categories of persons. And finally, in the third stage, it is required to be prove that such measures indeed promote the achievement of equality.[51] This test in itself requires the courts to make comprehensive assessment on who the disadvantaged groups are.

On the one hand, it is stated by the Court that s. 9(2) does not require every person made eligible for remedial scheme to show that they come from disadvantaged groups. It is sufficient to show that an overwhelming majority of members favoured under the scheme had been disadvantaged by unfair exclusions.[52] On the other hand, the legislative definitions of the disadvantaged communities have included only Black persons, women of all communities and disabled person.[53] Interestingly, the minority of persons who have not faced disadvantages by unfair exclusions but are made eligible for the remedial scheme in the case in hand, are not persons from these three defined communities. They are from minority white communities who were either not returned to the Parliament before 1994 or they chose not to contest elections before 1994.[54]

The Indian scenario with affirmative action is different. As will be seen in the third chapter of this study, the Court in India does not decide on the persons or groups of persons eligible for affirmative actions. In some situations, the Indian Supreme Court had to uphold admission schemes providing preference to persons coming from isolated geographical locations.[55] But such categories as geographical locations, are not combined with disadvantaged groups which are explicitly defined in the Indian Constitution.

[50] Supra note 26 (Moseneke J.)
[51] Ibid
[52] Ibid
[53] See Employment Equity (Amendment) Act 2014 and Broad Based Black Economic Empowerment Act 2013.
[54] Supra note 50
[55] *State of Kerala v. Roshana T.P. Kumari* [1979] 1 SCC 572 [11]

Even for a category of persons eligible for affirmative action in India called the 'OBCs', some persons with income higher than a threshold set by law, are excluded from affirmative action for being in the 'creamy layer' of OBC communities.[56] But the 'creamy layer' nevertheless belong to OBC communities. It is not permissible in India to make certain communities not suffering from social, political or economic disadvantages, eligible for affirmative action on the ground that an overwhelming number of persons actually benefitted by such scheme belong to disadvantaged communities.

The immense deference expressed by the courts in Canada to legislature on affirmative action, does not spare an instance where the courts have made similar analysis. There has not been an instance in Canada where certain persons from advantaged communities have been permitted to avail affirmative actions on the ground that the group comprise of overwhelming number from disadvantaged communities who are eligible for affirmative action. On the other hand, in the case of *Alberta v. Cunnigham*[57], where the claimants belonged simultaneously to two disadvantaged groups and the affirmative action was made available for one disadvantaged group, the Supreme Court of Canada denied eligibility to such scheme for the claimants on the ground that they were legally registered with one disadvantaged group that are not made eligible for the scheme in question.

In South African context however, as per the majority decision in Van Heerden, it is incumbent upon the courts to scrutinise different forms of disadvantages other than race, class or gender, on a case by case basis. In the words of the Court in Van Heerden:

" [27.] This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution."

[56] See *Ashok Kumar Thakur v. Union of India* [2007] 4 SCC 361
[57] Supra note 14

The paragraph mentioned above shows that the South African courts take upon itself in each case of discrimination, the responsibility to decipher different disadvantaged groups that are to be made eligible for affirmative action.

It is common in different jurisdictions that cases of non- discrimination are decided by the courts on case by case basis in terms of deciphering the position of the complainant in the society. It was held by Goldstone J. in the case of *Harksen v. Lane No. and Others*[58] that the position of the complainant in the context of the society has to be taken into consideration when deciding on non- discrimination cases.[59] Since *Van Heerden* decision has changed this position of law in context of affirmative action cases, there is no requirement to discuss the details of the test. Yet, the *Van Heerden* decision has been criticised for providing immunity to measures taken under s. 9(2) from tests laid down under s. 9(3) from the perspective of complainants belonging to advantaged groups.[60]

***Harksen to Van Heerden*: Was it a right step taken by the Constitutional Court of South Africa?**

It was held in the majority judgment in the case of *Prinsloo v. Van der Linde and Another*[61], that the Constitutional Court:

"..should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which the problem arises."[62]

This being said, it is evident that there has been a shift from *Harksen* case to *Van Heerden* case, of the position of affirmative action jurisprudence in South African context. In my opinion, the Court, through *Van Heerden* case clarifies and establishes the status of affirmative law in

[58] 1998 (1) SA 300 (CC)
[59] Supra note 58 (Goldstone J.)
[60] Supra note 3
[61] 1997 (3) SA 1012 (CC)
[62] Supra note 61 [20]

equality jurisprudence on a firmer ground though there are arguments to the contrary on this point.[63]

The majority opinion in Harken case[64] has be relied upon to argue that if equality for all is claimed through an affirmative action program, then there is a necessity to decipher whether complainants have indeed suffered impairment. It has been also been claimed that Harksen test does not lead to a rigid hierarchical scrutiny test or review on discrimination[65]. On the other hand, it is claimed that the test provides a flexible platform to review contextual factors that are taken into account when fairness and justifiability of a discriminatory measure is assessed.[66]

This claim raises several questions and concerns. Firstly, making validity of affirmative action contingent upon non-discrimination of advantaged group, places affirmative action as an exception or compromise on equality as oppose to being a clarification of equality clause. The position of affirmative action within fundamental rights context, has been clarified in different jurisdictions. For example in India, initially, the Supreme Court opined that affirmative actions are exceptions to the fundamental right to equality[67]. The Court then underwent a shift in its opinion when a few judges in the case of *State of Kerala v. N.M. Thomas*[68], mentioned that affirmative action clauses are not exceptions but are comprehensive clarifications of equality clause.[69] Subsequently, this view found more prominent mention in the concurring opinion of a Supreme Court decision in *A.B.S.K. Sangh v. Union of India*.[70] Finally, the status of affirmative action in India found establishment within fundamental right to equality, in the majority opinion in the landmark Supreme Court decision, *Indra Sawhney v.*

[63] Supra note 3 551
[64] Supra note 58 (Goldstone J.)
[65] Hierarchical scrutiny on discrimination is a principle practised in the US Supreme Court whereby a heightened level of scrutiny is made by the Court in case any law or program is made for suspect classes such as racial minorities etc.
[66] Supra note 63
[67] *M.R. Balaji v. State of Mysore* AIR 1963 SC 649
[68] AIR 1976 SC 490
[69] Supra note 68 (Mathew J.)
[70] AIR 1981 SC 298

Union of India popularly known as the Mandal case.[71] Even otherwise in India, the status of affirmative action as fundamental right has can be justified on the ground that it is implemented by the State through Executive Orders without legislations.[72] Such policies are upheld by the Court as constitutional. If affirmative action was an exception to fundamental right to equality, then the same could not have been implemented without legislation since fundamental rights to equality could not be taken away without an enacted law.

Applying this in South African context, firstly, the Constitutional Court has clarified in explicit terms that affirmative action is a part of substantive equality and not an exception.[73] Secondly, though usually, affirmative actions are implemented through legislations, the provision under s. 9(2) mentions legislative and 'other measures' for implementing affirmative action. The shift in position of presumption of constitutionality of affirmative action in *Van Heerden* decision therefore, provides for a more coherent principle as oppose to the inconsistent position of law which was formulated through *Harksen* test.

Secondly, if Goldstone J's opinion in *Harksen* test means to assess impairment caused to complainants, it will reduce affirmative actions into mere abstract principle. Similar situation was faced by the Indian Supreme Court as early as 1950 in the same year when Constitution came into force. In the case of *Champakam Dorairajan v. State of Madras*[74], the Supreme Court interpreted an affirmative action program in the light of impairment caused to an 'upper caste' non- designated candidate who was denied admission to the college because her cut off marks was insufficient for non- designated category admission. The Supreme Court therefore, struck down the affirmative action program claiming it to be discriminatory. This decision faced criticism and subsequently led to the enactment of 1st Amendment of the Indian

[71] 1992 Supp (3) SCC 217
[72] MP Singh, 'Are Articles 15(4) and 16(4) Fundamental Rights? ' [1994] 3 Supreme Court Cases (Journal) 33
[73] Supra note 26
[74] AIR 1951 SC 226

Constitution which explicitly authorised the State to make special provisions for women, children and backward communities and clarified its position on affirmative action. In the subsequent decisions, the Supreme Court does not assess validity of an affirmative action program from the perspective of the position of a complainant from a non- designated group in the society.

The shift to presumption of fairness through affirmative actions developed in *Van Heerden* test does not amount to absolute immunity to affirmative action programs.[75] The three step test laid down in *Van Heerden* decision, for assessment of disadvantaged groups, shows that the shift has not been unconditional. There is mere shift in the assessment from perspective of complainants to perspective of the disadvantaged groups for whom affirmative action schemes are framed.

Conclusion

The aim of this chapter was to argue that affirmative action in South Africa is driven significantly by the judiciary, among the other two organs of the State. In spite of legislations being in place defining disadvantaged groups, the Courts have tested each case on the basis of its facts and circumstances as oppose to mainly showing deference to the provisions of enacted law with respect to the definitions of disadvantaged groups.

The South African Courts have analysed affirmative action in the context of substantive equality in a race driven unequal society, to go beyond numerical representations of under-represented groups, to acknowledge legitimate ends in the forms of role modelling, diversity and measures to prevent future discriminations.[76]

[75] Supra note 26 (Moseneke J.), (Sachs J. concurring)
[76] Supra note 44 733

The Courts do not apply the same standard of scrutiny for all race based classifications regardless of whether such classification aims at advancing discrimination or preventing it.[77] Their standard of scrutiny has been asymmetrical and context driven, on case by case basis.

One can claim that affirmative action has been a direct matter of consideration before the South African Constitutional court, only one time.[78] However, the constitutional court has developed significant jurisprudence on the issue over the years. One may in fact, make a claim that despite illustrative mention of the communities for affirmative action programs and legislations, the Constitutional Court has applied its own tests to determine validity of such programs based on the degree and extent of vulnerability of designated groups that the programs target to benefit. One possible reason behind this might be the fact that the constitutional court has played a significant role[79] in the certification of constitutional provisions at the drafting stage. Therefore, constitutional court is deferred as the trusted forum for the correct interpretation of the constitutional provisions in spite of mention of communities for affirmative action in legislations.

Another possible reason for the prominence of constitutional courts in these cases is the lack of mention of designated groups for affirmative actions in the text of the constitution itself. The Constitutional court therefore could extend its authority of judicial review to interpret the definition of designated group in context of affirmative action schemes.

A third factor that possibly places the Courts as the major institution of validating affirmative action claims is that the existence of legislations and schemes in place do not de facto make a

[77] Supra note 44 734
[78] Supra note 26
[79] Once the constitutional assembly had drafted the constitution for the Republic of South Africa, it was sent to the constitutional court for certification of the draft. Following the amendments made by constitutional courts through rejections and amendment of provisions, the same was sent back to the constitutional assembly. After the acceptance of such amendments or re-deliberation on provisions, the draft was sent back to constitutional court for certification again. Following the certification by the constitutional court the second time, the draft was promulgated by the President as the constitution of Republic of South Africa.

person from designated group eligible for scheme when there is either a dispute on merit[80] or a competing claim by another person within the designated group.

Finally, the reason behind constitutional court affiliated affirmative action programs in South Africa can be sourced from their history. The South African constitution represents the shift from apartheid regime into democracy. The Constitution, that the justices of the constitutional court are responsible for upholding, unambiguously stems from the commitment of deleting traces of the apartheid regime from social, economic, political and cultural lives of the South African society. It is also pertinent to remember that the judiciary was conferred with the authority to review legislations for the first time, with the enactment of the Constitution. Therefore, the need for race based legislation for the eradication of classification finds more sympathetic reading by the justices of Constitutional Court.[81]

[80] *Independent Municipal and Allied Trade Union v. Greater Louis Trichardt Local Council* (2000) 21 ILJ 1119 (LC)

[81] Frank I Michelman, 'Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa', [2004] 117 (5) Harvard Law Review 1378-1419 1396

Chapter II: The Legislative Model: A case for affirmative action in Canada

Introduction

Canada is a common law country (except for Quebec region which practices civil law system). Countries practicing common law system are capable of evolving with new judicial doctrines over time in response to change in social values and societal structure.[82] However, in Canada, protection and advancement of disadvantaged groups did not get much attention from judiciary. Lepofsky claims that it was the time between 1960- 1981 (the period before the enactment of the Canadian Charter and the Canadian Human Rights Act), that the acknowledgment of equality rights gained prominence.[83] It is also claimed that the initiative to protect minorities against discrimination, was made by provincial legislatures followed by the federal Parliament. Positive effort was made to ensure shifting of responsibility of minority protections from the hands of judiciary to the hands of legislature.[84] The failure of judiciary to acknowledge and address issues of discriminations, can be deciphered as the reason behind this endeavour by legislatures.

Even the agencies and administrative tribunals which were vested with the responsibility to address the then newly recognised problems of discrimination on the basis of age, gender, marital status etc. were authorised by the expanded legislative mandates. Staffs of Human Rights Commissions and jurists were empanelled as adjudicators in these tribunals. Therefore, over a period of time, the responsibility of implementing anti- discrimination laws were shifted from judiciary to the Executive.[85]

[82] M David Lepofsky, 'The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?' [1992] 1 National Journal of Constitutional Law 1-408 317
[83] Ibid
[84] Supra note 82 319
[85] Supra note 82 319-320

The Supreme Court still retained some authority in enforcing equality rights. The Canadian Bill of Rights, which was enacted by the federal Parliament in 1960 was meant to guarantee civil liberties against infringement by federal Parliament. This Bill, through Section 1 provided for equality before law without discrimination on the basis of colour, religion, sex, race or national origin. The Bill was meant to prevail over all the federal statutes except those which by its provisions, exempt itself from the reach of the Bill.[86] The Supreme Court was authorised to implement the Bill of Rights to strike down discriminatory federal laws which were not in adherence with the Bill of Rights. However, instead of using Bill of Rights as a tool, the Supreme Court was of the opinion that it must show deference to the Acts enacted by Parliament.[87]

Subsequently, the Supreme Court in several cases opined on various aspects of the Bill which dampened the spirit of Bill of Rights rather than enhancing and implementing it. For example, the Court in the case of *Canada (Attorney General) v. Lavell*[88], was of the opinion that the right to equality guaranteed under Section 1(b) of the Bill is not egalitarian in nature. Subsequently, in the case of *Bliss v. Canada (Attorney General)*[89], the Court was of the opinion that equality rights do not extend to those laws which are enacted to extend benefits to the public. Also, judicial assessment of federal laws mandating differential treatments were not permissible if the law fell within the constitutional jurisdiction of federal government. This test, as is claimed by Lepofsky, can be passed by all federal laws which are constitutionally valid.[90] This was the brief history of the functioning of the organs of the government before the enactment of the Charter and the Canadian Human Rights Act.

[86] The Canadian Bill of Rights 1960 S.C. 1960, c. 44, s. 2
[87] See for example *Curr v. R.* [1972] SCR 889 (Laskin J.)
[88] [1974] SCR 1349 (Ritchie J.)
[89] [1979] 1 SCR 183
[90] Supra note 82 321

The enactment of the Charter and the Human Rights Act witnessed a new zeal in the Supreme Court in upholding equality rights. Besides Section 15(2) of the Charter, equality rights under the Charter came to be assessed by the Court under Section 1 which aimed at upholding the constitutionality of reasonable limits imposed on Charter Rights which are either prescribed by law or which can be justified in a free and democratic society.

The present study however refrains from discussion on section 1 of the Charter on the ground as it will subsequently discuss, that firstly, affirmative action provides for a complete independent provision under Section 15(2). Secondly, this study is based on the presumption that affirmative action under Section 15(2) does not curtail any right under the Charter which require justification under Section 1.

Occupational inequality in employment faced by women, disabled people, population of Natives and visible minorities in Canada prompted affirmative action programs in employment sector after the enactment of the Charter.[91] The commitment of the Charter of Rights and Freedom to equality rights, confers obligation upon the State to ensure representation of disadvantaged groups in employment sector. Affirmative action program in Canada aim at reducing inequality in employment and as a consequence, also intend to affect promotion, career development, recruitment and hiring.[92] One of the major aims behind affirmative action in employment sectors has been to increase the representation of under-represented groups of people which gave rise to the concept of 'employment equity'.[93]

[91] Carol Agocs, 'Affirmative Action, Canadian Style: A Reconnaisance', Canadian Public Policy, [1986] 12(1) 148- 162 149
[92] Ibid
[93] Supra note 91 150

Adjudication on equality rights under the Charter in its initial years however, came to be based on 'rationality review' standard which is the lowest standard of review by the Court. The exceptions to this situation were occasional intervention by the Court.[94]

This chapter intends to argue that despite being provided with opportunities, the judiciary and the executive branches of the State in Canada did not take the lead in eradicating inequalities through rigorous implementation of affirmative action programs. On the other hand, even the basic effort to implement affirmative action programs were lacking at the end of these two branches though both of the branches were authorised to take lead. The Courts have merely shown deference to the lead taken by the legislature, which remained the only branch of State in Canada to take this initiative. The legislature has made efforts in phases, to introduce affirmative action with detailed provisions.

Constitutional provisions for affirmative actions in Canada

The Canadian Charter of Rights and Freedoms, 1982 is the Bill of Rights entrenched in the Constitution of Canada. This Bill of Rights, through Section 15, guarantees equality to every person, either in the negative form of non- discrimination or in the positive form of affirmative action. Section 15 of the Charter states as follows:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

As mentioned above, prior to the entrenchment of this Charter in the Constitution, the basic freedom of the people were dependent upon the legislature through enactment of federal and

[94] See for example Andrews decision where the Court assessed a law under proportionality principle which is a heightened form of judicial scrutiny of a legislation.

state laws. With the Charter coming into force, the rights and freedom enunciated in it were given the status of constitutional rights which are justiciable in the Court of law. The rights enshrined in the Charter are implemented through legislations enacted by competent bodies while the courts of law guarantee interpretation of the rights mentioned in the legislation in adherence with the Charter.

Consequently, the right enshrined in the equality clause of the Charter is also guaranteed through legislations and not directly by the Charter. Further, the beneficiaries of affirmative actions in Canadian system, are also mentioned in the legislations. The Charter makes a broad provision that upholds the constitutionality of ***laws, programs or activities*** which aims at 'amelioration of conditions of disadvantaged groups' on certain grounds.[95] While 'laws' are enacted by the Parliament, mention of 'programs' and 'activities', in the equality clause authorise the Executive branch of the State and even the private employers to implement affirmative action. This broad authorisation of implementation of affirmative action by State as well as private sector raises question on the status of affirmative action within the equality jurisprudence in Canada. The issue regarding the status of affirmative action in Canada shall be addressed subsequently in this chapter. But prior to that, one needs to have a comprehensive idea about the affirmative action provisions under different legislations and their role in implementation of affirmative action in Canada.

The quasi-constitutional provision for affirmative action in Canada

Besides the Canadian Charter of Rights and Freedom which is entrenched in the Constitutional Act, the validity of affirmative action also finds mention in Canadian Human Rights Act,

[95] The Canadian Charter of Rights and Freedom 1982, s 15(2)

1985.[96] The relevant provision on affirmative action under Human Rights Act, appears in Section 16. Section 16(1) states:

"It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantage that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."

Further, Section 16(2) authorises the Canadian Human Rights Commission to advise and provide assistance for furtherance of Human Rights programs.

Section 16(2) states: (2) The Canadian Human Rights Commission, may

(a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in sub-section (1); and
(b) on application, give such advise and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in sub-section (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.

The Human Rights Act has gained the status of quasi- constitutional instrument in the light of several decisions of the Supreme Court of Canada itself.[97] Accordingly, the provisions of the Human Rights Act are given broad and purposive interpretation.

The affirmative action provisions under Human Rights Act are directed at 'person' in contrast to 'state'. Therefore, the Act may be presumed to be addressing private employers at large besides government sector. Also, the wide use of terms such as 'arrangements, programs' etc. indicate that this Act intends to draw extensive participation from private employers for addressing issues of inequality through affirmative action programs. However, at the same time this wide authorization to the private employer to make arrangements and programs through a

[96] R.S.C., ch. H-6 (1985)
[97] For examples *Ontario Human rights Commission v. Simpson Sears* [1985] 2 SCR 536, *Winnipeg School Division No. 1 v. Craton* [1985] 2 SCR 150

quasi- constitutional statute ensures immunity of such programs from being challenged on grounds of discrimination.

The definitions of designated groups under affirmative action laws in Canada

The Employment Equity Act of 1995, was enacted with the purpose of ensuring that no person is denied the opportunity of employment for reasons not related to ability.[98] This Act specifically mentions the groups that are to be made eligible for affirmative action. The 'aboriginal peoples' comprise of one of the designated groups under this Act and includes peoples who are Indian, Inuit and Metis.[99] The 'members of visible minorities' are defined as peoples other than aboriginal peoples who are non- Caucasian in race and non- white in colour.[100] Finally, the Act defines 'persons with disabilities' as persons who consider themselves disadvantaged by reason of their impairment; those persons who believe that their employer or potential employers are likely to consider them disadvantaged for the purpose of their employment because of the impairment and also includes those persons whose functional limitations owing to disability has been accommodated in their current workplace.[101]

Though the definition of 'aboriginal peoples' under the Employment Equity Act appear as distinct identities, there are several layers of overlapping in the identities of people described under this phrase. It is pertinent to mention this since the claim on affirmative action under the Charter is based on identity.

According to Jeremy Webber, there are three cultural divisions of aboriginal people in Canada.[102] The first group according to Webber, comprise of the First Nations who are known

[98] Employment Equity Act 1995, s 2 < http://laws-lois.justice.gc.ca/eng/acts/E-5.401/page-1.html> 9 December 2015
[99] Supra note 98 s 3
[100] Ibid.
[101] Ibid
[102] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis*, (Hart Publishing Oxford and Portland, Oregon 2015) 226

as the Indian Peoples under the Constitutional Act, 1982.[103] The second group comprise of the Inuits who were formerly known as the Eskimos. The third group comprise of Metis who are primarily the descendants of union between fur traders (who were especially French Canadian traders) and Aboriginal women.[104]

The definitions of people under the three groups appear to be neat and distinct and yet, there are contested claims of identity among all the three groups. The controversy surrounding the definition of Metis stems from the fact that uncontested identity of Metis is conferred upon those people who can trace their roots in Red River valley in Manitoba and have developed a national identity surrounding the Red River Rebellion in late 19th century.[105] But there are other people who also refer to themselves as Metis because they can trace their identities to communities formed through 'analogous experience of intercultural contact'.[106] There are yet another set of population who refer to themselves as Metis because of their mixed heritage.[107]

Similarly, there has been several controversies surrounding the identity of 'First Nation' or 'Indians' too since often a person can identify with dual identity of Metis and at the same time, have affiliation with the First Nation.[108] Therefore, without going into details of internal variations within distinct status, even the identity of status among the three groups, is blurred. However, unlike the Constitutional Court of South Africa, the Canadian Supreme Court has not developed an asymmetric level of analysis on the basis of the identity of the claimant. This is to say, that the Canadian Supreme Court neither takes into account multiple identities of a person nor sit in assessment of the dominant identity of a person among several identities to determine eligibility in affirmative action program. In this matter, the Supreme Court of Canada accord deference to legislature which enacts affirmative action laws. A prominent example on

[103] Ibid
[104] Ibid
[105] Supra note 102 227
[106] Ibid
[107] Ibid
[108] Ibid

this matter is the decision of the Supreme Court in the case of *Alberta v. Cunningham*[109] which shall be discussed in detail in the later part of this chapter.

The nature and functioning of affirmative action legislations in Canada

The Employment Equity Act, 1995 prohibits imposition of quota on employers. Section 33(1) of the Act states that the Commission or the Tribunal established under the Act shall not impose quota system on the employer. Under Section 33(2), the Act further defines quota as "requirement to hire or promote a fixed and arbitrary number of persons during a given period. The Canadian government has made an attempt[110] to clarify the functioning of Employment Equity Act. In the absence of quota system in Canada, the clarity on identity of persons become imperative for availing affirmative action.

The Government of Canada itself has made attempts to clarify the myths associated with the Employment Equity Act. It has stated that a member of designated group does not automatically become eligible for job under Employment Equity Act. Rather Employment Equity encourages 'selection, hiring, training, promotion, and retention" of qualified and qualifiable individuals.[111] The government further clarified that the purpose of the Employment Equity Act is confined to removing barriers for the designated groups in employment fields from organization's system, policies and practices.[112]

Employment Equity Act obliges employment institutions to set targets 'to get there'.[113] Getting there however, does not imply setting up fixed numbers for employment. The government of Canada mentions that the employment institutions aim at setting recruitment targets to close

[109] Supra note 14
[110] Employment Equity- Myths and Reality <http://www.labour.gc.ca/eng/standards_equity/eq/pubs_eq/myths.shtml> 9 December, 2015
[111] Ibid
[112] Ibid
[113] Ibid

the gap of under representations and developing a work force that better reflects the diversity of communities in a Canadian society.[114]

The Rosalie Abella Commission Report of 1984[115], can be used to bring clarification in the interpretation of functioning of Employment Equity Act since the Act itself was a follow-up to this Report presented by Judge Rosalie Silberman Abella.[116] As per the Commission, the designated group comprise of women, aboriginal peoples, persons with disabilities and visible minorities who are non- Caucasian in race and non- white in colour, and comprise of 60% of the population.[117] These are the same groups of people who find mention in the Employment Equity Act.

Since Canadian system of affirmative action does not have a quota system, competing claims within the four categories from the designated group appears inevitable. The members of designated group themselves have raised this issue which finds mention in the Rosie Abella Commission Report. The Commission records the concern as:

"……Their economic histories are different, their social and cultural context are different, their concerns are different and the particular solutions required by each group are widely disparate. Some therefore felt that it minimized the significance of each of their unique concerns to be combined with three other group.
This concern also derived from a sense that they would be competing for opportunities with the other groups rather than with the general community."[118]

But the government of Canada clarifies this issue by mentioning that though certain positions are left open only to designated groups, filling up of the same also depends of the representation of each of the four groups within the designated group on a case basis, and the group which is

[114] Frequently Asked questions in government services <http://jobs-emplois.gc.ca/centres/faq-eng.htm> 10 December 2015
[115] Minister of Supply and Services Canada, *Equality in Employment: A Royal Commission Report* (1984) 17 http://www.bakerlaw.ca/wp-content/uploads/Rosie-Abella-1984-Equality-in-Employment.pdf 23 December 2015
[116] John Hucker, 'Affirmative Action Canadian Style: Reflections on Canada's Employment Equity Law' in Titia Loenen and Peter R. Rodrigues (eds), *Non- Discrimination Law: Comparative Perspectives* (Martinus Nijhoff Publishers 1999) 266
[117] Supra note 115
[118] Ibid

more under represented gets the job.[119] This aspect of affirmative action in Canada draws similarity with the approach of the constitutional court of South Africa where affirmative action claims are decided on case by case basis. The similarity of this approach in the both of the jurisdictions might be attributed to the absence of quota system which specifies certain number of seats for each designated group.

Role of the Canadian Supreme Court in interpreting the Charter and establishing the position of affirmative action

The approach of Canadian judiciary towards equality rights led by its Supreme Court, has been described as a 'roller-coaster ride'.[120] At certain times, the Supreme Court has reached heights of recognising inequalities and discriminations and has formulated effective doctrine for adequate protection of equality rights and at other times, it has interpreted equality in narrow technical terms.[121]

While one may claim that the affirmative action in Canada is legislature driven, the Canadian Supreme Court has played substantive role in laying down the basic tenets of equality under which the affirmative action program may function. In the case of *Andrews v. Law Society of British Columbia*[122] the Supreme Court of Canada stated that Section 15 protects equality in substantive form as oppose to formal form. This approach adopted by the Court took into consideration the social positions of individuals while deciding equality claims as oppose to identical treatments prescribed in formal equality.[123] Further, in *Andrews* decision, the Court mentioned that one of the purposes of Section 15 of the Charter is to protect historically

[119] Frequently Asked questions in government services http://jobs-emplois.gc.ca/centres/faq-eng.htm 10 December 2015
[120] Supra note 82 316
[121] Ibid
[122] [1989] 1 SCR 143
[123] Andrews case was about a Canadian resident who was a non-citizen of the country and wanted to practise law in Canada. At that time, Canadian born non-residents could practise law in Canada but non-citizen Canadian residents were not permitted practise law. This case addressed this discriminatory practise in Canada.

disadvantaged group that is, 'discrete and insular minorities'. The Court in this case might have relied upon Footnote 4 of Stone J.'s opinion in the US Supreme Court decision in *United States v. Carolene Products*.[124]

Weber argues, that on this aspect of protection of discrete and insular minorities, both s. 15(1) and s. 15(2) serve the same purpose. Whereas s. 15(1) protects disadvantaged groups from discrimination, s. 15(2) permits the State to support disadvantaged groups through affirmative actions.

Andrews decision had its consequences. The reading of 'substantive equality' into Section 15 by the Court made the basis of distinction ambiguous. Any arbitrary action by the state is antithetical to equality. This proposition found its place in Indian jurisprudence as a new form of equality in *E.P. Royappa v. State of Tamil Nadu*[125]. However, the Canadian Supreme Court confined the requirement by a claimant to prove that (s)he has been discriminated on an enumerated or analogous ground. The burden of proof then shifted to government to prove non- discrimination.[126] The departure from the Indian position lies in the fact that the claimant in the Canadian situation need not prove that the State has acted arbitrarily. The claimant merely needs to prove that (s)he has been discriminated on the enumerated or analogous grounds mentioned in Section 15 of the Charter.

The extension of equality rights on 'analogous grounds' in addition to the enumerated grounds in Section 15, opened up the ambit of equality clause. However, in the absence of specific mention of this grounds by the Court, the ambit of protection tend to become over-inclusive. There was a requirement therefore, to introduce more specific test to ascertain discrimination. In the case of *Law v. Canada (Minister of Employment and Immigration)*[127], the Court laid

[124] 304 U.S. 144 [1938]
[125] [1974] 4 SCC 3
[126] Supra note 102 207
[127] [1999] 1 SCR 497

down new conditions into the existing test for interpreting 'disadvantage on the basis of enumerated or analogous grounds'. The Court in this case held that in order to prove violation of Section 15, one has to prove impairment of human dignity. The Court further laid down four factors that might indicate violation of dignity. Firstly, one needs to prove pre-existing disadvantage, stereotyping vulnerability or prejudice.[128] Secondly, one needed to assess when the legislation takes into account the ground on which the claim is based vis-à-vis the actual situation of the claimant. Therefore, it becomes difficult for claimant when the legislation actually takes into account the ground of discrimination and yet, does not cover the claimant within its ambit of protection.[129] Thirdly, whether the law had an ameliorative purpose with respect to a disadvantaged group of people. In such cases, a person from advantaged group cannot claim violation of dignity.[130] Finally, it is also necessary to see the nature and context of interests affected by the impugned law. If the effect of the legislation is localised and severe, then it is discriminatory.[131]

The contextual factors laid down in *Law* decision were meant to be guidelines in deciding discrimination claims. Yet, the fourfold context yielded more confusion to the existing vagueness in equality clauses. For the purpose of this study, it is imperative to focus on the third context which states that when a legislation has ameliorative effect on a disadvantaged group, then a person from an advantaged group cannot claim violation of dignity.

Subsequently, however, in the decision of *R. v. Kapp*[132], the Court finally opined that affirmative action does not deviate from equality but on the contrary, promotes equality. In this case, the Court held that once a program falls within the scope of Section 15(2) of the Charter, the same need not be analysed under Section 15(1). Thus, similar to the pronouncement by the

[128] Supra note 127 [9A]
[129] Supra note 127 [9B]
[130] Supra note 127 [9C]
[131] Supra note 127 [9D]
[132] [2008] 2 SCR 483

constitutional court of South Africa that once a program is tested under affirmative action provision, it need not be tested under non- discrimination clause of the Constitution, a similar judgment also establishes the same point of law in Canada.

In addition to the position laid down by the Court on affirmative action, the court laid down a more precise test as compared to the *Law* decision. The Court opined that to prove discrimination, firstly one needs to establish that there has been a discrimination on one of the enumerated or analogous grounds. Secondly, one needs to also prove that the distinction also intends to perpetuate prejudice or disadvantage or engaging in stereotyping.

There might be a requirement of further elaboration on the 'enumerated and analogous grounds' for the purpose of understanding non- discrimination. But for the purpose of this study, it is sufficient to trace the jurisprudence of the Canadian Supreme Court to R v. Kapp decision wherein the Court held that once the program falls within Section 15(2), there is no requirement of assessing the program under Section 15(1).

The *Kapp* decision establishes affirmative action as an independent fundamental right as a part of equality clause. Tracing the journey of the Supreme Court from *Andrews* to *Kapp* decision, the Supreme Court has played an active role in determining the framework of affirmative action within the Canadian Charter. Yet, when the issue arises on designated groups who are beneficiaries of affirmative action, the Supreme Court has shown deference to legislature and refrained from interpretation grey areas of identities when competing claims from within disadvantaged groups were brought before it.

Legislature as leading organ of State for affirmative action in Canada

The *Alberta v. Cunningham*[133] decision by the Supreme Court in 2011 concerned constitutional challenge to a provision of the Metis Settlements Act of Alberta.[134] The Act provided for settlement lands to eight Metis communities in the province. However, the Act prohibited status Indians from becoming members of the Metis settlement. Though the members were also members of the Metis communities, they were at the same time entitled to be registered under the Indian Act. This is not an unusual practice in Canada owing to multiple identities of aboriginal peoples as has been mentioned in the earlier section of this chapter. The claimants in this case, though belonging to both communities, opted to be registered under the Indian Act in order to avail medical benefits available under the Act.

As a consequence, they were de-registered by the Registrar of the Metis Settlement Land registry from the Metis Settlement Act as was prescribed in its provisions. Interestingly, the claimants moved the Supreme Court on violation of Section 15(1) and not Section 15(2).

The Court held that the Act was enacted under Section 15(2) which is a complete provision in itself. Section 15(1) cannot be invoked in this case. The object of this Act, the Court opined, was to promote and preserve Metis identity self- governance and culture by creating a land base for Metis. The Metis community, unlike the Indian community counterpart, lack reserves on which they could strengthen and nurture their identity, culture and self-governance. The Metis community also lack the benefits availed by the Indian communities under the Indian Act. Therefore, inclusion of self- registered Indians within the Metis community under this Act will result in dilution of Metis identity and consequently dilute the objective of the Act.[135]

[133] Supra note 14
[134] Peter W. Hogg, *Constitutional Law of Canada: 2014 Student Edition* (Carswell 2014) 55-56
[135] Supra note 14

Alberta case serves as an example of Court's deference to legislature on identification of beneficiaries of affirmative action program in Canada. Unlike the South African Court which takes into account the most dominant identity of persons from disadvantaged groups[136], Canadian Supreme Court adheres strictly to the provisions of the law and does not consider borderline cases through its interpretations.

This approach by the Supreme Court of Canada on the other hand, draws similarity with the Supreme Court of India. The backward communities in India are notified by the Order of the President with subsequent amendments through Acts of Parliament. For some community, there is no President Order but there is a central list which is prepared on the basis of an established procedure. The Supreme Court relies strictly on this Order, Acts and lists to identify backward communities for affirmative action. It does not decided upon the different effects of discrimination on communities to establish a hierarchy of suffering of discrimination. Though, there have been successful challenges to such Acts of Parliament which have not followed the procedure laid down while entering the names of the communities as backward classes.[137] However, Court did not decide in such cases as to which communities constitute backward class.

Section 15 of the Charter itself can be used to illustrate the way the Charter functions in co-ordination with legislations for furtherance of its provisions. As an example illustrated, when the judiciary declares law to be unconstitutional under Section 15, it is done on the ground that the law might have been under-inclusive.[138] This is to say, that the law has discriminated

[136] In South Africa, each disadvantaged groups is considered as bearer of different histories of marginalization and oppression. For example discrimination affects men differently from women. In *President of Republic of South Africa v. Hugo*: 1997 (6) BCLR 708 (CC), Goldstone J. opined that:
"Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context".
[137] See *Ram Singh v. Union of India* Writ Petition (Civil) No. 274 of 2014
[138] Peter W Hogg, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't such a Bad Thing After all)' [1997] 35(1) Osgoode Hall Law Journal 91-124

against a person on one of the grounds mentioned in the provision by excluding her/ him who otherwise had the constitutional right to be included. The legislature at this stage, is left with two options. It can either accommodate people who had been excluded on one of the grounds mentioned in the Charter. This can be done by extending the same benefits to the excluded group as was intended for those groups mentioned in the law.[139] The second option is to exclude every person from a particular benefit enunciated in the law on the ground of non-discrimination. Either case of extension or withdrawal of a benefit provided by law, is ultimately a policy decision by competent legislative body.[140] Extension of benefits to the excluded group depends on the importance of the objective of legislations which could justify the administrative expenditure in extension of benefits.[141] Therefore, one can claim that the extension of rights under Section 15 ultimately depends on competent legislative bodies with the judiciary checking on constitutionality of law on the ground of right to equality.

Affirmative action in Canada: Fundamental Right or exception

The status of affirmative action in a constitution determines the fate of programs initiated under it. The Canadian situation tends to produce a debate on this issue. Peter W. Hogg, in his work claims that Section 15(2) is an exception and not a clarification to Section 15(1) of the Charter.[142] Hogg argues that Section 15(2) protects affirmative action program against constitutional challenges under Section 15(1). As mentioned earlier, Section 15(1) guarantees equality and non- discrimination. In this manner, Section 15(2) permits government to practice 'reverse discrimination' by giving preferences to disadvantaged groups over persons from advantaged groups, who are either equally or are better qualified.[143] Therefore, Hogg claims that the requirement to insulate laws enacted to ameliorate the conditions of disadvantaged

[139] Supra note 138 91
[140] Ibid
[141] Ibid
[142] Supra note 134 55-54
[143] Ibid

group from Section 15(1) presumes unconstitutionality of such programs under Section 15(1) and requires saving through its isolation from Section 15(1).[144]

The claim made by Hogg can be challenged on the ground that a fundamental right can be taken away only through laws enacted by Parliament.[145] This is the common practice in all the major jurisdictions. In the Canadian case, the Charter, through Section 15(2) permits initiating affirmative action program through laws, programs or activities. While the law requires enactment by the Parliament, programs and activities can be initiated by any organ of the government and also by private employers.

Hogg cites the U.S. example to claim that in the absence of equivalent provision to Section 15(2), in the US constitution, affirmative action program faces continuous challenge under the fourteenth amendment of the Constitution.[146] He also cites *Ricci v. De Stefano*[147] to show how the legality of Civil Rights Act in US has been challenged in the absence of a constitutional provision on affirmative action.

Hogg is correct in claiming that it is precisely the absence of an explicit constitutional provision on affirmative action in US, the laws enacted and programs initiated for the furtherance of same are treated as non- integral part of fourteenth amendment. However, the presence of Section 15(2) in Canadian Charter and similar provisions in the Indian and South African constitutions set them apart from the US constitution.

Civil Rights Act, 1964 in the US gained prominence for a short period of time.[148] However, rights guaranteed under the constitution cannot be dependent on either the interpretation of the

[144] Ibid
[145] The claim that fundamental rights can be taken away only by law enacted by parliament finds mention in judicial decisions of many jurisidictions. Also See, Supra note 72
[146]Supra note 134 55-54.
[147] (2009) 557 US
[148] Affirmative action programs began to be struck down by the US Supreme Court beginning with the decision in *The Regent of the University of California v. Bakke* 438 U.S. 265 (1978)

Court in a particular manner[149] or on the whims of the legislature. It is for this reason that comparison with US on affirmative action decision has diminished value.

Regarding the status of affirmative action in Canada, as mentioned earlier, the Supreme Court of Canada, by majority opinion in *Kapp* case explicitly denied that affirmative action is exception to Section 15(1). However, the Court also mentioned that affirmative action is not mere clarification to Section 15(1) but discharges an independent function. When an affirmative program meets the requirement of Section 15(2) therefore, there is no requirement of assessment of the program for adherence to section 15(1). However, if the program does not meet the criteria mentioned in Section 15(2), then the analysis of the same under Section 15(1) becomes necessary.[150]

Conclusion

Affirmative action in Canada deserves a special appreciation for its wide ambit of reach. Similar to the South African constitutional provision, Section 15(2) explicitly furthers affirmative action through programs and activities apart from law. Also, similar to South African Constitution, the absence of the word 'State' from affirmative action provision empowers private employers to also implement affirmative action in private establishment.

Despite such wide ambit of methods mentioned in the Constitution for implementing affirmative action, the role of Executive in this context is far from being visible. The role of the judiciary has also been prominent only in phases. The only organ which has been active on this front is the legislature. Legislature, both provincial and federal, have played significant role in furtherance of equality provision even before the enactment of the Charter under which affirmative action gained constitutional status. Even after the enactment of the Charter,

[149] See for example *Schuette v. Coalition to Defend Affirmative Action* decided by the US Supreme Court on 22nd April, 2014 wherein the majority held that amending the State Constitution of Michigan to prevent affirmative action is a political process and should be respected.
[150] Supra note 134 55-54- 55-55

affirmative action has been implemented through legislations[151] though the Charter does not confer upon the legislature, the constitutional obligation to implement affirmative action. Unlike the legitimacy commanded by the constitutional court in South Africa for being the certifying organ of its Constitution, or the Executive in India by virtue of being authorised by the Constitution itslef, the legislature does not make similar claims in the Canadian case. In fact, a study of the equality jurisprudence for Canada reveals that the emergence of legislature is a consequence of the reluctance by the judiciary and the executive. Legislature in Canadian context, is not a deliberated organ of the state for implementation of affirmative action. On the contrary, it has naturally emerged as a result of non-action of the judiciary and the executive.

This situation by itself, does not prove against the separation of powers doctrine. When the constitutional provision is general in nature and is not addressed particularly to any organ of the state, the pre-existing roles played by the different organs of the State can be determinative factor regarding the implementation of constitutional provisions. In Canadian context, the general nature of affirmative action provision from the separation of powers perspective has not posed any conflict either. This is because the Courts have shown deference to the legislative provisions. They did not take the responsibility, despite legislative provisions, to determine upon notification of disadvantaged communities. Without commenting upon the outcome of this set-up, it can at least be safely asserted that affirmative action programs in Canada does not stand the risk of coming to halt due to conflict among the different organs of the State in determining backward communities.

[151] See for example The Alberta Metis Settlement Act, R.S.A. 2000, c. M-14

Chapter III: The Executive model of Affirmative Action: The Indian case

Introduction

The Indian constitution was adopted as a mark of breaking away from colonial rule and also as the beginning of a sovereign democratic state. Though the Constitution marked the beginning of political sovereignty of the Republic, the Constituent Assembly also acknowledged the need to build a socially just and equal society from within. It was realized that mere political equality was not enough to retain a nation. This sentiment of the framers of the Indian constitution is best reflected in the words of Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Indian constitution. On 25th November, 1949, he said in the Assembly:

> "On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has to laboriously built up."[152]

Affirmative action found its mention in the Indian constitution as an integral step to ensure social justice and equality. Besides the fundamental rights section, the idea of social justice on which affirmative action is premised, finds mention in the Preamble and the Directive Principles[153] of the Constitution.

Unlike South Africa, where different aspects of affirmative action are strongly entwined, the Indian scenario is different. In the Indian case, affirmative action is sought and contested on different aspects and the issues can exist independent for each other. This chapter intends to

[152] Dr. B.R. Ambedkar, Constituent Assembly of India, Vol. XI, 25th November, 1949 http://parliamentofindia.nic.in/ls/debates/vol11p11.htm 7 March, 2016
[153] The Constitution of India 1950, Art. 38 and Art. 46

argue that the affirmative action in India, from the perspective of identification of communities to be made entitled to the schemes, is heavily dependent on the role of the Executive branch of the State. Having said that, this chapter intends to establish that the accusations made on affirmative action in India that it is mere 'vote-bank' driven which is used by electoral candidates to win mandates, is ill- founded since the process of identification of communities for affirmative action in India is carried out extensively by the Executive bodies with assistance from the Parliament from time to time. The Executive, which does not have to follow electoral mandates, is the main branch of State in India that is implementing affirmative action, with the Legislature playing peripheral role in notifications of disadvantaged groups. It shall also be argued that the affirmative action schemes in India are also implemented through Executive Orders and not through Parliament. Finally, even the schemes initiated under affirmative action in India does not define the communities in particular, who are to be made entitled to the schemes. They are on the other hand, made available mandatorily, to all communities that are notified under the list of communities notified by the President of Republic and subsequently amended in a democratic manner by the Federal Parliament.

Major provisions on equality under the Indian constitution

Unlike the South African and the Canadian constitutions, the Indian constitution has multiple and detailed provisions on equality. Non- discrimination and affirmative action are both integral elements of equality. For the purpose of this study however, the affirmative action aspects of equality shall be highlighted though, more often than was imagined, affirmative action schemes in India have been challenged by the non-beneficiaries of the schemes under the provisions of non-discrimination.[154]

[154] See for example, Supra note 74

A stand-alone mention of the affirmative action provisions is insufficient to describe the gravity of inequality existing in Indian society which the Constitution sought to address through positive actions. Therefore, to provide a holistic idea of the equality provisions which include non- discrimination as well as affirmative action, Articles 14 to 16 are provided as follows:

"14. Equality before law.- The State shall not deny to any person equality before the law and equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.][155]

[(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 Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.][156]

16. Equality of opportunity in matters of public employment- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to any public office [under the Government

[155] Added by the Constitution (1st Amendment) Act 1951, s. 2
[156] Inserted by the Constitution (93rd Amendment) Act 2005, s 2

of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory][157] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

[(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion [,with consequential seniority,][158] to any class or classes of posts in the service under the State in favour of the Scheduled Caste and the Scheduled Tribe which, in the opinion of the State, are not adequately represented in the services under the State.][159]

[(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year][160]

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of any office in connection with the affair of any religious or denominational institution or any member of the government body thereof shall be a person professing a particular religion or belonging to a particular denomination."

The 'backward classes' mentioned in the Articles comprise of the SCs, STs and the OBCs as three different sets of communities. The affirmative action provisions and also the procedure for identification of communities for the purpose of affirmative action are also different for SCs and STs on one hand and the OBCs on the other.

Affirmative action schemes in India are usually implemented through Executive orders.[161] This practice by the government may be distinguished from both South African and Canadian systems where besides programs and activities, there are legislations in place to implement affirmative action. While the Executive orders themselves still face challenges in the court of law, the procedure for identification of disadvantaged groups for the purpose of affirmative action pose parallel line of challenges in the Indian context.

[157] Substituted by Constitution (7th Amendment) Act 1956, s 29
[158] Inserted by the Constitution (85th Amendment) Act 2001, s 2
[159] Inserted by Constitution (77th Amendment) Act 1995, s 2
[160] Inserted by Constitution (81st Amendment) Act 2000, s 2
[161] See Supra note 72

Other pertinent constitutional provisions on affirmative action provisions which provide for notification of Scheduled Castes and Scheduled Tribes

It can been found in the abovementioned provisions, that there are three groups of persons that are primarily eligible for affirmative action. They are- the SCs, the STs and the 'OBCs. The definition and process of notification of SCs and STs are mentioned in the Constitution. SCs and STs are to be notified by the President under the constitutional provisions.

SCs has been described in the constitution of India through Article 341.

341. Schedule Castes.- (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 or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Schedule Castes in relation to that State [or Union Territory, as the case may be].
(2) Parliament may by law include or exclude from the list of Schedule 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.

Similarly, Article 342 of the Constitution is dedicated to STs.

342. Schedule 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 tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Schedule 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 Schedule Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

The Constitution of India also directs setting up of national commissions for the SCs and STs, through explicit provisions. These Commissions are vested with the responsibility to monitor the progress of their respective communities, register incidents and issues of discrimination

and atrocities against these communities and also make significant decisions on the list of communities that shall be included or deleted from within the existing notification for SCs and STs.

Besides the constitutional definition of SCs and STs which comprise the list of of the names of the communities, it is worthwhile to note the definition of these groups by one of the National Commissions itself, set up by the Constitution. The National Commission for Scheduled Caste, in its handbook of year 2009 describes which communities qualify to be called a SCs or STs. According to the National Commission,

> "The framers of the Constitution took note of the fact that certain communities in the country were suffering from extreme social, educational and economic backwardness arising out of age-old practice of untouchability and certain others on account of this primitive agricultural practices, lack of infrastructure facilities and geographical isolation, and who need special consideration for safeguarding their interests and for their accelerated socio-economic development. These communities were notified as Scheduled Castes and Scheduled Tribes as per provisions contained in Clause 1 of Articles 341 and 342 of the Constitution respectively."[162]

The definition of SCs and STs by the National Commission is highlighted despite availability of academic definitions, in order to reveal how the Commissions which play major role in identification process, perceives SC and ST communities.

Initially, the Constitution through Article 338 provided for a constitutional post for a Special Officer for Scheduled Caste and Scheduled Tribe. However, through the 65th Constitutional Amendment in 1992, the Constitution directed setting up of National Commission for Scheduled Castes. Similar Commission has been set up for Scheduled Tribe under Article 338-A, through 89th Amendment of the Constitution in 2003. Since the provisions for Articles 338 and 338-A are similar, only the provision for Article 338 is mentioned below to avoid repetition. In Article 338-A, SCs is replaced by STs.

338. National Commission for Scheduled Castes.- (1) There shall be a Commission for the Scheduled Castes to be known as the National Commission for the Scheduled Castes.

[162] National Commission for Scheduled Castes (Handbook, 2009) 1 http://www.ncsc.nic.in/files/HANDBOOK-2009.pdf 9 March, 2016

(2) Subject to the provision of any law made in this behalf by Parliament, the Commission shall consist of a Chairperson, Vice-President and three other members and the conditions of service and tenure of office of the Chairperson, Vice- Chairperson and other Members so appointed shall be such as the President may by rule determine.

(3) The Chairperson, Vice- Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal.

(4) the Commission shall have the power to regulate its own procedure.

(5) It shall be the duty of the Commission-

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Castes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;
(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Castes.
(c) to participate and advise on the planning process of socio-economic development of the Scheduled Castes and to evaluate the progress of their development under the Union and any State;
(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
(e) to make in such report recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Castes.
(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Castes as the President may, subject to the provision of any law made by Parliament, by rule specify.

(6) The President shall cause all such reports to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non- acceptance, if any, of any of such recommendations.
(7) Where any such report, or any part thereof, relates to any matter with which any State Government is concerned, a copy of such report shall be forwarded to the Governor of the State who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendation relating to the State and the reasons for the non- acceptance, if any, of any of such recommendations.

(8) The Commission shall, while investigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub- clause (b) of clause (5), have all the powers of the civil court trying a suit and in particular in respect of the following matters, namely:-
(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;
(b) requiring the discovery and production of any document;
(c) receiving evidence on affidavit;

(d) requisitioning any public record or copy thereof from any court or office;
(e) issuing commissions for the examination of witnesses and documents;
(f) any other matter which the President may, by rule, determine.

(9) The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Castes.

(10) In this article references to Scheduled Castes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of 340, by order specify and also to the Anglo Indian community.

Various clauses in Article 338 show that it is constitutionally mandated that the National Commission shall be set up by the President of the Republic. The members of the Commission including its chairperson shall be appointed by the President. Further, the Commission shall submit its report to the President. The Union and the State governments shall have to consult the commission for policy matters related to these communities.

Except for clause 10 which appears only in Article 338, Article 338-A provides for similar provisions for STs. With respect to clause 10 of Article 338, the "other backward classes" mentioned in the clause includes the socially and educationally backward classes that are identified by the President on the basis of reports of the Commission under Article 340(1).[163]

The national commissions for SCs and STs are constitutional bodies which carries the power of civil courts for the purpose of investigation and inquiry on the matters concerning the respective groups. It is pertinent to note here that these Commissions are neither authorised nor expected to adjudicate upon rights of parties on their caste status.[164] It is also pertinent to mention here that the authority of civil court conferred upon the Commissions does not include imposing injunction on persons who act against the interest of the SCs and STs. However, they

[163] Mahendra Pal Singh, *V.N. Shukla's Constitution of India* (12th Edn., Eastern Book Company 2013) 998
[164] Ibid

have the authority to approach appropriate court seeking injunction or mandamus for protecting the interest of the abovementioned communities.[165]

Procedure for notification of Scheduled Castes and Scheduled Tribes

The notification of SC and ST communities are enumerated in The Constitution (Scheduled Caste) Order, 1950[166] and the Constitution (Scheduled Tribe) Order 1950[167] respectively, by the President of the Republic. Inclusion in and exclusion from the lists for both SC and ST communities follow rigorous process.

The communities made eligible for affirmative action under these two categories are enumerated in the Orders and the two lists are exhaustive. The communities whose names do not appear in the lists cannot make claims for reservation even though the claiming community might belong to the same caste but belong to different sub- castes. The President of the Republic, is authorised to limit the notification to parts or groups within the castes, race and tribes while specifying castes, races and tribes in the notifications. Further, the President can specify castes, races and tribes or parts thereof not for the entire state but parts of the state where he is satisfied that the examination of social and backwardness of the race, caste or tribes justifies such specification.[168] The same procedure is followed for Schedule Tribes.

It is also important to briefly mention the procedure by which communities get included in and excluded from the two lists. After the two 1950 President Orders came into force, any subsequent addition, modification or deletion of communities from the lists can be made only by an enactment by the Parliament. Any proposal made for modification of the lists has to undergo a procedure.[169] The state government/ Union Territory administrations begins the

[165] Ibid
[166]The Constitution (Scheduled Caste) Order, 1950 http://lawmin.nic.in/ld/subord/rule3a.htm 7 December 2015
[167]The Constitution (Scheduled Tribe) Order, 1950 http://lawmin.nic.in/legislative/election/volume%201/rules%20&%20order%20under%20constitution/the%20constitution%20(scheduled%20tribes)%20order,%201950.pdf 7 December 2015
[168] Supra note 163 1002-1003
[169] Press Information Bureau, Government of India Ministry of Social Justice and Empowerment, *Inclusion into SC List* (2015) http://pib.nic.in/newsite/PrintRelease.aspx?relid=115783 14 January 2016

process by making a proposal for inclusion/ exclusion, with ethnographic data as support. The proposal is made to the Registrar General of India (RGI) for her/ his comments. If the proposal is agreeable to the RGI, then it is sent to the specific National Commission. If it is not agreeable by the RGI, then the report is sent back to the state government/ Union Territory administrations for reconsideration that might present it back to the RGI after modifications. If the modified proposal is still not agreeable by RGI, then the state government might reject the proposal.[170]

Once the proposal reaches the specific national commission according to the category (whether claim is made for SC/ST), it might be rejected by the National Commission with approval of Minister for Social Justice and Empowerment. But, if the proposal is agreeable by National Commission, then it is introduced as a Bill for consideration and passing before the Parliament as required by Articles 341(2) and 342(2) of the constitution. Once the Bill is passed by both the House of the Parliament and President gives assent, the list stands amended.[171]

Thus, the procedure reflects a high level of scrutiny exercised at every stage before a Schedule Caste and Schedule Tribe community is notified in the Order.

Subsequent shift of power to the legislature under constitutional provision

While Article 16 of the Indian Constitution provided for affirmative action for the backward communities in public employment, it was felt that it was not enough to make such provisions at the stage of appointment alone. This led to the Constitution (Seventy-Seventh) Amendment Act, 1995 whereby clause (4-A) was added to Article 16.[172] Clause (4-A) authorises the State to make provision for affirmative action in matters of promotion in public employment. This provision is confined for the SC and ST communities. It does not extend to OBCs. However,

[170] The Constitution (Schedule Caste) Amendment Order, 2014 9
[171] Ibid
[172] Supra note 159

what becomes a matter of concern with this provision, from the separation of powers perspective, is the phrase,

"…..which, in the opinion of the State, are not adequately represented in the service under the State".[173]

Insertion of Article 16(4-A) and Article 16(4-B) in the Constitution was challenged before the Supreme Court of India in the case of *M. Nagaraj v. Union of India*[174] on several grounds. For the purpose of this study however, the authority conferred upon the State to determine backwardness and under-representation during promotion of Schedule Caste and Schedule Tribe candidate in each case, shall be examined.

Kapadia J. writing for the majority in *M. Nagaraj* decision, held that in every case of providing affirmative action in promotion for SC or ST candidate, the State has to show, through quantifiable data, the compelling reasons of backwardness and inadequacy of representation of the community to which the candidate seeking promotion under affirmative action belongs. This, coupled with the factor of overall efficiency in administration mandated under Article 335 of the Constitution and also ensuring that the limit of affirmative action does not exceed 50% of the total seats available, will validate the provision on reservation in promotion.[175] The Court further added that the Article 16(4-A) is an enabling provision and there is no compulsion on the State to provide for affirmative action in promotion.

Though affirmative action at promotion level in government services, was seen as a positive move towards promotion of equality, the discretionary authority conferred on the State for determination of backwardness and under-representation of communities for each case, has almost nullified the objective of the amendment.

[173] The Constitution of India 1950, A. 16(4-A)
[174] [2006] 8 SCC 212: AIR 2007 SC 71
[175] Ibid

The two issues of concern arising out of this amendment are firstly, the shift of power of determination of backwardness and under-representation of communities, from the constitutionally mandated procedure to the discretion of State, which I argue as a violation of separation of powers doctrine. Secondly, the discretion on the State to make affirmative action provisions for promotion as oppose to a mandatory obligation also, render the objective of the amendment into nullity .

The SC and ST communities, as mentioned above, are notified by the President of the Republic though the President Orders of 1950. Any modification to the two lists are made only by an Act of Parliament, the procedure for which also has already been discussed in previous section of this chapter. The list for each community therefore, is one unit. When the State on the other hand, takes upon itself to further determine backwardness and under-representation from within the existing list for the purpose of affirmative action, it amounts to sub-categorization of the SC and ST communities which is not permissible under the Constitution. It was held by the Supreme Court in the case of *Pasram v. Shivchand*[176] that in order to determine whether a particular caste is a SC within the meaning of Article 341, one has to look into the notification made by the President under the President Order, including its subsequent amendments from time to time. It is not open for the Court to scrutinize on evidence as to whether a person who is described as one caste falls within that specified caste.[177]

It was also opined by the Supreme Court in a Constitution bench[178] decision in case of *E.V. Chinnaiah v. State of Andhra Pradesh*[179], that the Constitution itself defines the members of Schedule Castes as an integrated class of most backward citizens. Therefore, any executive action or legislative enactment which interferes with the Presidential list will be violative of Article 341 of the Constitution. Hegde, J. justified his observation by mentioning that though

[176] [1969] 1 SCC 20
[177] Supra note 163 1002.
[178] Five or more judges bench in Supreme Court of India
[179] [2005] 1 SCC 394

Article 342 of the Constitution defines ST, Article 330(1)(b)(c) separately defines the STs in the autonomous districts of Assam. This goes on to show that the framers of the Constitution wanted a separate category for these STs and have by themselves, expressly mentioned this in the Constitution. They did not leave this to the legislature or government to make any sub-classification. Subsequently, in the case of *Ashok Kumar Thakur v. Union of India*[180], it was clarified by the Supreme Court that elimination of affluent communities among SCs and STs shall be done by the Parliament after consultation with the National Commissions appointed by the President as has been mentioned in a previous section of this chapter.

Consequences of the disturbance in separation of powers principle for affirmative action in promotion

Though on constitutional principle, it appears as a violation of separation of powers, it is not confined to theoretical conflict among the organs of the State. It, on the other hand, has attracted adverse practical implications for the candidates who sought to avail affirmative action at the time of their promotions in public services.

The Supreme Court in *Uttar Pradesh Power Corporation v. Rajesh Kumar and Ors.*[181] has nullified promotion of persons from SC communities on the ground that the State in this case has failed to show adequate proof of backwardness and under-representation of the communities of the persons who got promotion under the affirmative action scheme. In this case, Deepak Misra, J. has read Article 16(4-A) of the Constitution to be requiring '*quantifiable data'* as an absolute and non- negotiable requirement for ascertaining backwardness, inadequacy of representation and overall efficiency in administration.

The Constitution does not demand the need of a set of quantifiable data as an absolute requirement for ascertaining the parameters of backwardness though it has been laid down in

[180] [2008] 6 SCC 1
[181] [2012] 7 SCC 1

M. Nagaraj decision. However, despite this point being raised by the state counsels, the Court in *Uttar Pradesh* case opined that though the vesting of power by an enabling provision might be constitutionally valid, yet its implementation by the State can be arbitrary and will be liable to be struck down in absence of '*quantifiable data'* being produced by the state as evidence.[182] The main issue in this case was not non-availability of data. On the other hand, the issue was regarding the correctness of methodology applied to obtain this data.

The Constitution, through Articles 338, 338A, 341 and 342 provides for procedure for notification of SC and ST communities for affirmative action. An additional method which further classifies among these communities for the purpose of promotion, using alternate methods are vulnerable to challenges.

In the wake of repeated nullification by the Supreme Court, of affirmative action in promotion on the ground of disputed methodology of ascertainment by State resulted in the drafting of the Constitution (One Hundred and Seventeenth) Amendment Bill, 2012. This Bill through Section 2 sought to amend clause (4-A) of Article 16 to state:

> "(4-A) Notwithstanding anything contained elsewhere in the Constitution, the Scheduled Castes and the Scheduled Tribes notified under article 341 and article 342, respectively, shall be deemed to be backward and nothing in this article or in article 335 shall prevent the State from making any provision for reservation in matters of promotions, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes to the extent of the percentage of reservation provided to the Scheduled Castes and the Scheduled Tribes in the services of the State.".[183]

The main objective behind this amendment was to do away with the determination of backwardness, under-representation and overall efficiency of administration by State, in each case of promotion of a SC or ST candidate. Therefore, if Article 16(4-A) could be successfully amended, then a SC or a ST candidate would be deemed backward for the purpose of promotion

[182] Supra note 172

[183] The Constitution (One Hundred Seventeenth) Amendment Bill 2012, s 2 http://www.prsindia.org/uploads/media/117%20Amendment/Bill%20Text%20Const%20117th%20Amendment%20Bill%202012.pdf 2 December 2015

and communities notified in composite singular list for both SC and ST shall be eligible for affirmative action in promotion . In effect, this amendment sought to restore the separation of powers among the organs of the State which had been disturbed by the insertion of existing Clause (4-A).

The Bill, in its 'Statement of Object and Reason' acknowledged that there are difficulties in collection of quantifiable data showing backwardness and inadequate representation of communities in public employment.[184] The Bill also acknowledged that there are uncertainties and disputes on the methodology of collecting the quantifiable data for the purpose.[185]

Though the Bill was passed by Rajya Sabha, that is the Upper House of Parliament[186], it could not be introduced in Lok Sabha (The House of People) due to opposition from members of Parliament. This subsequently resulted in the lapse of the Bill.

Initially, the Supreme Court struck down reservation in promotion on the ground of disputed methodology of quantifiable data. Subsequently, for many provinces, the State did not record quantifiable data for the purpose of ascertaining backwardness, inadequacy of representation and overall efficiency for the purpose of reservation in promotion.

There was a writ petition before the Supreme Court of India seeking mandamus to direct the State to implement Article reservation in promotion.[187] The Court was however, of the opinion that reservation in promotion is an enabling provision of the State and not a mandatory provision. Moreover, relying upon the decision of the Supreme Court in the case of *Managing Director, Central Bank of India and Ors. V. Central Bank of India SC/ ST Employees Welfare Associations and Co.*[188], it held that there must be existence of a provision for reservation for

[184] Supra note 183, Statement of Object and Reason
[185] Ibid
[186] See The Constitution (One Hundred Seventeenth) Amendment Bill 2012 (as passed by the Rajya Sabha) http://www.prsindia.org/uploads/media/117%20Amendment/Constitution%20117th%20passed%20by%20RS.pdf 28 March, 2016
[187] *Suresh Chandra Gautam v. State of Uttar Pradesh* Writ Petition (Civil) No. 690 of 2015
[188] (2015) 1 SCALE 169

selection in promotion, for seeking mandamus.[189] That is, writ of mandamus can be sought if the State has erred in implementing a provision. The case in hand deals with grievance pertaining to inaction of the State in not collecting quantifiable data as is required for the purpose of reservation in promotion. Hence, a writ of mandamus cannot be issued in this case. Also emphasizing upon the discretionary nature of Article 16(4-A), the Court opined that directing the State to implement an enabling provision will amount to legislation by the Court.[190]

From the cases mentioned above, it is evident that disturbance of the separation of powers doctrine even through a procedurally valid constitutional amendment might adversely affect implementation of a constitutional provision. In the case of SCs and STs, the restoration of powers to the respective organs of the State is necessary for implementation of affirmative action in promotion. Therefore, the passing of the Constitution (One Hundred Seventeenth) Amendment Bill is both constitutionally necessary and desirable.

Constitutional provisions for notification of 'Other Backward Classes'

Unlike the SCs and STs, the Constituent Assembly witnessed serious debates on the definition of OBCs.[191] Some members of the Assembly strongly felt that providing reservation to backward classes other than SCs will seriously jeopardise the prospects of SCs in getting reservation in government services.[192] Some other members expressed serious doubts on the vagueness and ambiguity associated with the term 'backward' in the context of Indian society.[193] However, some members like Shri K.M. Munshi argued that every community which are really backward should be availed with reservation. The definition and scope of the

[189] Supra note 187 [41]
[190] Ibid
[191] See generally Jayant Lakshmikant Aparajit, *Equality and Compensatory Discrimination under the Indian Constitution* (Dattsons 1992) 149- 168
[192] See H.J. Khandekar, Constituent Assembly of India (Vol. VII). 691- 692
[193] See Mohames Ismail Saheb, Constituent Assembly of India (Vol. VII) 692- 693

word 'backward' cannot be restricted and confined to particular community.[194] Instead of restricting the definition of 'backward' to the lowest social, economic and political layer of the society, Shri K.M. Munshi, asserted that the safety associated with the word 'backward' is that it is comprehensive and inclusive and covers all those communities who are in need of protection under the constitution.[195]

Though Shri T.T. Krishnamachari, another member of the Constituent Assembly, stated that the term 'backward' has to be interpreted by some supreme authority, Dr. Ambedkar clarified the authority that is supposed to interpret the term 'backward'.[196] Dr. Ambedkar stated that as follows:

"Somebody asked me: "What is a backward community?" Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My honourable friend Mr. T.T. Krishnamachari asked me whether this rule will be justifiable. It is rather difficult to give a dogmatic answer. Personally, I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or State Government has acted in a reasonable and prudent manner."[197]

For the 'Other Backward Classes' or the 'socially and educationally backward classes' mentioned in the provisions in Articles 15 and 16, the Constitution initially provided for appointment of commissions from time to time to look into the matters concerning these classes of people.

Article 340 of the Constitution provided as follows:

340. Appointment of a Commission to investigate the conditions of backward classes.- (1) The President may by order appoint a Commission consisting of such persons as he thinks fit

[194] K.M. Munshi, Constituent Assembly of India (Vol. VII) 696- 697
[195] Ibid
[196] Supra note 191 159
[197] Dr. B.R. Ambedkar, Constituent Assembly of India (Vol. VII) 700- 702

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.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each house of Parliament.

The appointment of commission under Article 340 however, is not prerequisite for discharge of function by the State under Article 15(4) or 16(4). Article 340(1) provides recommendation to Union and State government who may implement them at their discretion.[198]

Legislative provisions on 'Other Backward Classes':

Prior to the establishment of a permanent statutory body under the National Commission for Backward Classes Act, 1993, the Commissions for Backward classes were temporary appointments. Historically, there have been two appointed commissions for backward classes under Article 340. The Kaka Kalelkar Commission set up in 1953, 3 years after the coming into force of the Constitution, was a failure.[199] This was because, as admitted later by Kaka Kalelkar, there was a sharp divide among the members of the Commission regarding the yardsticks of backwardness to be taken into consideration while identifying backward communities. Therefore, the recommendations of this commission was not implemented.

Subsequently, another commission was appointed under the Chairmanship of B.P. Mandal in 1978[200], the recommendation of which marked the watershed moment in the history of

[198] Supra note 163 1001

[199] Kaka Kalelkar Commission Report recommendations were never implemented.

[200] Report of the Backward Class Commission (Vol. I & II, 1980) http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf

affirmative action in India. Though, the report was submitted in 1980, it was put into action only in 1990 when the government decided to implement the recommendations of Mandal Commission Report[201] which recommended reservation of 27% jobs in Central services and public undertakings, for backward classes.[202] This recommendation too, was implemented by a notification dated 13th August, 1990.[203]

Finally in 1993, the permanent statutory body was set up under the National Commission for Backward Classes Act, 1993. It is pertinent to mention here that for the backward classes, the Central Government which comprise of the legislature too, are comparatively more involved as compared to the SC and ST Commissions. However, a reading of the legislation along with Article 340 of the Constitution shall reveal that with the amendment of the Constitution and the enactment of the legislation, identification of communities for the OBCs are not solely left on the local government as was mentioned in the Constituent Assembly.

A reading of the provisions of the Act might help in ascertain the involvement of legislature. But prior to this exercise, it is pertinent to highlight the definition of 'backward classes' under this Act. As per section 2(a):

""backward classes" mean such backward classes of citizens other than the Scheduled Castes and the Scheduled Tribes as may be specified by the Central Government in the lists."

The list, under this Act is defined in section 2(c) which states:

""list" means lists prepared by the Government of India from time to time for purpose of making provision for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of Government of India."

http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%202nd%20Part%20%20English635228722958460590.pdf 28 November 2015

[201] Ibid

[202] Ibid

[203] National Commission of Backward Classes (G.I., Dept. of Per. & Trg., O.M. No. 36012/31/90- Est. (SCT), Annual Report of, 2012- 2013, Annexure I) 71- 72 http://www.ncbc.nic.in/Writereaddata/AR%202012-13%20Pandey635705824205955927.pdf 9 March 2016

Instead of the President of the Republic, as is the case for National Commissions for Scheduled Castes and Scheduled Tribes, the Central Government appoints the members of the Backward Class commission. However, a composition of the members of the Commission shall reveal that it is not under the control of the Central Government once it is constituted. Section 3(1) provides that the Central Government shall constitute the body of the commission. However, section 3(2) provides that Central government shall nominate the Chairperson who is or has been a Judge of the Supreme Court or the High Courts. The Commission shall also comprise of one social scientist and two persons who have special knowledge in the matters related to backward classes. Finally, the Commission requires a Member secretary who has been an officer with the Central Government.

It is seen from political appointment of judges in many countries that the appointment by Central Government does not necessarily lead to curtailment of independence of a body. The requirement of the Chairman to be a judge of an appellate court shows that commission is to be headed by a current or former member of the judiciary. While the three other members that is, a social scientist and two persons with special knowledge about backward classes are to be appointed on the basis of their involvement with backward class issues, the member secretary is required to be an officer of the Central Government. Officers of Central Government are public servants and are not members of political parties.

Section 9 of the Act through clause 1, confers upon the Commission, the authority to examine requests for inclusion in the list. The Commission has also been conferred with the authority to hear complaints about over inclusion or under inclusion of backward classes from the list and advise the Central Government from time to time. Section 9(2) provides that the advise of the Commission shall be ordinarily binding on the government.

This means that the government needs to furnish reasons for its disagreement with the commission in case it holds contrary view to that of the Commission. In one such case, *Ram Singh v. Union of India*[204], the Supreme Court of India struck down the inclusion of *Jat* community from the list of backward classes holding that since the of the Commission had advised against inclusion of the community in the list of OBCs after examining their case, the inclusion of the community in the list by Central Government is unconstitutional.[205]

At present, the Backward Class commission lists is drawn by Central Government which comprise of individual state lists.[206] However, initially when the Mandal Commission was sought to be implemented through Government Order by reserving 27% seats in government services, the list of OBC comprised of those communities whose names appeared both in the list of the respective state government and the recommendation of the Mandal commission.

Minimal level of involvement of the legislature and judiciary in the procedure of notification of backward class communities:

Minimum level of legislative involvement

The list of constitutional provisions related to affirmative action in India reveals that the procedure for notification of communities and even matters related to the interest of these communities are initiated by the Executive bodies which is often led by the President of the Republic. Beginning from the notification of the communities in respective Lists to the appointment of people in the National Commissions for Scheduled Castes and Scheduled Tribes are carried out by the President of the Republic. It is true that any inclusion in or exclusion from the already existing list of communities, requires an enactment by the

[204] Supra note 137
[205] Ibid
[206] National Commission for Backward Classes, *Central List of OBCs* http://www.ncbc.nic.in/User_Panel/CentralListStateView.aspx 15 March 2016

Parliament. But the procedure involved shows that the role played by Parliament in the process is marginal.

The Executive model of affirmative action in India followed by the authority conferred on the Parliament instead of Legislative Assemblies (provincial legislature), has been a deliberate decision by the members of the Constituent Assembly. The main idea behind this Executive model of affirmative action has been to ensure objective analysis of the conditions of the communities for the purpose of affirmative action. It is imperative to understand why a Constitution which intends to guarantee democracy at the lowest level of village Panchayats (village councils), explicitly provides immunity to affirmative action from interference of local level government.

The apprehension with leaving the decision of deciphering beneficiaries of affirmative action by the local government, was expressed in the Constituent Assembly Debate by a distinguished Member of the Assembly. His arguments supporting his apprehension later found mention even in Supreme Court decision[207]. In the words of Muniswamy Pillai:

"…..I am grateful to the Drafting Committee and also the Chairman of that Committee for bringing the second portion of it very clear, that in future, after the declaration by the President as to who will be the Schedule Castes, and where there is need for including any other class or to exclude anybody or any communities from the list of Schedule Castes that must be by the word of Parliament. I feel grateful to him for bringing in this clause, because I know as a matter of fact, when Harijans [Scheduled Castes] behave independently or asserting their right on some matter, the Ministers of provinces not only take note and actions against those members but they bring the community to which that particular individual belongs; and thereby not only the individual, but also the community that comes under that category of Scheduled Castes are harassed. By this provision, I think the danger is removed".[208]

[207] See E.V. *E.V. Chinnaiah v, State of Andhra Pradesh* (2005) 1 SCC 394
[208] Supra note 207 (Hegde J)

Minimum level of judicial involvement

On the basis of the debates in the Constituent Assembly, it is argued that the members had reposed faith in the Court of law to monitor the laws on reservation.[209] Since the ascertainment on the backward communities were left to the respective State governments, it was expected of the respective governments to implement affirmative action schemes in the true spirit of the Constitution. In case of failure therefore, the persons who are aggrieved by such schemes can move the Court on the ground of constitutional validity of the schemes.[210]

While it is true that from the time of the coming into force of the constitution till present, the Supreme Court of India has shaped the jurisprudence surrounding affirmative action, the Court has mostly confined its jurisdiction to the provisions of Articles 15(4) and 16(4) of the Indian Constitution.

As mentioned earlier, in Indian context, adjudication on affirmative action related issues run independent from adjudication related to designated groups. This situation in India can be distinguished clearly from the South African context where the constitutional court plays an important role in adjudication of both the issues. Moreover, both the issues in the affirmative context in South Africa are intrinsically connected rather than being independent.

Even when any person has moved the Supreme Court regarding the assessment of her/ his eligibility as members of a backward class community, the Court has referred to the notification by the President to ascertain eligibility of a person within the notified communities.[211]

In some occasions, the Supreme Court of India has been assigned upon the task to adjudicate upon the 'backwardness' of a community for the purpose of being included in the notified

[209] Supra note 191 169
[210] Ibid
[211] See for example *Bhaiyalal v. Harkishan Singh:* AIR 1965 SC 1557; *Bhaiya Ram Munda v. Anirudh Patar:* (1970) 2 SCC 825

list.[212] In such cases too, however, the Court has confined itself to deciphering whether the advise of the National Backward Class Commission was followed by the Central Government when making notification.

Conclusion

Most studies on affirmative action under Indian Constitution remains confined to interpretation and analysis of Articles 15 and 16 which authorises the State to make special provisions for backward communities. Critics of affirmative action have often claimed that these provisions are misused by the electoral parties to gain mandates from the backward communities who comprise of a significant part of the population. Such claims are based on the presumption that affirmative action programs solely rest on the discretion of the legislature. Some constitutional amendments[213] coupled with some Supreme Court decisions based on those amendments[214], might further add to such presumption. However, one needs to take note of the complete set of provisions in the Indian Constitution to understand the mechanism under which affirmative action functions. In the Indian context, affirmative action is heavily based on Executive actions. Also, apart from the involvement of the Executive through the President of the Republic, the setting up of independent national commissions provided for in the Constitution also aims at more accurate identification of backward communities thereby avoiding conflict of interest on electoral fronts. The members appointed in these commissions are not members of Parliament but are required to be specialists on the backward community issues and are more competent to make analysis on the conditions of these communities. Also, the appointment of the members of the Commission by the President of the Republic by itself is intended to ensure non- biased

[212] See for example, Supra note 137
[213] See for example Supra note 159
[214] Supra note 181

decisions in appointments and also non- biased notification of backward communities by the appointed members.

Affirmative action in Indian context, though heavily based on Executive model, also requires involvement from the other two organs of the State. The legislature makes general laws on affirmative action from time to time. The executive undertakes the task of notifying the backward communities from time to time and also generating periodic information on the conditions of these communities, to the President. Apart from this, the implementation of affirmative action in India has largely been through executive orders which have been upheld by the Supreme Court as constitutional.

The national commissions on backward communities are responsible for facilitating the procedure of inclusion in and exclusion from the different list of backward communities on receiving such request as is required by the procedure. Also, the National Commission for Backward Classes, on its own, every ten years, need to produce a revised list of OBCs based on its investigations on the existing conditions of the communities and also changes if any that has happened for any community. The Court on the other hand, monitors the smooth functioning of the other two organs of the State on this issue. It ensures that neither organ of the State oversteps its jurisdiction and that they function within the authority conferred on them.[215] The Court in many cases, have even imposed self-restraint against directing the other organ of the State to fulfil their obligation of providing affirmative action to SC and ST communities in promotion.[216]

[215] In *E.V. Chinnaiah v. State of Andhra Pradesh*, the Court prohibited the legislature from selecting communities among SCs and held that sub- categorization from the SC list is not permissible. In *Ram Singh v. Union of India*, it declared the inclusion of a community by the Central Government in the list of OBC as unconstitutional since the National Commission for Backward Classes had advised against doing the same, after examination of the condition of the community.

[216] Supra note 187

Unlike South Africa and Canada, the affirmative action provisions in India is detailed and are mentioned explicitly in the Constitution. Therefore, it restricts any organ of the State in claiming better competence or superiority as compared to other organs of the State, for implementation of such provisions. No organ can take initiative on its own for implementation of affirmative action on the ground that it is more active and can take the lead and that other organs of the state are not fulfilling their duties. This is because the Constitution of India through its provisions, have strictly defined the roles of each organ of the State and even that of the independent National Commissions set up under the direction of the executive and the central government. Any stand-alone amendment subsequently made[217] to the Constitution creates an internal conflict among the organs of the State resulting in striking down of such affirmative action programs by the State.[218] It is required therefore, to restore the functions of each organ of the State as was provided for in the Constitution. This is not to disregard constitutional amendments made on affirmative action in India. On the other hand, it is strongly urged to restore the harmonious role played by the different organs of the State through Constitution (One Hundred Seventeenth) Amendment Bill, 2012. This amendment shall revert back to single notification lists for SCs and STs and the State for the purpose of affirmative action in promotion, shall deem all SCs and STs as deemed backward instead of coining separate tests to determine further their backwardness. It is because of this extreme backwardness itself as compared to the other sections of the society, that sub-categorization of these two communities had been declared unconstitutional by the Supreme Court whereas exclusion of 'creamy layer' among OBCs has been declared as valid and constitutional. There is therefore, a need to confer the authority on the Executive and the National Commissions

[217] For example the Constitution (Seventy Seventh) Amendment, 1995 inserting Article 16(4-A) in the Constitution authorised the State to make affirmative action provisions for SCs and STs in government services only after taking into account the backwardness and under-representation of the community, and overall efficiency of the administration under Article 335 of the Constitution.

[218] See *Uttar Pradesh Power Corporation* case where the Court held that the quantifiable data produced by the State for the purpose, is not acceptable due to error in the methodology by which it has been made etc.

alone, set up for these communities, to exercise their competence for notification of the backward communities without interference by the State outside their scope. Besides restoring the separation of powers defined by the Constitution, this step shall also prevent vagueness of State actions and confer more faith on the non- biased functioning of affirmative action programs.

Conclusion

Affirmative action programs aim at a just and egalitarian society through special provisions and considerations for the disadvantaged communities. These special provisions neither take the form of privilege nor the form of charity. Affirmative action programs have been introduced in some of the democratic constitutions of the world as an element of fundamental rights for those communities whose oppression has not been natural outcomes but has been the consequences of social construct. However, since the adoption of affirmative action measures in different constitutions, the privileged communities who could not avail themselves of affirmative action, have criticised this measure. Taking the South African example which has introduced affirmative action as late as 1996, a huge amount of literature has been generated on the failure of affirmative action programs in South Africa.

It is often claimed by the privileged communities such as the white minorities in South Africa or the 'upper caste' general category communities in India, that affirmative action is availed by the affluent class of people from these backward communities and those who are truly deserving of affirmative action are deprived of it. Therefore, affirmative action on the basis of identity should be abolished.

It is true that there are affluent classes in every backward community that avail affirmative action. However, discrimination has been strongly identity based and the constitutions through affirmative action does not aim at eradicating poverty. Rather it aims at abolishing discrimination. There are claims in all the jurisdictions that affirmative action under constitutions provide for vague provisions and wide discretionary power to the State to frame affirmative action programs according to their electoral convenience. It is also claimed that identity based affirmative action fails to reach out to those among backward communities who are really deserving of it.

This study intends to establish that affirmative action are not consequences of momentary concern for equality. In all the three jurisdictions which have been the subjects of this study, affirmative action provisions in the respective Constitutions have been an issue strongly deliberated upon by the framers of the constitutions.

It is true that the level of details on the functioning of affirmative action vary with jurisdictions. However, since the adoption of their constitutions, each jurisdiction has developed a distinct model of affirmative action program under the separation of powers doctrine. In each jurisdiction, one organ of the State has taken the lead for implementing affirmative action. The emergence of a leading organ of the State in different jurisdictions has been either a consequence of constitutional provisions or historical and general constitutional set-up in the jurisdiction.

The Indian Constitution for example, provides for detailed unambiguous division of authorities on the different organs of the State and independent commissions, for the purpose for implementation of affirmative action. Other jurisdictions like South Africa and Canada does not find such detailed conferment of authority in their Constitution and Charter respectively.

Even then, the affirmative action programs in these two jurisdictions cannot be termed as vague. In Canadian context for example, the legislature has taken the leading role in implementing affirmative action with judiciary paying deference to the actions of the legislature. In the South African context, the conferment of power of judicial review by the Constitution from a system of parliamentary sovereignty, has resulted in emergence of judiciary as leading organ for implementation of rights based legislations including affirmative action. In spite of detailed provisions in legislations, South African judiciary has developed its own jurisprudence on this issue.

This study does not aim at claiming superiority of one model of affirmative action over the others. In fact, the study of these three jurisdictions has revealed different sets of problems witnessed by all the three States in implementing affirmative action. For example, on the ground of stagnancy in notification of the President Orders for SCs and STs in India, there has been a shift of power in the hands of the legislature through a constitutional amendment, to determine in each case of affirmative action even from the extremely backward communities, their backwardness and inadequate representation. This, followed by the repeated striking down by the Court of any affirmative action made by the State, on the ground that it has adopted incorrect methodology for deciphering backwardness etc., has heavily impaired implementation of affirmative action programs.

The idea therefore is not to shift authority from one organ of the State to the other on the ground of inaction. In the Indian context for example, the Executive has been deciphered by the framers of the Constitution as the most competent and non-biased organ of the State for the purpose of notification of backward communities. The issue of stagnation can be addressed by active implementation of the inclusion and exclusion procedure for communities from lists by respective commissions. More rigorous involvement by the President of Republic on this issue shall also make the process more dynamic. The requirement is therefore, to ensure that the commissions function properly and submit reports on time rather than making amendment to the Constitution and disturb the equilibrium of authority established through the separation of powers principle.

At least for India, the detailed provisions mentioned in the Constitution, coupled with the adoption of the proposed Constitution (One Hundred Seventeenth) Amendment, shall restore balance of power and result in effective implementation of affirmative action.

As for South Africa and Canada, the coming into force of the Constitution and the Charter respectively, has been fairly recent. Development of jurisprudence happens only with time. Both South Africa and Canada have developed their distinct jurisprudence on affirmative action. Though the issue of non- discrimination has been very actively dealt with in both the jurisdictions, affirmative action cases before the courts in both the jurisdiction has been rare. With time, both South Africa and Canada have developed distinct approach towards the implementation of affirmative action. With the cases available in hand, one can distinctly decipher the functioning mechanism of affirmative action in both jurisdictions. However, more number of cases might be helpful in establishing a stable pattern for affirmative action cases. Unlike India, Canada and South Africa are more vulnerable to conflict among different organs of the State. This is because their constitutions do not provide specific authority to an organ for implementation of affirmative action. Therefore, one needs to wait to analyse if these models are effective and result in smooth implementation of affirmative action programs, without interference by other organs of the state.

Bibliography

Constitution, Laws, Rules, Orders and Commission Reports

The Canadian Charter of Rights and Freedom 1982
The Constitution of India 1950
The Constitution of the Republic of South Africa 1996
The Alberta Metis Settlement Act, R.S.A. 2000, c. M-14
The Broad Based Black Employment Equity Amendment Act 2013
The Canadian Bill of Rights 1960 S.C. 1960, c. 44
Canadian Human Rights Act 1985
Employment Equity Act 1995 (Canada)
The Employment Equity (Amendment) Act 2014 (South Africa)
The Constitution (Scheduled Caste) Order, 1950 http://lawmin.nic.in/ld/subord/rule3a.htm
The Constitution (Schedule Caste) Amendment Order, 2014
The Constitution (Scheduled Tribe) Order, 1950
http://lawmin.nic.in/legislative/election/volume%201/rules%20&%20order%20under%20constitution/the%20constitution%20(scheduled%20tribes)%20order,%201950.pdf
The Constitution (One Hundred Seventeenth) Amendment Bill 2012
http://www.prsindia.org/uploads/media/117%20Amendment/Bill%20Text%20Const%20117th%20Amendment%20Bill%202012.pdf
The Constitution (One Hundred Seventeenth) Amendment Bill 2012 (as passed by the Rajya Sabha)
http://www.prsindia.org/uploads/media/117%20Amendment/Constitution%20117th%20passed%20by%20RS.pdf
The Constituent Assembly of India (Lok Sabha Publication 2015 Reprint)
Minister of Supply and Services Canada, *Equality in Employment: A Royal Commission Report* (1984) 17 http://www.bakerlaw.ca/wp-content/uploads/Rosie-Abella-1984-Equality-in-Employment.pdf

Report of the Backward Class Commission (Vol. I & II, 1980)
http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf
http://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%202nd%20Part%20%20English635228722958460590.pdf

Books

Aparajit Jayant Lakshmikant, *Equality and Compensatory Discrimination under the Indian Constitution* (Dattsons 1992)

Hogg Peter W., *Constitutional Law of Canada: 2014 Student Edition* (Carswell 2014) 55-56

Lakshmanan AR and others Ed., *Durga Das Basu Shorter Constitution of India* (Fourteenth edn, Lexis Nexis 2015)
Roux Wessel le, 'Descriptive Overview of South African Constitution and Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Vijeon (eds.), *Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, (PULP 2013) 139

Singh Mahendra Pal, *V.N. Shukla's Constitution of India* (12th Edn., Eastern Book Company 2013)

Webber Jeremy, *The Constitution of Canada: A Contextual Analysis*, (Hart Publishing Oxford and Portland, Oregon 2015)

Articles

Agocs Carol, 'Affirmative Action, Canadian Style: A Reconnaisance', Canadian Public Policy, [1986] 12(1) 148- 162

Budeli Mpfariseni, 'Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994', (Twenty Years of South African Constitutionalism, New York Law School 14th November, 2014)

Drumbl MarkA and JohnDR Craig, 'Affirmative Action in Question: A Coherent Theory for Section 15(2)' [1997] 4(1) Review of Constitutional Studies 80- 123

Hogg Peter W, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't such a Bad Thing After all)' [1997] 35(1) Osgoode Hall Law Journal 91-124

Hucker John, 'Affirmative Action Canadian Style: Reflections on Canada's Employment Equity Law' in Titia Loenen and Peter R. Rodrigues (eds), *Non- Discrimination Law: Comparative Perspectives* (Martinus Nijhoff Publishers 1999)

Jagwanth Saras, 'Affirmative Action in a Transformative Context: The South African Experience' [2004] 36(3) Connecticut Law Review 725- 746

Lepofsky M David, 'The Canadian Judicial Approach to Equality Rights: Freedom Ride or Rollercoaster?' [1992] 1 National Journal of Constitutional Law 1-408 317

Michelman Frank I, 'Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa', [2004] 117 (5) Harvard Law Review 1378-1419

Mushariwa M, 'UNISA v. Reynhardt [2010] 12 BLLR 1271 (LAC): Does Affirmative Action Have a Life Cycle?', [2012] 15 (1) Potschefstroom Electronic Law Journal 412- 428

Pretorious JL, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence', [2010] 26 South African Journal on Human Rights 536-570

Singh MP, 'Are Articles 15(4) and 16(4) Fundamental Rights? ' [1994] 3 Supreme Court Cases (Journal) 33

Singh MP, 'Ashok Kumar Thakur v Union of India: A Divided Verdict on an Undivided Social Justice Measure' [2008] 1(2) NUJS Law Review 193- 21

Electronic Sources

Employment Equity- Myths and Reality <http://www.labour.gc.ca/eng/standards_equity/eq/pubs_eq/myths.shtml> 9 December, 2015

Frequently Asked questions in government services <http://jobs-emplois.gc.ca/centres/faq-eng.htm> 10 December 2015

National Commission of Backward Classes (G.I., Dept. of Per. & Trg., O.M. No. 36012/31/90- Est. (SCT), Annual Report of, 2012- 2013, Annexure I) 71- 72
http://www.ncbc.nic.in/Writereaddata/AR%202012-13%20Pandey635705824205955927.pdf
National Commission for Backward Classes, *Central List of OBCs*
http://www.ncbc.nic.in/User_Panel/CentralListStateView.aspx
National Commission for Scheduled Castes (Handbook, 2009)
http://www.ncsc.nic.in/files/HANDBOOK-2009.pdf

Press Information Bureau, Government of India Ministry of Social Justice and Empowerment, *Inclusion into SC List* (2015)
http://pib.nic.in/newsite/PrintRelease.aspx?relid=115783

Table of Cases

A.B.S.K. Sangh v. Union of India AIR 1981 SC 298

Alberta (Aboriginal Affairs and Northern Development) v. Cunningham 2011 SCC 37, [2011] 2 SCR 670

Andrews v. Law Society of British Columbia [1989] 1 SCR 143

Ashok Kumar Thakur v. Union of India [2007] 4 SCC 361

Bhaiyalal v. Harkishan Singh: AIR 1965 SC 1557

Bhaiya Ram Munda v. Anirudh Patar: (1970) 2 SCC 825

Bliss v. Canada (Attorney General) [1979] 1 SCR 183

Canada (Attorney General) v. Lavell [1974] SCR 1349

Champakam Dorairajan v. State of Madras AIR 1951 SC 226

Chinese Association of South Africa v. The Minister of Labour 59251/ 2007

Curr v. R. [1972] SCR 889

E.P. Royappa v. State of Tamil Nadu [1974] 4 SCC 3

E.V. Chinnaiah v. State of Andhra Pradesh (2005) 1 SCC 394

Federation francaise de gymnastique, [2008] Conseil d' Etat, req. n. 359219

Fourie v. Provincial Commissioner of the SAPS (Northwest Province) [2004] 9 BLLR 895 LC

Harksen v. Lane No. and Others 1998 (1) SA 300 (CC)

Independent Municipal and Allied Trade Union v. Greater Louis Trichardt Local Council (2000) 21 ILJ 1119 (LC)

Indra Sawhney v. Union of India AIR 1993 SC 477

Law v. Canada (Minister of Employment and Immigration) [1999] 1 SCR 497

M. Nagaraj v. Union of India [2006] 8 SCC 212

M.R. Balaji v. State of Mysore AIR 1963 SC 649

Managing Director, Central Bank of India and Ors. V. Central Bank of India SC/ ST Employees Welfare Associations and Co. (2015) 1 SCALE 169

Minister of Finance, The Political Office Bearers Pension Fund v. Frederik Jacobus Van Heerden [2004] 6 SA 121 (CC)

Ontario Human rights Commission v. Simpson Sears [1985] 2 SCR 536

Pasram v. Shivchand [1969] 1 SCC 20

President of Republic of South Africa v. Hugo: 1997 (6) BCLR 708 (CC)

Pretoria City Council v. Walker 1998 (2) SA 363 (CC)

Prinsloo v. Van der Linde and Another 1997 (3) SA 1012 (CC)

Public Servants Association of South Africa v. Minister of Justice and Others 1997 (3) SA 925 (T)

R. v. Kapp [2008] 2 SCR 483

Ram Kumar Gijroya v. Delhi Sub. Service Selection: Civil Appeal No. 1691 of 2016

Ram Singh v. Union of India Writ Petition (Civil) No. 274 of 2014

Ricci v. De Stefano (2009) 557 US

S v. Makwanyane 1995 (3) SA 391 (CC)

Solidarity obo Barnard v. South African Police Service [2014] 2 SA 1 (SCA)

State of Kerala v. N.M. Thomas AIR 1976 SC 490

State of Kerala v. Roshana T.P. Kumari [1979] 1 SCC 572

Suresh Chandra Gautam v. State of Uttar Pradesh Writ Petition (Civil) No. 690 of 2015

The Regent of the University of California v. Bakke 438 U.S. 265 (1978)

United States v. Carolene Products 304 U.S. 144 [1938]

Uttar Pradesh Power Corporation v. Rajesh Kumar and Ors [2012] 7 SCC 1

Winnipeg School Division No. 1 v. Craton [1985] 2 SCR 150