CHAPTER 2

AFFIRMATIVE ACTION, CONSTITUTIONAL PROVISIONS, AND INTERNATIONAL EXPERIENCES

We have so far established how affirmative action and its legality (vested in the legal framework adopted by various different countries) are meant to favour various discriminated groups in a particular society. Its programme refers to the concrete steps that need to be taken not only to eliminate discrimination in employment, education, and contracting, but also to redress the effects of past discrimination that a community of people may have undergone. The underlying motive behind affirmative action is the constitutional principle of equal opportunity, which upholds the value that all persons have the right to access self-development equally. In other words, persons with equal abilities should have equal opportunities.

Different affirmative action programmes in different countries vary from each other and differ widely in the way that they attempt to overturn discrimination. Some programmes may simply be designed to review hiring processes, such as adequate and equal inclusion of women, of minorities, and of other affected groups. Yet, others might be designed to explicitly give preference to members that belong to affected groups. In such programs, there are certain minimum job requirements that form the basis of a fundamental criterion of eligibility of qualified applicants, and out of which members are selected further.

The thought behind affirmative action and its implementation has been contested for since its origins in the 1960s in both the United States as well as India; it has been affirmed ever since our constitution was adopted. The central issue of contention has been the definition of discriminatory practices themselves – within employment procedures. As the interpretation of affirmative action has evolved, employment practices that were not intentionally discriminatory but nevertheless had a “disparate impact” on affected groups were considered a violation of affirmative action
regulations. Another central issue was about whether members of affected groups could receive preferential treatment and, if so, the means by which they could be preferred (Leiter, 2002: 28).

The programme of affirmative action consists of tools for the removal of discrimination, reducing the limitations that hinder the public to freely access official and administrative information and services. Measures like protective discrimination, or reservations, are adopted to remedy the continuing ill effects of prior inequalities stemming from discriminatory practices against various classes of people, which have resulted in their social, educational and economic backwardness. It also addresses the infirmities caused due to purposeful societal discrimination, and attacks the perpetuation of such injustices.

2.0 Removing Injustice in India: Approaches, Traditions and Western Influences

The importance of affirmative action in India is connected with the aim of alleviating the sufferings of the underprivileged and exploited sections of Indian society. It has also been desired to reconstruct and transform the hierarchical society that emphasizes inequality between people and make it into a modern, egalitarian society that is based on individual achievement and equal opportunity for everybody. It was with these ideas that affirmative action was designed. However, this ideal of egalitarianism was something that was not arrived upon in a day or two, but was the culmination of a long process of change within the traditional patterns of the society. Two factors basically worked as catalysts in the process, and these were firstly, indigenous reforms and secondly, certain Western influences.

The caste system in India, which has its roots in the traditional system of varna, evolved in a certain historical pattern. The varna system had not always been discriminative, at the time when it emerged. However, the nature of varna later changed and the criterion of caste came up in the late 7th century (Ghurye, 1950: 163-65).
The person who was declared as Brahmin was declared so because it was believed that he was endowed with the responsibility to preserve the spiritual and intellectual elevation of his race, and that he had to cultivate the spiritual temperament and acquire the spiritual training which could alone qualify him for the task. The second position was given to the Kshtraiya not merely because he was the son of a warrior or a prince, but because he was endowed with the duty of protecting the country and preserving the high courage and manhood of the nation. In case of the vaishya, it was his function to amass wealth for the race, while the sudra was discharged with the duties of services, without which the other castes could not perform their share of labor for the common good (Singh, 1976: 25-29).

But this spiritual categorization was later perverted through false interpretations to generate exploitation, and it resulted in the deprivation of large sections of the population. It is the nature of human institutions to degenerate, lose their vitality, and decay, and the first sign of this decay is the loss of flexibility and oblivion of the essential spirit in which they were conceived. The spirit of the caste arrogance, exclusiveness and superiority replaced the spirit of duty under the old caste hierarchy system, and the caste system became the synonym of abominable thralldom and human injustices under which a substantial class of the people had been groaning for centuries. It was this realism of the Indian scene that led to the adoption of protective discrimination programs under specific and elaborate provisions of Indian Constitution.

The only possible method for avoiding casteism was through the Indian legal system. It was finally in 1947 that the constitution of India made provisions for social justice in the form of reservation or affirmative action. The thoughts and ideas that leaders like Mahatma Gandhi and Dr BR Ambedkar brought about were most effective (Sana, 1993: 63-67).

The founding fathers of the Indian constitution were aware about the miseries and appalling conditions of these backward groups. They were aware that these people had to often lag far behind in many arenas of life that they were segregated away from the national and social mainstream, and were continuously exploited for centuries due to
their disabilities. There were certain historical factors behind all this; they were economically condemned, they lived a life of penury and want; they were coerced to adopt and inherit the responsibility of the primary trade or occupation that their family followed, and had to succumb to the education that was fated for the caste or class that they belonged to (Shetty, 1969: 6).

But simply forcing upon a doctrine and insisting on a formal kind of equality does not work. It in fact manages to aggravate and perpetuate inequality even further. After independence, India therefore embraced equality as a cardinal value against this background.

Since these handicaps were significant in creating differences among people, compensatory treatment was what was needed to balance things out. But the formal, constitutionally authorised preferences and protective discrimination created confusion and conflicts; it led to heated debates, court cases, street violence, and social unrest (Galanter, 1992: 374-375).

India is the largest democracies in the world, with a thousand or more people from a variety of different backgrounds. It can boast of more than 5000 years of history, continued civilization, as well as a hoary past mired by under-development and medieval hierarchical social orders. But at the same time, there is the hope of a bright future ahead, with its rise as an economic powerhouse and convincing democratic credentials, experimenting with the protective discrimination programme of unprecedented variety. The reservations for Scheduled Castes, Scheduled Tribes, other backward classes, and now also for women across platforms – in jobs, educational institutions, legislatures, as well as local self governing institutions or Panchayati Raj Institutions – have all been a grand experiment in the development of the nation. Scheduled Castes, Scheduled tribes and other backward classes consist of a whole cluster of thousands of castes spread over the length and breadth of the country.

An important point to be noted is that the nature of equality and justice being carried out in India under the tag of the ‘protective discrimination’ program has a strong western
influence and vintage. As A L Basham explains, “the ancient civilization of India differs from Egypt, Mesopotamia and Greece, in that its traditions have been preserved without a break down to the present day”. It was with the advent of the archaeologists that the peasants of Egypt or Iraq grew to know about the culture of their forefathers, and their Greek counterparts had any but the vaguest ideas about the glory of Athens. In each case there had been an almost complete break with the past (Basham, 1990: 46).

On the other hand, when the earliest Europeans visited India, they found a culture that was fully aware of its own antiquity; in fact, it was a culture that actually exaggerated this antiquity a bit too far. It claimed that there had been no fundamental change within the culture for thousands of years. To this day, legends known to us recall in them the names of shadowy chieftains living thousands of years Before Christ, and orthodox Brahmans living in their homes of worship chant hymns that were composed even earlier than that. India has, in fact, been one of the oldest and continuing cultural traditions of the world (Basham, 1990: 49).

There is an interesting contradiction that one can note in this context. Though India completely broke away with these institutional practices with the advent of the British era on a political level, these orthodox traditions of caste still continue on a social level. With Queen Elizabeth’s Charter in the 17th century, the East India Company was authorised to carry out trade with countries in the East and the Far East and the colonisation resulted in India becoming an experimental laboratory for testing various politico-legal institutions and other western concepts. Starting with the Charter of 1726 to the Government of India in the Act of 1935, the colonial administration introduced more than two scores of major reform packages that involved a restructuring of legislative, administrative, judicial and land reforms. And when India finally gained independence in 1947, Indian political leaders were already so complacent with the British Parliamentary system that this order of governance was what formed the basis of the Republican Constitution in 1950. India established a parliamentary form of government, and the common Republican Law system was entirely of British vintage.
This system has continued to exist up until this day, and is thoroughly grounded in our soil. How western political institutions and concepts (wrapped within local indigenous philosophy) have functioned is a matter beyond the scope of this study. But it is justice and equality which remained at stake. In this study, we will firstly take a glimpse at the model of India's ancient socio-political governance that reflects the concepts of equality and justice. We will later examine the factors leading up to modern India's march towards egalitarianism through certain pre-dominantly western ideas and institutions, which sought to be implemented in Indian situations.

This might provide an insight into the issues and problems that modern India is grappling with. Historically, non-western societies have imbibed the ideological urges and social aspirations of the west in the absence of having certain basic resources. In a sense, the shrinking of the world through colonial forces has had some adverse effects on India: it has bequeathed a social and political belief system without providing any material and institutional props that are needed to support this shift. In India, the legacy of a long tradition, and its historical culture that was built through religious and social movements had for long acted as buffers against an inherently fissiparous situation. But today, the social system is undergoing a profound change and has entered a process of continuous fluidity and fragmentation. The country continues to grapple between the two paradigms of the past and the present: an ancient land that is slowly blending the best elements of an international culture with its age old traditions and diversities.

The arguments for and against preferential policies continue to compete with each other. On one hand, preferential policies give an array of beneficial effects such as providing a direct flow of valuable resources to those who have been deprived throughout history, providing them with a feeling of belonging and loyalty. It promotes social and political integration of groups, induces an awareness that beneficiary groups should participate in mainstream life, that their interests and views are important to be taken into account – and mostly, it inculcates a sense of pride, self respect, sense of achievement and personal efficacy that enables the beneficiaries to contribute to national development as willing partners. By broadening opportunities for the deprived, affirmative preferences work at stimulating the acquisition of skill and resources needed
to compete successfully in an open-minded environment, cultivating talents, providing opportunities and incentives, and promoting awareness and self consciousness.

The other side of the argument has a number of opinions favouring it as well. Some of the arguments are that resources are enjoyed by a small group of the intended beneficiaries rather than the group as a whole; that accurate representation of interests are blurred by emphasising the separateness of these groups, that it reduces their opportunities for common participation, that unfair favoritism can antagonize people; that it subjects these groups to manipulation; it aggravates their dependency and undermines their sense of dignity, pride, self sufficiency and personal efficacy; that preferences provide artificial protection which blunts the developmental skills and resources needed to succeed. The arguments also include that making these groups dependent in fact blunts their development and talent, undermines their self respect, and reduces the capacity for an organised effort on their own behalf. Detractors feel that by projecting an image of comprehensive governmental protection and preferment, preferences stir resentment.

2.1 American Experience of Injustice and Affirmative Action

It is relevant to have a look at the American system of justice in relation to the Indian judicial system. We have often sought answers on caste, justice and equality through models adopted in the United States, and have looked for guidance on an international level. The United States is one of those countries where similar experiments on affirmative action policies have been tested. The 14th Amendment of the United States’ Constitution provides that:

"all persons born or naturalised in the US, and subject to the jurisdiction are citizens of the US and the states where they reside. No state shall enforce any law that abridges the privilege and immunities of US citizens, nor shall any state deprive any person of life, liberty, or property, without the due process of laws, nor deny any person within its jurisdiction the equal protection of laws."
The guarantee under this amendment is aimed at the removal of undue favour and individual or class privileges on one hand, as well as hostile discrimination, oppression and inequality on the other hand (Schwartz, 1976: 269-260). Despite the existence of the equal protection clause under the 14th amendment, racial discrimination had continued in the United States up to the mid 20th century. However this discrepancy between its ideals and its treatment of Black people began to be corrected around the 1950s, and most notably in 1954.

The United States Supreme Court had strongly opposed the segregation and alienation of blacks in American schools. The first step, as reflected in the decisions of the Courts and Civil Rights laws of the Congress, merely removed some legal and quasi-legal forms of racial discrimination. It was only with the decision in which Brown overturned the Plessy v. Ferguson ruling (equal yet separate doctrine of 1894) and enforced that any kind of racial discrimination that was publicly enforced was beyond the pale, and that equal protection was not a bounty, but a birth right (Beleich, 2001: 91).

A decade after Brown’s decision for separate educational facilities for those who were being treated as inherently unequal (Brown v/s Board of Education Decision, 1954, US), the Congress joined the movement to eliminate segregation by enacting the Civil Rights Act in 1964. In general, this prohibited discrimination against any person on the grounds of race, color, or ethnic origin, and was concerned with any programme or activity that received federal funds. These attempts were seen as a mandating force for affirmative action programs that used the classification of race. The decision of the Supreme Court of the United States in the case of Allan Bakke in 1973 and the debates that took place in its wake, have further re-enforced the constitutionality of the Affirmative Action Programme in the United States (Regent of University of California vs. Bakke, 483, US 265, 1978).

The decision on the Allan Bakke case in 1973 in the United States, as well as Article 15 (4) and 16 (4) of the Indian Constitution, have both laid down common norms for affirmative action from the broader context of each of the two societies. However, while the heated debates, judicial pronouncements, and academic and philosophical
discussions in the United States are referred to and helpful in understanding various complex and complicated issues of India's affirmative action program, it is far more difficult to actually implement all of it within India's varied culture (Thomas, 1976: 22).

The methods that were implemented in removing discrimination and impairment of African Americans in the United States became a sort of model for the removal of the caste problem in India. However, the contexts of historical injustice is completely different in India from that of United States, and the plight of the Blacks is extremely different in many respects from the plight of the Schedule Castes and Schedule Tribes in India. There is also the French Constitutional schemes of protective discrimination that can be compared to both, that of the United States as well as India. The French affirmative action programme was based on the concept of a fraternity, which implemented the idea of helping the poor and disadvantaged members of society. The declaration of 1793 in Article 21 of the French Constitution states that public assistance is a sacred debt and that society owes its existence to those who are unable to work. The Girondin Proposal for Rights maintained that equality consists in everyone being able to enjoy the same rights. Though the system of equality that was mentioned in the fifth Republic has served the French mentality really well, peculiar and contradictory as it is, it sadly doesn't really enjoy the same values of the American and Indian system (Lieberman, 2004: 16-37).

2.2 India: Past and Future

Times change, and so does the life of a nation. Socio-political orders of a system are dynamic, live, and organic, and the changes introduced from within or outside affect newer changes as this cascading effect impacts culture as a whole. Social morals and ideals change from time to time in the backdrop of emerging social crises which create new problems and alter the complexion of the old ones. Indian social system has witnessed changes of multiple dimensions.

Going by the old form of the caste system, the Indian social system was so deeply embedded into the caste-structured system that even educational institutions, the
country's economical, developmental, and political consciousness, its legal institutions, its constitutionalism and modernization itself could not do much about it. So much so, that, even the Protective Discrimination system, when introduced under the Constitution of India, got formulated on the discredited version of the caste system. Our present set of policies has over 100 years of history. Initially, the policy was influenced by the colonial administration to divide and rule and perpetuate their authority. In the post-independence period, however, the set of policies of protective discrimination were adopted as a measure of social engineering and for the upliftment of the weaker and deprived sections of our society for the purpose of redressing the ills of the past and ushering in an egalitarian social order.

The past has certainly not been a blameless one; nevertheless it also does not justify Henry Maine's dismissive remark that much of Ancient India's wisdom consisted of 'dotages of Brahmanical superstitions' (Dhavan, 1962: 7-8). This kind of an attitude towards ancient Indian traditions in law and justice represent attempts made by the colonial administration to discredit the ideological issues in Hindu philosophy, despite its popularity among many groups in India, who accepted their position as part of the dharmic order. India's genius for accommodation for so many different communities, cultures and people from linguistic traditions can only be understood against the backdrop of this created social order. This social system in itself was not as rigid and hierarchical as many saw it to be; it was actually quite dynamic and unparalleled in history.

2.3 The Importance of Reservation: Provisions in the Indian Constitution

The constitution of India treats scheduled castes and scheduled tribes with special favour, and provides them with some valuable safeguards. One of the large reasons for tribals remaining economically and socially backward is the lack of exposure and accessibility in the forest and hilly regions where they live. They've mostly been cut off from the main currents of national life (Jain, 1997: 78).
The main problem concerning them is their socio-economic conditions. These need to be provided in a manner that doesn’t disturb their environment abruptly, and to adjust their lifestyles to those outside more gently. It is for this reason that Article 330 of the Indian Constitution was formulated, which states that Lok Sabha seats should be reserved for representatives of the tribal communities in proportion to the size of their population.

The Governor of Jharkhand, Shri Syed Sibtey Razi expressed his regret over the dis-inclusion of various states in legislative assemblies for reservations – during his speech in 2007. However, this Article sadly still excludes many states that are predominantly tribal, though it was later extended to some such states, like Meghalaya, Mizoram, and Arunachal Pradesh with the 31st Amendment Act. However, under Article 332, where seats are reserved in state legislative assemblies for Scheduled Castes and Scheduled Tribes in proportion to their population in the particular state, Meghalaya, Nagaland, Mizoram and Arunachal Pradesh are excluded. Article 331 and 333 suffers from the same lack on inclusion where the Anglo-Indian community is concerned (Speech of His Excellency delivered while chairing the 13th Working Session of the Fourth International Conference on Federalism: “Can deep differences be accommodated?” 7th November, 2007).

The purpose behind these reservations for Scheduled Castes and Scheduled Tribes was to ensure the presence and representation of the scheduled castes and scheduled tribes in legislative bodies. But if members of either of these categories are able to secure these additional seats on their own, these provisions may not really be needed. After all, the claim for the eligibility of a reserved seat does not mean that as a member of this group, one cannot claim a general seat. Elections to the reserved seats are held on the basis of a single electoral roll, and each voter in the reserved constituency is entitled to vote; there is no separate electorate. This method has been adopted with a view to discourage segregation of Scheduled Castes or Scheduled Tribes from other people, and to gradually integrate them within mainstream, national life (Giri and Suri, 1959: 132-135).
Initially, reservations were meant to be provided only for 10 years since the Constitution was created, as per Article 334. But this duration has been extended over and over again, and by 10 years each time since then. Today, the period of time given for reservations in the Lok Sabha and state legislative assemblies, stands valid for 60 years from the commencement of the constitution (following the 79th Constitutional Amendment Act 1999).

The government believes that the handicaps and disabilities which these people are dogged have yet not been removed, and that reservation is needed for some more. The fact that reservations are not constitutionally a permanent concept in the way they have been formulated, shows that there will be a time when the results of this affirmative action will be felt in society by the deprived communities themselves as well as society as a whole, and that people will be able to move on from the past ailment and stigma of casteism.

2.4 Reservation in Employment

Reservation of jobs in the governmental sector is one of the measures of protective discrimination, incorporated under Article 16 (4) of the Indian Constitution, and which falls under the head 'Right to Equality'. The constitution also secures citizens with a general freedom from discrimination on grounds of religion, race and caste under Article 14. The state is forbidden to discriminate against any citizen on the grounds of place of birth, residence, descent, class, language, and sex. (Indian Constitution, 1950: 15(1) 15 (2)).

It is in Article 16 (2) that the constitution states that no citizen – on the grounds of religion, race, caste, sex, descent, place of birth, or residence – be ineligible for or discriminated against in respect to any employment or office, while it is in Article 16 (4) that the Constitution provides for the protective measure of reservation in the government and in employment, and lays down that nothing shall prevent the state from reserving posts in favor of a backward class of citizens it considers inadequately represented (Basu, 2003: 91-96).
This protective discrimination emphasised above [as in Article 16(4)] is not intended to be negative or derogatory, and neither does it contradict the guarantee of equality that has been defined in Article 14, 15 (1), 16 (1) and 16 (2). Equality should not be defined in relation to a backward group, but it should be understood that classifications for favoured treatment must take into account inequalities based on the existence of caste, religion, and race. The constitution forbids discrimination on these grounds so as to end age-old prejudices. This view is supported by many Supreme Court judgments, and in fact according to the SC the state is authorised to use the index of caste to evaluate the country’s social and educational malnourishment, and give preferential treatment to communities that are deprived. The opposite argument is that caste cannot be the sole or dominant test though it can be seen in a conjugation with other social evils like poverty, occupation, and place of habitation (Singh, 1985: 103).

Another important aspect of Article 16 (4) is that it prescribes that reservations in government service could be made not only at the initial stage of recruitment, but even during promotion and grant of a higher position. However the article does not confer any right or impose any constitutional duty for the government to make reservations for any one in public services. It is merely an enabling provision and leaves the discretionary power on the state – about whether it wants to reserve appointments in favour of certain classes of citizens or not. This provision only gives permission to the state to classify individuals for favored treatment; it is not however a ‘rule’ (Pillai, 1968: 47-48).

Dr Ambedkar had suggested that there should be a proviso to Article 14, which states that ‘nothing in this clause shall prevent the state from creating any new law for the removal of inequality, disparity, disadvantage or discrimination that might arise out of existing laws.’ But this was not adopted, and had this proviso been there, there would have been no need for Article 16 (4) in the first place. However, a cursory glance at the constituent assembly debates proves that article 16 (4) was incorporated as a measure of caution (Rao, 2006: 86-88). But despite the caution, the ideological clash between formal equality and proportional equality has affected Article 16 (4). Since article 16 (1) has already stated the rule of formal equality and non-discrimination, Article 16 (4) can
be seen as simply an exception to this rule. This means that if the permissible limit of reservations cannot exceed 49 percent – it might be impossible to consider overriding this decision in any circumstance, and because an exception to a rule cannot entirely override the original provision on its own. Further, if Article 16 (4) is considered an exception where formal equality is concerned, then the state is not authorised to choose any method for giving favoured treatment to the backward classes in the area of public employment. Even reservations have to be made subject to the requirement of Article 16 (4) regarding backwardness and under-representation of the preferred groups (Pillai, 1968: 47-48).

Article 16 (4), if read for itself, rules out other possible ways to encourage backward classes from gaining employment in the state. While it suggests many different ways to meet the requirements of the deprived, it is unclear whether preferential rules for waiving off age requirements, the application of fees, and minimum educational qualifications, as well as special coaching and training programs are all included within Article 16 (4). Many of these preferences are not reservations in the strict sense of the term. However, if we adopt a broader understanding of proportional or substantive equality in the first place, 16 (4) would not be an exception, but an explanation of Article 16 (1), and it would in fact allow the state to make exceptional provisions for the purpose of benefiting backward classes. For example, if 16 (4) becomes an explanation of 16 (1), and doesn’t have to be controlled by 16 (1), the quantum of reservations under Article 16 (4) will not have to be restricted to a 50 percent limit. For long, it had been the view that Article 16 (4) is an exception of article 16 (1) and as such the claims of backward classes could be projected only through the exceptional clauses and not outside them (Pillai, 1968: 62).

The departure from equality can be permitted only to an extent according to Clause 4 of Article 16. This clause does not exclude or ignore the rights of other citizens, but sets down a restriction, because unlimited reservations would have an effect on the guarantee that is provided in the terms of equality. In one of the court case decisions, the Supreme Court rejected the notion that Article 16 (4) is an exception or proviso to Article 16 (1). The Court majority held that Article 16 (4) is merely an illustration of
Article 16 (1) and is not controlled by Article 16 (1). The result is that the state is not confined only to the method of reservations for bringing in backward groups for public employment; it is free to choose any means in achieving the equality of opportunity for these backward classes. This led to the conclusion that quantum reservations should not necessarily be within 50 per cent limits and also validated the scheme in favour of scheduled castes and tribes being exempting from passing the departmental test for promotion in services (Rao, 2006: 89-91).

It was brought to the notice of the Government of Kerala that a large number of government servants belonging to the scheduled castes and tribes were unable to get promotions. In order to give relief to the backward classes of citizens, the government incorporated Rule 13-A (A) under the Kerala State and subordinate services, which enabled the grant of exceptions for reserved employees for a period of two years from passing the necessary tests. As a result of this rule, thirty four out of fifty one posts were filled up by members of scheduled castes and tribes without passing the test.

2.5 Reservations in Indian Educational Institutions and Universities

The ongoing debate (since May 2006) on reservations in central government institutions continues; however, the Indian government has already formulated various provisions with regards to it. Provisions for reservations in educational institutions to deprived sections of scheduled castes and scheduled tribes have been secured under Article 15(4).

Article 15 (1) specifically bars the state from discriminating against any citizen, race, caste, sex, and place of birth. Article 15 (4) on the other hand lays down that the state is allowed to make special provisions for the advancement of backward classes. The expression "making any special provision" is evidently an open-ended provision, and the government can go on to providing an entire array of facilities for promoting the interests of socially and educationally backward classes -- for example, waiving fees, waiving age requirements, providing special coaching facilities, scholarships, grants, loans and other aids (Basu, 2003: 91-96).
2.5.1 Identifying Backwardness

The two most contentious issues in providing reservations in educational institutions to scheduled castes and scheduled tribes is firstly, the determination of the backward class status and secondly, the extent or quantum of reservations themselves. Determination of backward classes is not easy, as sociological and economic considerations come into play in evolving proper criteria for its determination. Article 15(4) has left the matter to the state to specify how the backward classes can be identified (Yadav, 2005: 115).

Article 340 contemplates on whether a commission should be appointed to investigate the conditions of the backward classes, and that all matters concerning them should be referred to the commission. Article 341 provides that the President of India may specify the castes, races, and tribes that can be deemed as scheduled castes, after consultation with the governor of that state. The second clause of this article provides a list of people who fall under the title of scheduled castes and scheduled tribes. However, it may be noted that the courts are allowed to question the criteria used by the state and whether it is relevant or not (Paswan and Jaideva, 2003: 224).

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the court’s stand has been that state resources are limited; protection to one group affects the constitutional rights of other because it is implicit in the very idea of reservation that a person of lower merit is being preferred to a over a person of higher merit. The court is also concerned about how this might perpetuate the caste system further in India, and about how many advance classes are being termed as backward classes (Mungekar, 2006: 45).

Several propositions emerge from the judicial pronouncements of what is backward class. Firstly, according to Article 15 (4) backwardness is both social and educational, and not just one of these two. This means that a class that is identified as backward should be backward both in terms of its social status, as well as in terms of education. Secondly, poverty alone cannot identify backwardness because a large section of the population would then fall under the backward category. This would create confusion
with regards to the very objectives of reservation. Thirdly, backwardness should be comparable (though not exactly similar) to scheduled castes and scheduled tribes (Tondon, 1982: 157).

Fourthly, caste cannot be the sole factor in defining backwardness. If classification for social backwardness was to based only on caste, the caste system would perpetuate in the society. This test would also not work for non-Hindus that do not recognize caste in the same conventional manner. Fifthly, poverty, occupation, and place of habitation – all of these factors contribute to backwardness, and such factors cannot be ignored. As emphasised by the Supreme Court and Article 15 (4) caste and class are not synonymous with each other: they mean two different things. Therefore, neither does a complete exclusion of caste to ascertain backwardness vitiate classification if it satisfies other tests. Secondly, the most contentious issue is on the amount of reservation that there should be. This has become a complicated socio-political issue of the day (Paswan and Jaideva, 2003: 109).

Since there is a lot of competition and opportunities available in our country is limited, governments are pressurised to indulge in all kinds of reservations for different groups apart from that of scheduled castes, scheduled tribes and other backward classes. Basically, any kind of reservation means that a candidate belonging to a certain quota is preferred over all others. This often frustrates others who may be deserving candidates, and leads to them challenging the very constitutional nature of reservation itself.

2.6 Affirmative Action and Equality in the United States

The affirmative action programs or benign discrimination programs in the United States has a long and defined history. America has had both, a history of deprivation, as well as a history of evolution. The need for affirmative action in the United States began with the depraved slave trade system, to the Civil Rights Movement, a horrendous civil war, to the 14th Constitutional Amendment, the development of a policy for “separate and equal” doctrines, various de-segregational measures, as all of this finally evolved into a full fledged protective action programme.
After the discovery of the American continent, an influx of European settlement followed. The first ship that took a batch of English Protestants to the United States in 1620 was Mayflower – and these Protestants came to be known as the “Pilgrim Fathers” (Nehru, 1989: 251). A series of colonies sprouted; there were catholic colonies, colonies founded by cavalier nobles from England, the Quaker colonies (Pennsylvania got its name from the Quaker Penn), Dutchmen, Germans, Danes as well as the French. There was a huge demand of labour following the boom in the tobacco and cotton plantation industries in South America, and the nomadic Red Indians who refused to settle down in one state, also stubbornly refused to work under the conditions of slavery. Many of them were either exterminated or died under severe conditions of torture (Dev, 1986: 108).

So, much of this demand for labour was supplied from Africa, from the people there who were captured against their will, tortured, and who were sent across the seas in cruelly unbelievable ways. The Spanish and Portuguese were the primary partners to this America slave trade, though the English also had a huge share in what was to them, an extremely profitable business. The Africans, especially African Americans (Negroes), were hunted and caught, like wild beasts, and then chained together and transported to America (Nehru, 1989: 224-225).

Special ships were built for the slave traders, constructed with galleries between the decks. African American slaves were chained up to each other in these galleries, for weeks, and often months, during the time that the voyage across the Atlantic lasted. They lay shackled together throughout the journey: within this five and a half feet by sixteen inch space.

Large numbers of slaves died before they reached the destination. As the Industrial revolution rose and the cotton industry in England grew, the demand for slaves only increased. By 1790 the population of slaves was 697,000; in 1861, this number grew to 4,000,000. The northern states took a lead over the southern states where industrial development was concerned as its machine industry grew rapidly, while in southern states, slave labour gave rise to a lot of plantation industries. Slavery was considered
legal, though it was mostly in the south that the trade thrived; it was of little importance in the north. The economic interests of the north and the south were also very different. Friction arose over tariffs and custom duties, and political rivalries between the north and the south, dividing them further away from each other. The creation of new states led to the question of which side they would support. In the meanwhile, the anti-slavery movement gathered momentum in the north under the leadership of William Lloyd Garrison.

When Abraham Lincoln was elected, many Southern states broke away and became Confederate States. Despite Lincoln's best efforts to avoid a civil war, it broke out in 1861. The civil war continued for four years and finally, at the end of it, slavery was abolished, as the Negroes were given full rights of citizenship. This was made part of the United State's Constitution, in the form of the 14th amendment. It was also laid down that no state could discriminate on the basis of race, color or past slave trade history.

This, however, was not the end of suffering for the blacks. Despite abolition of slavery and the 14th amendment of rights for all citizens, the discrimination against Afro-Americans continued up until the mid 20th century. There was discrimination, segregation, and they were kept away from whites in hotels, restaurants, churches, colleges, parks, bathing beaches, trams and even in shopping stores. In railways, they had to travel in special carriages, which were called "Jim Crow Cars". Marriages between whites and Negroes were forbidden (Dev, 1986: 31-32).

The State of Virginia had passed a law in 1926, which prohibited white and colored persons from sitting on the same floor. Despite that it had been decades since slave trade had been abolished, there were innumerable instances during the 1930s and 40s where Negroes were sent to prisons over false charges, and convict labor was leased out to contractors.

The formulation of the 14th amendment deprived the states that had been defeated in the civil war from discriminating against the blacks who were emancipated by their white
protectors. The Acts of 1866 and 1870, guaranteed equality of legal status and voting rights against state action; the Act of 1875 placed the right to equal enjoyment of public inns, conveyances and amusement regardless of race and provided protection through the federal law. This also abolished class legislations in states, and did away with the injustice of subjecting one class to a code or law that another class did not have to endure. In 1883, the court was confronted with congressional legislation, guaranteeing equal protection of law to blacks. The 1st and 5th sections of 14th Amendment meant that the Congress could pass legislation that superseded discriminatory state legislation (a power similar to that of judicial review), and preserved the existing federal system at the expense of implementing the principle of “equal protection” of laws. The persistent question, however, was about how the blacks could be accommodated within the new legal policies without them losing their own traditions and identity (Schwartz, 1976: 17-18).

One of the ideas that gained prominence was that of ‘separate but equal’ – which got approval from the Supreme Court in the Plessy v. Ferguson ruling of 1886. The concept of ‘separate but equal’ was founded on the idea that all races were equal, but that they should be treated separately; this meant that blacks and whites were often segregated and kept in different setups in educational institutions. Justice Brown articulated that the majority felt that the black argument was false, and that the inferiority that the blacks felt was a construction of their own. Justice Harlan was the one to dissent on this astonishing part of the 14th Amendment, who insisted that the “law was color blind”. (V. Ferguson) Though Justice Harlan was thinking on progressive lines, it fell short of many modern ideals and principles that equality was based on. It was not until the late 1930s that the court became more serious about the need for equality (Bleich, 2001: 17).

In 1938, Gaines, an African American applicant was refused admission to the School of Law, State University of Missouri. Following this, Missouri began to make funds available for Gaines and other qualified black applicants to finance their legal education, in its own state as well as adjacent states, where un-segregated educational facilities were being offered, and argued that by this action it was meeting the separate but equal requirement. However Chief Justice Hughes disposed of the state’s contention
emphatically, saying: “The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to African American students solely on the grounds of their color” (Brubacher, 197: 38).

Races can enjoy the privileges afforded by the state, depending upon the equality of the privileges which the law gives to separate groups within the state. This is an obligation imposed by the constitution on the states as governmental entities. Each is responsible to its own law-establishing the rights and duties of persons within its borders. It is an obligation – the burden of which cannot be cast by one state upon another, and no state can be excused from performance by what another state may do or fail to do. That separate responsibility of each state within its own sphere is the essence of statehood maintained under our dual governmental system (Brubacher, 1971: 38-39).

2.6.1 Provisions of Affirmative Action in the United States

Around 1945-50, a group of cases threw light on how the ‘separate but equal’ doctrine was creating further discrimination and complexities. The case of the Sweatt v. Painter ruling (US, 1950) was highly significant in this matter. In this case, the applicant, who had been denied the admission to the University of Texas Law School solely on the basis of his colour, claimed that the instruction available in the newly established law school for blacks was markedly inferior to the instruction at the University, and that equal protection of laws was being denied. In a unanimous decision, the Supreme Court ordered his admission to the white school. This move indicated that the ‘separate but equal’ formula was not being met (Smith, Altbach and Lomotey, 2002: 79-80).

Following this, the National Association for the Advancement of Coloured People and other organisations pressed the fight against segregation in public schools. In May 1954, the landmark Brown v. Board of Education ruling came about. The unanimous opinion of the court articulated by Justice Warren, declared that in the field of Public Education, the doctrine of ‘separate but equal’ had no place. They said that separate educational
facilities are inherently unequal. Nor did the historical evidence, furnished at the court’s request and available to it in briefs of counsel, influence the decision (Zinn, 2002: 123).

The *Brown v. Board of Education* ruling of 1954 sounded the death knell for all racial segregation, at least where the requirement of state action was being met. The ruling was based upon the categorical finding that segregation must involve discrimination, by providing separate facilities. That is inevitably true of any and all segregation (Ackerman, 1991: 144-145).

The post-Brown decisions struck down all forms of segregation in publicly operated facilities, buildings, housing, eating facilities, hospitals, and other health facilities. There is now no longer any excuse for being unable to desegregate: be it officials finding it difficult to prevent interracial disturbances, violence, riots, or community confusion and turmoil (US case, 1963: 373). It is important that public order must be preserved and it cannot be accomplished by depriving African American children their constitutional rights (Gaffin and Maryland 1964: 371).

The “Right to Equal Protection” was established without distinction for race, color, and ethnic origin. Shorn of all its contextual interpretations in the 14th Amendment, the “Equal Protection” clause provided that “all persons born or naturalized in the United States are subject to the jurisdiction and are citizens of the US and the states where they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of the citizens of US, nor shall any state deprive any person of life, liberty or property, without the due process of law, or deny to any person within its jurisdiction the equal protection of laws” (Gaffin and Maryland 1964: 337).

However, despite the existence of this law in the United States Constitution for around a century, there have been discriminations of individual cases of discrimination, and the interpretation of this clause has changed from time to time. In fact, there was even a point when the 14th Amendment was quoted to support the ‘separate but equal’ doctrine (Ferguson, 1896: 16). Historical data has often been cited to show that segregated
school systems were in existence when the 14th Amendment was adopted and the advocates of Amendment had not questioned their constitutionality.

By 1964, the United States witnessed the emergence of busing to achieve racial balance, quotas in employment and public housing and exclusionary admission standards for colleges and universities. These developments signified the relevance of race as a factor to achieve actual equality for African Americans and other disadvantaged groups.

Neither can an African American be discriminated against on grounds of race and nor can a white. Justice demanded equality without regards to colour, and the special treatment for Afro-Americans meant recognising color just when it was historically moving towards its abolition. The equalitarian guarantees of the constitution accrued to the individuals and not to groups (Brown, Kurland, Topeka and Casper, 1975: 123).

A *modus vivendi* between equal opportunities for the advanced sections of society on the basis of merit, and for special protective provisions for the underprivileged need to be created. This an incessant struggle between two opposing issues that involve social history, pathological politics as well as constitutional law. The essence of equality and justice lies in some kind of a leveling process. It implies the giving of favored treatment to those who are governed by unfavorable circumstances and lacking in resources, opportunities, incentives, and backgrounds to achieve success on the basis of formal equality (Brown, Kurland, Topeka and Casper, 1975: 347-48).

Distribution according to merit, as well as contribution and distribution, are both consistent with the essential principles of equality. The criterion of need means that there are inequalities that affect an individual’s abilities to contribute to society, and dispersal of benefits to the unequal is important. Redistribution of society’s goods and services in order to remove or eliminate existing inequalities may ultimately be beneficial to the society as a whole. Even if compensation involves social costs, imposes burdens on those excluded and affects the standards and meritocracy, the benefits accruing to the society as a whole will in the long run outweigh the costs (Singh, 1982: 192).
Compensatory treatment provides benefits and access to the opportunity structure of the society than they would have otherwise enjoyed. The preferences promote integration of disadvantaged groups into a larger society and promote national development as well. It may be noted that stipulations of equality and justice in a constitution are often expressed in universalistic or individual terms: they do not lay down any particular or specific concepts of equality and justice. In fact, there is much that needs to be continuously added to the equality clauses, responding to the currently accepted social values or norms, and establishing morality or the constitutional goal to achieve overall equality.

This meaning of equality as an aspect of justice is capable of universal application irrespective of the fact whether the constitutional text of a society defines broader notions of equality as defined by the Indian Constitution or uses the language in the individualistic and universalistic terms as has been done in the constitution of the United States (Singh, 1982: 197).

It is interesting to look at the two largest democracies in the world – India and the United States – and look at their social history, the causes behind their present disparities, and the way they think about their differences, the way provisions for benign discrimination have been framed in their respective constitutions, the way they administer policies of affirmative action. It is also interesting to conclude how theoretical studies for the democratic functioning and law have been formulated.

In a democratic order, the state system has the responsibility to ensure an environment where every individual, irrespective of his caste and creed, community, sex, descent or place of birth could find the fullest development. For a balanced, equitable, and healthy growth, the individual should have the power to make choices, and in a structurally hierarchical society, this can not happen unless conscious interventions by the state system, to alter the normal processes and existing patterns, are made through public action.
The directives in no uncertain terms require the state, inter alia to promote the welfare of the people by securing and protecting a social order in which justice — social, economic, as well as political, should inform all the institutions of national life, reduce economic disparities, make available adequate means of livelihood, distribute ownership and control of material resources for the common good to operate the economic system in such a way that it does not result in the concentration of wealth and means of production to the common detriment; protect health and strength of workers and children of tender age against abuse; and provide legal assistance and aid, the right to work, education and public assistance in cases of unemployment, old age, sickness and disabilities and in other cases of undeserved want; to secure just and humane conditions of work and provision of maternity relief to provide for living wages and conditions of work ensuring decent standard of life and full enjoyment of leisure and social and cultural opportunities to promote with special care the educational and economic interests of weaker sections of the people and their protection from social injustice and all forms of exploitation and to raise the level of nutrition and standard of living and public health (Smith, Altbach and Lomotey, 2002: 79-80).

In the United States constitution on the other hand the 14th amendment provides that “All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and states wherein they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of laws, nor deny to any person within its jurisdiction the equal protection of laws” (Smith, Altbach and Lomotey, 2002: 81).

The guarantee under this amendment is aimed at removal of undue favor and individual or class privileges on the one hand and at the hostile discrimination or oppression on the other. The 5th amendment contains a due process clause, which seeks the same ends as the equal protection clause. Equality of right is fundamental in both clauses and each forbids unequal government action such as class legislation that arbitrarily discriminates against some and favors others in like circumstances.
2.7 Differences between Indian and the United States' Affirmative Action Programmes

The entire concept of legal rights is individualistic in the United States on the other hand, and the language used in the Equal Protection clause can plausibly be used to defend both, the claims of the individual equality as well as the claims of the disadvantaged groups. And if the equal protection clause is used to provide justice for groups by creating a quota or reservation, the right of the discriminated individuals of the excluded groups is said to be violated.

There is no presence in the United States Constitution of provisions such as Article 15 (4) and 16 (4), which authorize the state to take affirmative action for elevation of oppressed classes, besides social welfare (Farazamand, 2002: 29-30). Another key difference between the Indian discrimination and the US discrimination is that the caste system is based on an attitudinal tradition of the varna, whereas slave trade does not come from such a history.

Nonetheless, Justice Powell remarked that “nothing in the Constitution supports the notion that individuals may be asked to otherwise impermissible burdens in order to enhance the societal standing of ethnic groups.” He rejected the argument that the guarantee of equal protection permits the recognition of special wards entitled to a degree of greater protection than accorded to others. There is therefore no principle that can force an individual in the United States constitution to be asked to suffer in order to promote the welfare of the victims of societal discrimination.

However, researcher George Gallup remarked that according to the public opinion in America today, one finds a striking degree of consensus quotas and special preference. Americans support strict adherence to meritocratic standards but conduct countenance programs that help bring the disadvantaged group up to the level of the meritorious standards (Glazer, 1978: 196).
It seems however, that there is nothing like an emerging national consensus that has appeared in America on the permissibility of quotas. There are competing arguments for and against both the individualistic as well as the group rights approach. Prof. Dworkin, clearly rejects the group rights approach for the purpose of redressing past injustices. According to him, “affirmative action program seems to encourage a popular misunderstanding, which is that they assume that racial or ethnic groups are entitled to proportionate shares of opportunities, so that Italian or Polish ethnic minorities are in theory as entitled to their proportionate shares as blacks or Chicanos or American Indians are entitled to the shares the present program give them” (Boxill, 2001: 331).

However the programs are not based on the idea that those who are aided are entitled to aid, but only as a strategic hypothesis to attack a national problem. In India, the popular perception about benign discrimination is that, since the scheduled castes, scheduled tribes, or other backward classes for that matter have been subjected to discrimination for hundreds of years, they are born in unequal conditions and die in those conditions, were denied access to wells, temples, schools and other places – and that now, without which, their very existence and continuance would have been impossible.