CHAPTER IV

COMPARATIVE STUDY OF RESERVATION LAWS

“If our political progress was to be real, the underdogs of our society must be helped to become men.”
(Rabindranath Tagore, Letters from Russia)

In the preceding chapter, the researcher has discussed constitutional provisions relating to the policy of reservation in favour of Other Backward Classes, their current factual social, economical and educational position and various problems accrued due to this policy in the social order of India. The comparative study relating to the affirmative action policies adopted in various countries of the world is also sought because this kind of study helps a lot to learn from each other’s experience. Therefore, in the present chapter, the comparative analysis is attempted to examine and sort out such provisions regarding this policy applicable in different countries, which can be embodied in the Indian Laws to make it more adaptable, relevant and effective.

The concept of affirmative action in the international law is generally referred to as “special measures”. Affirmative action is recognized in international instruments as a duty on member States. Affirmative Action is an intricate and contentious issue. Sentiments are brought into play in people by the term itself from panic and fury, to contentment. Affirmative Action is a set of optimistic, anti-discriminatory policy measures which were planned in the various social spheres, particularly in the preferential positions and the levels in the society, for increasing the presence of under-privileged and under-represented groups. Affirmative action is a system which searches for lessening historic social inequalities which were perpetrated through a logical laceration of the societal framework. For the disadvantaged, the case for the Affirmative Action in any society is made both due to historical deprivation and persistence of inequality along with continuation of the discrimination. Affirmative action programs are the apparatus to get rid of the continuing and the present effects of the historical discrimination, for getting access to equal prospects for lifting the restrictions which are hindering the access to the public offices and administration of the classes of people. To cure the ongoing ill effects of the past inequalities, which stemmed from the discriminatory practices, resulting in the social, educational and economic backwardness of various classes of people, such measures like affirmative
action, protective discrimination or reservations are adopted. Thus, it is clear that these measures are grounded in the State’s responsibility to check out disadvantage caused by past and current discriminatory laws, traditions and practice, and represent a means to speed up the achievement of equality between members of a particular target group and the rest of the society. So, affirmative action program is vital for the equality to be accomplished. Fundamentally, preferential legislation is broadly perceived as indispensable only so long as discrimination continues. So, affirmative action policy is defined as an approach implemented for the advancement of the disadvantaged individuals, for them to be empowered in order to compete on an equal footing. Looking in this respect, at the definition of Duncan Innes, affirmative action is defined as,

“A set of procedures aimed at proactively addressing the disadvantages by the sections of the community in the past.”

Despite the fact that in India affirmative action takes the shape of the preferential treatment, there crops up a question about whether preferential treatment and the affirmative action are synonyms or different from each other. It is submitted that both affirmative action and the preferential treatment are employed in quest of compensatory and distributive justice. Affirmative action or “positive discrimination” or “preferential treatment”, all search for guaranteeing greater equality of the opportunity and all recognize rights to compensation for the past discrimination. Further, both affirmative action and the preferential treatment are similar with regard to the reality that for both kinds of practices, the target groups and their moral arbitrariness are the same. The fairness of the affirmative action programs or preferential treatment policies is ensured by the promise against the arbitrariness. So, in theory, it may that whilst between affirmative action and the preferential treatment, a clear border line seems to appear but in actual practice, no such distinction seems to present and the boundaries become unclear.

Affirmative action has had numerous different immediate objectives. On the whole, in stages, affirmative action programs can be planned in order to abolish the present discrimination, equalize the prospects between the classes, to cure the historical discrimination and embrace and endorse diversity. Affirmative action, among other things, may take the shape of permitting preferences for the members of particular groups, trainings and grievance resolution mechanisms, self-studies for finding out if there is the existence of any discrimination, definite sorts of claimant,
outreach and guidance, unique admittance standards for certain groups of people and for members of these groups, establishing quotas or mathematical set aside. And the affirmative action programs may be used both; in the public sector when in quest of more proportionate number of employees, contractors, legislators, or students at schools and Government-run universities and in the private sector when seeking to expand private universities, schools, workplaces, and other Non-Governmental settings.

The concrete shape has been given by the international community to the idea that every individual has fundamental rights that must be protected by the State. Such protection has become part of the modern international legal consciousness and of the contemporary law of nations. In International human rights, non-discrimination is a fundamental concept, as there is almost agreement in the global standards in necessitating that States take definite steps for enforcing the right to equality and non-discrimination before the law. To major international human rights norms, non-discrimination provisions are primary, and in certain cases, affirmative action is forced by these standards. As it is affirmed by the United Nations Human Rights Committee,

“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”

The United Nations Charter focuses on equality and dignity and it provides for non-discrimination on four grounds, namely race, sex, language and religion. Universal Declaration of Human Rights, although not legally binding, has become the foundation for establishing legal norms for covering international behavior with regard to the rights of individuals. Therefore, the ideological roots of dignity and non-discrimination can be said to be international. At international level, the general principles of the Universal Declaration of Human Rights have been articulated in various shapes.

The significance of non-discrimination is repetitively highlighted by the important regional treaties and universal norms like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) which were founded on the Declaration. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the international Convention on the Elimination of All Forms of
Discrimination against Women (CEDAW)\textsuperscript{16} had also been adopted which were specific instruments with regard to discrimination. The requirement was acknowledged for taking actions in order to make this duty effective by the above-stated and the other norms.\textsuperscript{17}

1. The International Convention on the Elimination of all Forms of Racial Discrimination

The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) provides the global level community’s most particular treaty-based regulation on the affirmative action. Racial Discrimination is defined by the International Convention on the Elimination of all Forms of Racial Discrimination as given below:

“\textit{Any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.}”\textsuperscript{18}

This convention was adopted in 1966 and it deals in paragraph 4 of Article 1 with “favourable discrimination” measures taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms. A horde of rights to be enjoyed without any kind of discrimination is also specified by the treaty. The right to equal treatment before the law, a range of economic, social and cultural rights and several civil and political rights are incorporated in these rights.

A vital component of this Convention is taking action. Article 2 paragraph 2, of this Convention imposes on State parties the duty to take special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and the fundamental freedom and “prohibit and to bring an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”\textsuperscript{19} States are also required by the same Article to review their legislation.\textsuperscript{20} Provisions of this Convention not only cover certain affairs relating to public life but also certain private matters that other human rights norms specifically do not deal with and debatably might not cover.
Thus, vigorous action is obligated in order to fight discrimination by the Convention. It is also unquestionably highlighted by this Convention that to make distinctions among groups is not impermissible discrimination inherently. In contrast, everything depends upon the aim and effects of the categorization, racial or ethnic, which is provided, whether made up forbidden discrimination or not. The form of the racial or ethnic distinctions which are allowable is further clarified in the General Recommendation 14, by the Committee on the Elimination of All Forms of Racial Discrimination. Affirmative action is also pointed to, by the country reports of the Committee, as a means of promotion of the compliance with the treaty provisions. The Seminar on the elimination of all forms of racial discrimination, held in 1968, undertook a significant debate on the legitimacy of reservations and quotas. It was held that the systems of reservations and quotas were not essentially inconsistent with the principle of equality, as long as they were of a sternly temporary nature. Thus, the critical point was made that even though reservations and quotas under certain circumstances might be proper, but they must always be of limited duration.21

2. The International Covenant on Civil and Political Rights (ICCPR)

In certain situations, non-discrimination and State actions are also authorized and affirmative action is supported by the covenant in order to encourage equality. Definite non-discrimination provisions are provided under Articles 2, 25 and 26 among others of this convention. Discrimination is prohibited under Article 2(1), equality before the law without discrimination is recognized by Article 26 and Article 25 mandates the right to political involvement and participation without discrimination. Although the derogation of certain rights is allowed by the covenant, it mandates that such measures do not involve any discrimination “solely on the grounds of race, color, sex, language, religion or social origin.”22 It is avowed by Article 2(2) that State action is obligated by these norms, noting that:

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”23

A duty to combat private discrimination is also suggested by the International Covenant on Civil and Political Rights.24 It is also noted by the Human Rights
Committee that it is reported by many States on legislative, administrative and judicial decisions on discrimination, “but they very often lack information which would reveal discrimination in fact.” Accordingly, it is required by the committee that not only the information is provided by States on Articles 2(1), 3, and 26 with regard to their Constitution or equal opportunity laws, but that it is also reported by them on “any problems of discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies” because “the Committee wished to be informed about legal provisions and administrative measures, directed at diminishing or eliminating such discrimination.”

It has also been declared by the Human Rights Committee that in another field, the adoption of the special measures—addressing equality in political involvement—acts in accordance with the provisions of Article 25. It is declared by the Committee that “affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.” The practice of the Human Rights Committee confirmed its view on affirmative action. The Committee’s individual case decisions and observations made on country reports which were submitted under Article 40 also echo its welcomed approach to the affirmative action. During the contemplation of a report of Sweden, it was recalled that Article 26 does not only refer to equality before the courts but also to equal protection of the law. It was also analyzed cautiously the purpose of the measures which were in question, finally opting against any finding of violations of Articles 2, 25, and 26 because the law could not “be regarded as incompatible with the reference to ‘general terms of equality’ in Article 25(c)” and its implementation could not be considered “invidious distinction under Article 2, paragraph1,” or “prohibited discrimination” under Article 26. Moreover, in country reports, in numerous comments, it has been recommended by the Committee that affirmative action measures are adopted by certain nations, while appreciating efforts in this respect made by others.

3. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Similarly, many non-discrimination provisions are also contained in this covenant. States are required by this covenant to guarantee the rights “without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” This covenant does not envision a complete equalization of result in the sense of achieving an
equivalent allocation of material benefits to all the members in the society. It does but, make out a process of equalization in which social resources are reallocated to give for the satisfaction of the basic rights of every member of society, founded on the notion of equality of opportunity.\(^{30}\) The Committee on Economic, Social and Cultural Rights in its first General Comment states that a primary step towards the realization of the Covenant rights is to spot the disadvantaged sectors of the population, which should be the focal point of positive State action meant for securing the complete realization of their rights.\(^{31}\)

The scheme of equality of opportunity is particularly to be found in Articles 7(c) and 13 (2) (c) of this covenant. Equality in the matter of employment is further mandated by it under Article 7 (c), and Article 13 (2) (c) provides that higher education “be made equally accessible to all, on the basis of capacity, by every appropriate means……”\(^{32}\) The positive measure may be taken on the behalf of certain groups in the society is confirmed by the text of Article 10 (2) (3) of the Covenant which offers for special measures of safeguard to be accorded to mothers before and after childbirth and to children, particularly in the place of work. Moreover, the vital role of the affirmative action in the promotion of the effective non-discrimination is pointed out by the General Comments and connected Articles of the Convention.

It is expressly mandated by the covenant that steps are taken by States for making the rights guaranteed by it effective. By paragraph 1 of Article 2, taking “steps” in relation to all the rights provided under the treaty, while it is reiterated by other Articles, it is mandated that there is compulsion in relation to particular rights like the right to work, the right to decent standard of living, and the right to education. By Article 6(2), work-related measures like “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment……” are mandated. Steps are required by Article 11(1) to provide the guarantee of the right to an adequate standard of living, including “adequate food, clothing and housing and to the continuous improvement of living conditions.”

These obligations are clarified by General Comment 3 of the Committee on Economic, Social and Cultural Rights.\(^{33}\) It was also indicated by the covenant that the measures can include legislative, financial, educational, administrative and judicial as well as social actions.\(^{34}\) General Comment Number 5 has included “disability” as ground on which unique treatment can be justified. An explicit disability-rated
provision in the International Covenant on Economic, Social and Cultural Rights is absent, possibly due to the lack of awareness. The Committee specifically stated that:

“All legislative and other reforms should take into account the need to promote equality and reverse the devastating affects of discrimination against the indigenous populations, in particular through affirmative action.”35

In General Comment Number 13, it is upheld that the embracing temporary special measures planned to bring out de facto equality for men and women and for disadvantaged groups is not an infringement of the right to non-discrimination with regard to education, so long as such measures do not direct to the maintenance of unequal or separate standards for different groups, and provided that they are not continued after the objectives for which they were taken have been accomplished.36


The State Parties to the present Convention determined to implement the principles set forth in the Declaration on the elimination of Discrimination against women and, for that purpose, to adopt the measures required for elimination of such discrimination in all its forms and manifestations.37 Although, the provisions specific to racial discrimination are not contained in convention, reasoning by analogy, it should be taken to suggest as favouring affirmative action on the basis of race. Discrimination is defined in Article 1 of this convention while States are obligated by Article 2 to “pursue by all appropriate means and without delay a policy of eliminating discrimination against women.” It is clarified by the remaining provisions of Article 2 that to abolish discriminatory “laws, regulations, customs and practices…against women by any person, organization or enterprise” is the final goal.

The Convention on the Elimination of All Forms of Discrimination against Women of 1979 had a precedent in Article 3 of International Covenants:

“The State Parties to the present Covenant undertaken to ensure the equal right of men and women to the enjoyment of all economic, social and cultural (civil and political) rights set forth in the present Covenant.”

Specific rights are targeted by further provisions and more concrete measures are outlined.38 During the drafting of the Convention on the Elimination of All Forms of Discrimination against Women the question of special measures was discussed. It was highlighted that the establishment of provisional conditions for women intended
to establish de facto equality should not be considered discriminatory and it is provided unequivocally under Article 4 of this Covenant. The Committee on the Elimination of All Forms of Discrimination against Women recommended State parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women’s integration into education, the economy, politics and employment.\(^{39}\)

In its General Recommendation Number 23 on women’s participation in political and public life, the Committee refers to temporary special measures.\(^{40}\) It is recommended by the Comment that elimination of de-jure obstacles “is necessary, but it is not enough,” and non-discrimination provisions can be given effect to by that temporary special measures.\(^{41}\) Recruiting, financially assisting and training women candidates; amending electoral procedures; developing campaigns directed at equal participation; setting numerical goals and quotas; and targeting women for appointment to public positions such as judiciary or other groups have been incorporated in such policies.\(^{42}\) The Committee on the Elimination of All Forms of Discrimination against Women has expressly considered the issue of terminology in General Recommendation Number 25 on temporary special measures. The Committee itself in its previous recommendations used different terms to describe temporary special measures and that in different national context, this term is often equated,

*With the terms ‘affirmative action’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’ and ‘positive discrimination’.\(^{43}\)*

5. Other International Norms and Institutions

The International Labour Organization’s (ILO) Discrimination Convention resolutely also forbids discrimination and supports affirmative action and has been a pioneer in using chiefly promotional conventions to recognize definite objectives and policies. It has also set out standards to be attained, consequent with the principle of equal remuneration for work of equal value, included into the International Labour Organization Constitution, and of equality of all human beings, irrespective of race, creed or sex, as proclaimed in the 1944 Declaration concerning the Aims and Purposes of the International Labour Organization, adopted by the International Labour Conference at Philadelphia. In two ways, the discrimination is defined by the Convention. First, it is “any distinction, exclusion or preference made on the basis of race, color, religion, political opinion, national extraction, or social origin, which has
the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."⁴⁴ Second, it is any “other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...”⁴⁵ All the State Parties are also obligated by the Convention for devising and putting into operation national policies for promoting in the employment the equal opportunity, in this field to eliminate discrimination, and to attempt for achieving cooperation between industry and labour, as well as among other related organizations (Article 2 and 3).⁴⁶ Article 5 is one of the first Articles in an international treaty to authorize unequivocally “special measures of protection or assistance” intended to meet the particular necessities of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural States, are normally acknowledged as requiring extraordinary protection or help. It is obviously declared that these special measures will not constitute discrimination.

In 1960, a Convention linked to the field of education was adopted in the framework of United Nations Educational, Scientific and Cultural Organization (UNESCO). The Convention against Discrimination in Education of United Nations Educational, Scientific and Cultural Organization does not include any reference to such measures, but authorizes under certain circumstances, the establishment or preservation of separate educational systems or institutions to assure the effectual realization of the right to education of specific groups of individuals (e.g., linguistic minorities).⁴⁷ The significance of Declaration on Race and Racial Prejudice of 1978 of United Nations Educational, Scientific and Cultural Organization, though only a declaration, cannot be undervalued as it was extensively supported, being adopted unanimously by commendation. Article 9, paragraph 2, states that particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health and to facilitate their social and occupational advancement, especially through education.⁴⁸

The support of affirmative action has also been expressed by the Human Rights Subcommittee of the United Nations’ Economic and Social Council. Special Rapporteur of the Subcommittee has been issued on States multiple reports specifically on Racial Discrimination and in general on affirmative action. Following
a visit to the United States, in the special Rapporteur’s 1995 report, it was suggested by it that the United States should “revitalize ‘affirmative action programmes…..in order to offset the negative consequences of the policy pursued during the 1980’s in the fields of health, housing, education and employment.” The General Assembly’s attention was also drawn by the Special Rapporteur to the significance that appends for maintaining affirmative action programmes for guaranteeing by law an effective equality of opportunity for members of ethnic and racial minorities. The Special Rapporteur report of 2002 on affirmative action, vigilantly expresses the concept of the affirmative action, justifications, limitations and target groups of the same. Many sources of law providing support to affirmative action steps are also detailed by it and they are also distinguished from impermissible discrimination.

International Law has also set major limits on the affirmative action measures for its adequate and proper implementation. These are:

(a) Affirmative action measures may not lead to discrimination.
(b) Affirmative action measures need to be temporary.

In spite of the various International guarantees discussed above, discrimination against the members of certain national, racial or ethnic groups is still continued around the world.

With the problem of less representation of the minorities and the under privileged communities in the public spaces, several countries in the world have not been grappling and thus, they have focused their attention on the policies with the intention of diminishing the diversity. To each country, the criterion for identifying these minority groups is specific and particular. For example, in the case of United States of America (USA), Brazil and South Africa, on a combination of “race” group divisions are based (or skin color, and/or phenotype: black, white, colored etc.) and nationality (Indian, Asian etc.). In Malaysia, on nationality or ethnicity (Malay, Indian, Chinese) groups are based. Affirmative action is required to level the playing field, where certain groups have long been disadvantaged. This can be done in a number of innovative ways, which can be utilized depending on the unique requirements and the concerns of the country affected. The affirmative action programs have been employed around the world. By considering the experiences of the United Kingdom, United States, India, South Africa, Malaysia, Brazil, Pakistan and Sri Lanka and making a comparative study of the affirmative action policies applicable in these countries, it can be demonstrated how many different countries
have shaped these policies (affirmative action policies) to meet their specific requirements and concerns and it also exhibits some of many models which may be utilized for equalizing opportunity for all citizens. So, affirmative action program does not exist in the vacuum. Rather, backdrop is formed by the history, legal precedents and statutes against which any affirmative action program must be viewed.52

I. History of Discrimination

The roots of the present always lie in the past. So, the justification of the affirmative action policy can be appropriately scrutinized only by looking into the past history of any system. The way to shed some light on the affirmative action program is to look at its past in each and every country. Because one can initiate to understand the reasons for the affirmative action and employment equity measures adopted in different countries, it would be crucial to start with a study on the history of the affirmative action. This study helps for understanding how and why people were discriminated in the past and how in all fields of their lives, they had been led to lose the opportunity to be equal by the discriminatory practices and also why the affirmative action program has an essential programme for redressing the inequalities inherited from the past Governments. Therefore, it would be very difficult without this historical background to get an understanding of the requirement for the affirmative action measures.

1. United Kingdom

United Kingdom affirmative action has been developed in the historical context. The history of United Kingdom has not afforded the indisputable moral right of compensation for past discrimination to any single group and there has been no mass public demand for positive action. Instead economically driven European policies have shaped the background framework against which the collective economic and social priorities of United Kingdom positive action function. The history of race relations within the United Kingdom had been affected from its start by the small size of the minority population and its own ethnic and cultural plurality. The political and judicial opposition to positive action in United Kingdom has formed the law. United Kingdom has faced criticism for its reaction to positive action and the justification behind its decisions has linked to the particular background and legal framework
within which the policies exist. United Kingdom has increasingly advocated the attainment of substantive equality irrespective of the requirement for differential treatment. Further principles upon which affirmative action has been based have also been crafted in accordance with current legal, political and social priorities so that the role of concepts such as merit is extremely value-laden in this context. In United Kingdom, the use of positive action has consistently prioritized voluntary action which has been condemned for being too weak an approach to cure inequality prevalent in the society.

2. United States of America

Broad discrimination against the persons in the society has been wide spread because of their race, background, religion and gender. In American society, racial inequality continues to be a major problem. Race is more easily identified because race is ascriptive in that it is based on the color of the skin primarily and also on other phonotypical attributes for instance quality and color of hair, nasal index, type of lips etc. Thus, it is necessary to be emphasized that race is like a social construction in a color-based societies where inequality are crucially defined through race and so, it is a very true phenomenon in everyday life, particularly for those who are racially discriminated.

For probing the reasons for the legal standing of the affirmative action, all of the history of America, from the colonial times, through slavery, Reconstruction, the Jim Crow era, the Civil Rights period is necessary to be explored. Not only these programs, due to a specific past, have been adopted and justified, but they have had a definite evolution as well. Commencing with the evil slave system, to the Civil Rights Movement- a horrifying civil war, the fourteenth amendment and its adoption; development of the policy of “separate but equal” doctrine and the desegregation measures, at the end, evolving into a full fledged affirmative action program for attending to the country’s ancient and extremely deep-rooted discrimination against ethnic and racial minorities and women.53

Slavery

In the United States, the history of the ethnic conflict dates back to the late 16th century as a nation to its foundation or its ‘discovery’ by white European occupiers. As the colonizers moved in, Native Americans were subjected to brutal dispossessio
and there was gain of the control by the settlers over the land, which was the most precious natural resource. Beginning in the year 1619, in the United States, the economic development which was subsequent to it was based on bringing of the black slave labour by force from Africa. By the late 17th century, in the Southern America, large tobacco and cotton plantations had cropped up, for which a large number of labour was required. By the supply of the people of Africa, particularly Negroes this demand of the labour was met. This slave trade was funded chiefly by English, the Spanish and Portuguese. Under Slavery, Blacks were not granted any kind of rights whatsoever.

The United States of America geographically was divided into slave and non-slave regions and in the North; there was the starting of the anti-slavery movement under the leadership of William Lloyd Garrison which led to the enactment of the Northwest Ordinance in 1787.\textsuperscript{54} In some Northern States, by 1787, the slavery had been abolished and populations of the black freedmen began to establish themselves there.\textsuperscript{55} It was about this period that the first case on the issue of slavery was decided by the Supreme Court.\textsuperscript{56} This case reaffirmed the view of the legal status of black slaves; they were less than fully human and were mere property.\textsuperscript{57} This case could be seen to have fuelled the civil war of America that followed.\textsuperscript{58} For the South, the election of Abraham Lincoln was also a signal. Despite all the efforts made by Lincoln to avoid the civil war, even the assurances given by him that slavery would be respected where-ever it existed, 11 States of the South broke away, calling themselves as Confederate States and as a result, the war ensued in 1861. After about four long years of the civil war, there was the abolishment of the slavery system. In 1865, the end of institutionalized slavery was marked by the American Civil War and its aftermath.\textsuperscript{59}

**The Jim Crow System**

The system which replaced slavery was only marginally better than it and had a number of features which were similar to the Indian Caste system. There was condoned a culture of separate and seemingly equal treatment in the South which was known as Jim Crowism. The subjugation of African-American into the twentieth century was ensured by the “Jim Crow” laws.\textsuperscript{60}
Towards Equality

In 1863, an executive order was issued by President Abraham Lincoln, the Emancipation Proclamation,\(^{61}\) by which the freedom of the slaves were mandated in the areas which were under the control of the federacy.\(^{62}\) Therefore, the amendments were made in the Federal Constitution for attending to the issue of the racial discrimination and the rights and status of the legally liberated African Americans. It is provided by the thirteenth Amendment inter alia that,

"neither slavery nor servitude......shall exist within the United States or any place subject to their jurisdiction".\(^{63}\)

Equal Protection of all its citizens is provided by the Fourteenth Amendment\(^{64}\) and the Fifteenth Amendment provides for the right, notwithstanding the race, color or previous conditions of servitude of a person.\(^{65}\) During the same time period, the Freedman’s Bureau Act was passed by Congress by which provision was made for making available land, funds and building for the “education of the freed people”.\(^{66}\) Further in 1865, the Civil Rights Act was enacted by Congress.\(^{67}\) This Act was the first public accommodations act and it provided that all the citizens were “entitled to the full and equal enjoyment of the accommodations, facilities, advantages and privileges” of the public places and the places of the public enjoyment.\(^{68}\) Thus, the equality of legal status and voting rights against State action were guaranteed by the Acts of 1866 and 1870 and the right to equal enjoyment of the public inns, conveyances and amusements irrespective of race was guaranteed by the Act of 1875 within the protection of the federal law. However, the Civil Rights Act 1865 was declared by the Supreme Court of United States of America to be unconstitutional in the Civil Rights Cases.\(^{69}\) But, in the year 1883, when the court had to deal with congressional legislation, which was guaranteeing equal protection of the laws to the Blacks, then it hesitated at providing the positive meaning to the clause. The States were to find out the answer to the persistent question, what would be an acceptable legal principle for supporting the policy of holding blacks in their better previous status. And in the formula of “Separate but equal” there was the answer to that question and this solution received the final acceptance and approval of the Supreme Court in Plessey v. Ferguson.\(^{70}\) Under this case, Justice Brown decided that the enforced separation of the white and the blacks stamped the colored race with a badge of inferiority. But in 1938, a law was declared void by the Court under which Gaines,
a black applicant, was refused admission to the School of law of the State University of Missouri.

There was also the subjection of other races to the oppression as well. Until 1943, there was the exclusion of the Chinese immigrants from becoming citizens. Around 1945-50 the impending death of the “Separate but Equal doctrine” was heralded by a group of cases. Until 1952, the right to become the citizens was not granted to many other Asian immigrants. Asians were sent to segregated schools, not allowed to marry persons of a different race, interned by the hundreds of thousands and discriminated against, in addition to the prohibition on citizenship, in getting permits for the businesses during World War II. In the aftermath of the Civil War, Native Americans were nearly exterminated. The target of the discrimination was Latinos as well, such as “mass deportations” in the 1930s. Anti-discrimination laws were adopted as a part of the movement of the 1950s and 1960s. Finally, in May 1954 there came the famous ruling of Brown v. Board of Education, under which it was decided that Separate Educational facilities were inherently unequal. Brown v. Board of Education sounded the death knell for all kinds of racial segregation. Over the following decades, the struggle for the civil rights played out across the United States, in Congress, in the courts, in public lives and in the private life, culminating with the Civil Rights Act of 1964 in some respects. But soon it became quite clear that these laws, on their own, could not undo the effects of the years of oppression and inequality. Between many races living in the United States of America, there have been gaps and in order to fill those gaps among those races, many arguments have been given. The United States tried hard to better the country by upholding Affirmative Action. Therefore, for addressing this continuing pattern of discrimination, race and gender-specific programs were adopted.

3. South Africa

The past of the South Africa has been portrayed as that of “a deeply divided society characterized by strife, conflict, untold agony and the injustice” and which “generated gross violations of the human rights, the contravention of humanitarian values in the violent conflicts and legacy of hatred, panic and vengeance”. In South Africa, there were two groups of persons who were discriminated against: the black community and the women. The whole of the State was plagued by the racial discrimination and the gender discrimination. Though a number of cases of racial
discrimination occur in other different parts of the world, but it was the apartheid with its legal, systematic and official character by which South Africa is made distinctive. It was the policy of the segregation of the races through legislation which made the bases of apartheid. Apartheid sought to regulate along racial lines human relations. Apartheid is an Afrikaans word and its meaning is ‘separation’ or ‘apart-hood’. In English, it has emerged as a premeditated system of the racial discrimination which was applied against the black majority community by a specially privileged white minority community. Thus, one of the defining characteristics of apartheid in South Africa was the racial discrimination and it had been entrenched in an array of statutory provisions for many decades.

In South Africa, the finding of the diamonds and gold deposits were made and it resulted in the invasion by the English and from the seventeenth century onwards, there was the complete colonization in the South Africa by the Dutch and English. Attracted by the prospect of the mineral wealth, the British Government took control of the diamond mines. On every sphere of the society, there was a radical impact of these mineral discoveries. Significantly, on a massive scale, labour was required. The race discrimination in the South Africa was also first perpetuated as early as in 1652 by the Dutch East India Company. For the next two centuries, various fragments of the South Africa were gone on to be captured by the Dutch and the English.

After the development of the four mines, there was the establishment of the town Kimberley. In the 1870’s and 1880’s, in the inside of Southern Africa, this town became the largest urban society. In 1872, Kimberley’s white claims-holders persuaded the British colonial administration for introducing a pass law. This law was passed with the object for limiting the mobility of the migrant workers, by whom the employers were frequently changed or the diamond fields were left in a constant attempt for bargaining for getting higher wages for their work. Following the promulgation of this pass law, other restrictive laws were also passed. Therefore, the indigenous population was dominated by the European settlers through political control as well as also through the control of the land and the wealth. So, South Africa had been completely colonized by the British by the end of the nineteenth century. Further, it was required by the Hottentots Code of 1809 that passes were carried by all Khoi-khoi and other free blacks stating where they lived and also about who were their employers.
In 1886, the “closed compounds” were constructed which were fenced and guarded institutions and in these compounds, for the period of their labour contracts, all the black diamond mine workers had to reside in.\textsuperscript{93} It was the outcome of the preservation of the communal areas\textsuperscript{94} that Africans were deprived of their rights within the urban areas by reducing the wages and keeping their families and dependants on the subsistence plots in the reserves.\textsuperscript{95} Basic rights could be denied to Black Africans if the fiction could be preserved that they came from ‘tribal societies’ not from ‘White South Africans’ and they came to serve the ‘needs of the white man’.\textsuperscript{96} The origins of a segregationist ideology, and later apartheid were based upon this set of assumptions and policies.

In the British administration of law, a major turnabout was noticeable by the institutionalization of practice of such discrimination. The first industrial city of South Africa thus developed into a community where in the discrimination became well-established in the economic and social order because of the wish for the cheap labour but not due to the racial hatred formed on the frontier.

However, in a battle for the rich mineral resources of South Africa, there was eventually a clash between the two colonial powers, the Boers and the British when there was the commencement of the Anglo-Boer War in 1899. Many black farmers were in a position to avail themselves of employment opportunities at handsome wages and they benefited from the Boer War, but these benefits were short lived.\textsuperscript{97} The signing of the Treaty of Vereeniging by which the Boer War was ended, the issue of rights for Africans was left to be decided by a future white self-governing authority.\textsuperscript{98} But during the war, Dutch were edged by the British colonists. The Boers lost the Anglo-Boer war, but a decision was implemented by the British to give power to the Boers by granting Constitutions from 1906-1907. Inspite of this, in Southern Africa, considerable influence was still retained by the British.

In 1909, the South Africa Act of Union was passed by the British Parliament and ratified by the South African parliament in 1910. The British and Afrikaner colonies were brought under the same Government by the same Act. This act continued in force until it was replaced by the Republic of South Africa Constitution Act of 1961. There was a deep effect on South Africa both socially and economically due to the outbreak of Second World War in 1939. Between 1939 and 1945, out of many of the people employed in the manufacturing, African women increased by almost sixty-percent. By 1946, in comparison to the whites, there were more Africans
in the towns and cities of the South Africa. Throughout the early `1940s, the trade unions were formed by the urban black workers who were making demands for the higher wages and better working conditions and they also got resorted to strikes.

**Apartheid and the International Law**

In 1948, the Afrikaner National Party came to power after wining the elections, advocated a system of complete segregation—the Apartheid system (1948-1994) - is without any parallel in the world history. Through scores of apartheid laws, the ruling National Party very methodically and almost wholly segregated the various communities in all spheres of social and economic organization and woven a widespread system of supremacy of, privileges for, the white community. Apartheid was an intentional affirmation of the belief in white superiority. The perversity of the system is even more apparent when we note that the whites were actually a minority group. In summary, people’s most fundamental freedoms and rights were affected by the apartheid laws. 99 Obvious inequality before the law was established by these laws. Some of more than 350 Apartheid laws were passed for entrenching both racial inferiority and racial superiority. 100 So, in these ways, the existing and the successive Governments laid the foundations of the Apartheid. This system of apartheid came under severe condemnation and criticism by world community, leading to the imposition of widespread international sanctions against National Party Regime. South Africa became more and more isolated internationally. In 1973, the text of the International Convention on the Suppression and Punishment of the Crime of Apartheid was agreed on and passed by the General Assembly of the United Nations for providing the legal framework within which the sanctions could be applied by the member States for pressing the South African Government for changing its policies. In 1976 this Convention came into force. Article II of the Convention defines apartheid. 101 A number of resolutions were passed by the United Nations and numerous conferences were held condemning South Africa, including the World Conference against Racism in 1978 and 1983. The South African Government was persuaded by these international movements combined with the internal troubles that its hard-line policies were unreasonable. Internationally, Apartheid in the South Africa was condemned as racist and unjust. The pressure exerted by the international community finally forced the apartheid regime to negotiate with and African National Congress, the true representative of African people, for dismantling of Apartheid.
Due to the internal issues and the international pressures, attempts were made by the Government of the South Africa to change its policies in respect of the Apartheid. The Government embarked on a series of reforms.\textsuperscript{102} The Constitution of 1983 was passed.\textsuperscript{103} One Parliament was created by this Constitution with three racially divided houses. The House of Assembly was allocated 178 seats which represented the whites, the House of Representatives was allocated 85 seats which represented the coloreds and the House of Delegates was allocated 45 seats which represented the Indians. However, the Constitution was drafted for ensuring that in the House of Assembly the real power remained with the whites. This Constitution failed to solve amongst its people the problem of segregation but reinforced such notions.

The pass laws were scrapped in 1986. In the same year, between the members and Nelson Mandela (member of the African National Congress), secret discussions began.\textsuperscript{104} The ex-State President of South Africa F.W. De Klerk then held secret talks with imprisoned leader Nelson Mandela for starting preparations for the major policy shift. The former liberation fighters were invited for joining the Government for preparing at the negotiating table for a new multiracial Constitution. Improved relations were sought by De Klerk with the rest of Africa by proposing with the neighboring States joint regional development planning and by inviting African leaders for increasing trade with South Africa. Nelson Mandela was released two weeks later from prison and he became the first democratically elected President of the Republic of South Africa. In addition, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been ratified by the South African Government.

By then, the South African society had already been impoverished by apartheid. Apartheid also impoverished the dignity of the people of the South African by its segregationist measures like, tertiary, job institutional and economic reservations and by its deliberate policy of creation of the hierarchy of the races.\textsuperscript{105} For achieving substantive equality, these imperfections have to be directly addressed by the reparation measures. In 1991, the Lands Act, the Group Areas Act and the Population Registration Act, the last of the so-called “pillars of apartheid” were abolished.
4. Malaysia

In Malaysia, social and economic inequality had existed since the colonial era, or even before the arrival of European colonial powers (Portuguese in 1511, the Dutch in 1640 and the English in 1795). Malaysia had to struggle for achieving economic and political freedom right from Portuguese who occupied it in the year 1511. In a traditional Malaysia, the social and economic gaps were ‘silently condoned’ when the population was relatively homogeneous and these were accepted as a reality of life. These social and economic gaps did not cause any social disagreement, at least not openly. But there was gradual exposure of the country to the modernization then the demographic features were perceptibly changed by the immigration from other nations particularly during the era of European imperialism.

The British wanted to get control over Malaysia for tapping its resources specifically those of the rubber and the tin as the country had become and remained for many years world’s leading producer of these two products. But it is very interesting to note that in the process of exploitation of the Malaysian natural resources, the indigenous Malay population was not enslaved like in Africa by the British. Rather for carrying out the task, numerous Chinese and Indians were preferred to be transported to the country. The result was what is often referred to as ‘ethnic division of labour’. In other words, there was a wide gulf between the native population constituting the agricultural sector on the one hand and the Chinese and Indian peoples on the other hand, which constituted the industrial sector. By this “ethnic division of labour,” a plan of British colonialism was executed which was termed as ‘divide and rule’. It was particularly taken care of under this scheme that the contact among the different communities was negligible and this aspect not only served the British colonists to manage this colony hassle free but also to prevent a common aspiration to be surfaced among different communities.

In Malaysia, the history of the economic and social inequalities among the main racial or ethnic groups cannot actually be separated from the growth of its multi-ethnic society. While the Malaysia was still a British colony at that time Malaysia was described as “an example of a multi-racial society par excellence.” Because the Malaysian society was severely of heterogeneous nature and it was divided into several lines—racially, religiously, regionally, economically, linguistically and socially. Inequalities can be discovered in every single ethnic or racial group along
economic, social and regional dimensions. A sequence of practices started by colonial Government promoted those inequalities either through the institution of formal policies or on the selected matters through adopting non-interference attitude or through utter disregard, allowing certain groups and communities to be trapped in the web of their backwardness. Besides, there took place some infra-structural developments in an irregular manner under which certain groups were benefited and certain others were ignored. In fact, there was rapid expansion of the economy but its distribution was not fair. The inequality and disparity in the fair distribution of the expanding economic cake took place in several dimensions: as between European Colonial Power (British) and the Asian (indigenous or immigrants), between the Chinese immigrants and the Indian immigrants, between the immigrant and the indigenous population, between the Malay aristocrats and the Malay peasants. And the “divide and rule policy” of the British seemed to be the basis of all that by design or by accident. This policy of the British was very much to their benefits politically and economically. The plural society of Malaysia was burdened by this policy of the British colonial powers with envy, difference, suspicions and even bitterness but still people had to live or lived in the same country. In Malaysia, the Chinese attained economic supremacy towards the end of the nineteenth century. To counter this threat, for the native Malay population, a reservation policy was launched.\textsuperscript{111} On this issue, the first known legislation was the Selangor Land Code of 1891, under which certain lands were reserved for the Mohammedans.\textsuperscript{112} It has further been explained that provision for providing special position to the Malays was the outcome of the demands, during the ‘Durbars’ (meetings between the British officers and the rulers of the Federated Malay States), made by the rulers of Malay.\textsuperscript{113} This sharp economic divide of urban-rural character between the immigrants and the native populace in Malaysia led to the marginalization of the Bhumiputeras.

\textbf{The Social Contract Algorithm}

Social contract is a concept which means a ‘notional agreement of the members of a society living together, under which elements of the individual freedom are mutually relinquished in the interests of collective peace and good order.’\textsuperscript{114} A social contract was entered into by the native Malay population prior to Malaysian independence in the year 1957 with the Chinese and the Indian immigrants. Under this contract, citizenship was agreed to be given in favour of immigrants according to
the Federal Constitution if natives were conferred upon a special constitutional position. However, there were deeper roots of the special contract system in Malaysia and the pact was succeeded by it and that pact was entered into between the Malay sultans and the rulers of the British power under which British were permitted by the sultans in return for getting political independence to provide employments to the immigrants in mining the natural resources. Under Article 14 of the Federal Constitution, immigrants were provided with the citizenship as part of this social contract while in favour of Malays, a number of ‘positive discrimination’ provisions were incorporated.

5. Brazil
The main dissimilarity between Brazil and the other countries of the world is that there was Portuguese colony in Brazil—as distinguished from South Africa and Malaysia which were colonies of British colonial power. However, Brazil can be compared with many former colonies in that a systematic method of racial discrimination, viz. slavery in this South American nation flourished. In sugar trade, for realizing ambitions of Portuguese authorities, native Brazilians were enslaved since 1500 A.D. Besides, for the same purpose, millions of African slaves were transported to Brazil. Out of Brazil’s population of 201 millions, for this reason, slaves of African descent constituted around 50%. Finally, with the enactment of the ‘Golden Law’ in 1888, Brazil became the last country in the western world for abolishing slavery. But decades of the racial discrimination, which was unrecognized, were to follow. In Brazil, until the 1980s; the unique nature of the racial discrimination lied in the fact that the marginalization against the Afro-Brazilians was un-recognized.

A national myth had long been harbored by Brazil that the various races of the country lived in harmony and equality – a lie by which the full inclusion of Afro-descendants, indigenous people, and members of other discriminated communities had been precluded into the society at large. The citizens of this country were living under the false impression that Brazil was a ‘racial democracy’. Even though the law of this country prohibited the racial discrimination, yet in reality, the black community was never considered politically equal to the white population. In Brazil, a ‘whitening’ policy was carried out until the 1930s and this policy had two significant features: the first that the immigration of the white population into Brazil was
encouraged; and the second that black individuals who were vested with higher economic position were considered ‘whiter’ than the average black individuals residing in Brazil. Therefore, acceptance of the existence of ‘Racial Discrimination’ was the first step for ensuring de facto equality in Brazil.

6. Pakistan

In 1947 after independence, a society was inherited by Pakistan, and in the constituent parts of that society, there was wide gap in social, economic and educational conditions of the people in high situations in certain regions which were far better placed than the others. Caste has in deed been in existence for centuries in south Asia including Pakistan. While caste indeed has a religious dimension and it finds legitimacy in religious texts of Hindus, it is also a socio-economic system. Pakistan continued to use officially the category of scheduled Caste, albeit for a section of its Hindu population, customarily associated with ‘polluting’ work. It is also a fact that almost the entire Christian population of the country is converts from Dalits of Punjab; caste question gets closely related to the minority issue in Pakistan. The Gandhian category of Harijan has also been in use in Pakistan. Popular categories of people with which Dalits of Pakistan are identified are not completely aliens to Indians. For example, Mochi (clossers), Pather (brick maker), and Bhangi (sweeper) are mostly Muslims and considered “lower” castes on the basis of their family occupation, regardless of their religion. There are other titles, such as Musalman Sheikhs, Mussalis (both used for Muslim Dalits) and Masihi (Christians) universally refer to specific groups of people, also identified with specific occupation and used to segregate them from the rest as “untouchable” groups. It is not only the Dalits who are identified through caste names and maintain caste boundaries in kinship ties and in building other social set-up. Though Islam is popularly believed to be an egalitarian religion, Muslim Communities of the area have evolved their own system of hierarchical groupings, where some are considered more equal than others. According to the Sunni school of jurisprudence, lineage has foremost which could be categorized as follows:

“An Arab is superior to a non-Arab (Ajami) Muslim; amongst Arab, the descendents of Hazrat Ali come first, the Qurashi are above all other arbs, followed by Hazrat Ali’s descendents; the descendents of the caliphs; a learned non-Arab (ajami) is equal
to an ignorant Arab; a Qazi (a Muslim Judge) or a Faqih (a Muslim jurist theologian) ranks higher than a merchant and a merchant than tradesman."

Pakistan employs Islamic identity and ideology to totally contradict the existence of caste in the social and economic fabric of the country even when caste-based identities and caste-related discriminations are quite prevalent in the country, including among the Muslims. Such official contradiction of caste also works to the double disadvantage of the Hindu and Christian Dalits of Pakistan. While being members of a small religious minority, they face a hostile majority ruled state and civil society; being Dalits they also remain marginalized within their own religious communities.

7. Sri Lanka

Interestingly, in Sri Lanka, caste was the primary category of classification in the region and was used in all regional censuses until 1871 when it was replaced by race and nationalities for classification of Sri Lankan population. The pre-colonial Sri Lankan state was built around caste-based privileges of the ruling elite and hereditary and mandatory caste services of the lower orders of society. Unlike the Hindu caste system founded on the basis of the religious notions of purity and pollution, the caste systems in Sri Lanka have relied more on a kind of secular standing encouraged by the state, land ownership and tenure, religious organizations and rituals, and firmly-rooted concept of inherent superiority and inferiority. The official requirement and support to the caste systems has definitely declined over the years but the State has also ignored the deprivations caused by caste discrimination. The militant Tamil movement led by Liberation Tigers of Tamil Eelam (LTTE) also forced a ban on the practice of caste for strengthening Tamil unity, which only turned it into a sort of underground reality, not to be confronted openly through politics and policy.

The political regime of pre-British society was based on a feudal social order, a system of land tenure and extraction of services around the institution of caste and legitimized by a ritual order. The ruling elites were identified as ‘born to rule’ social formation. The lower orders of society consisted of a Goigama, free peasantry consisting mainly of Sinhala population, coastal low-country caste groups who were viewed as being outside the indigenous caste system. Coastal low-country caste groups, a range of service castes, with hereditary Rajakariya, providing services to the
king. They were tied to the elite through land allotments. At the bottom of the social order were caste groups expected to perform “menial” services such as removal of dead animals and dirt, public execution of criminals and manufacture and supply of mats and other useful objects using raw material collected from the jungle. Approximately 1 percent of the total Sinhala population was engaged in menial services and they lived in secluded but congested villages usually in the jungle.

Though caste system is somewhat less rigid in Sri Lanka, yet, it continues to be a core feature of its social structure. There are three parallel caste systems being practiced by the three major ethnic groups\(^{123}\) in Sri Lanka as below:

1. The Buddhist Sinhalas.
2. The Sri Lankan Tamils.
3. The Indian Tamils.

Caste system, each of these is based on some idea of hierarchy and discrimination. Buddhism has also organizationally adapted caste in its social and religious set-up. For instance, the popular annual religious rituals and cultural pageantries such as the Kandy Perahara conducted in honour of sacred tooth relic in the Temple of the Tooth where the four guardian deities were displayed, the caste order was celebrated.

Historically, caste based divisions and discriminations have been much stronger among Sri Lankan Tamils in Jaffna where untouchability has a religious sanction.

Sri Lanka also has witnessed certain new forms of caste discrimination which have emerged in the plantation economy, sanitary and scavenging services, and more recently in context of civil war and tsunami re-habilitation.

8. **India**

The preferential policies of India stems from a classification system which was based in the society on a person’s caste. Caste is defined as a rigid social system in which generation after generation there is maintained a social hierarchy and little mobility is allowed out of the position to which a person is born.\(^{124}\) The caste or the Varna system is a characteristic which is determined by birth of any person into a particular caste, irrespective of the faith practiced by the individual. Caste is therefore, descent based and hereditary in nature.\(^{125}\) This system of caste dates back about 3000 years (1500-500B.C.).\(^{126}\) By the Europeans the word caste is especially used for denoting different classes into which the Hindus are divided.\(^{127}\) Class or Caste, Varna or Color and Jati or Race are the Indian versions.
According to the ancient Hindu book and Indian history of the earliest literary source, the Rig Veda, Purush, the primal man destroyed himself for creating a human society. From the different parts of this primal man’s body; the different Varnas were believed to have been created. From his head, the Brahmans were said to have been created; from his hands, the Kshatriyas; from his thighs, the Vaishyas and from his feet, the Shudras. After these four castes arranged in a hierarchy, there are the Shudras. The members of this class of the society are the working class and the peasants who work in the non-polluting jobs. The caste hierarchy ends here. The untouchables worked only in the jobs of Indian society which were considered to be degrading; like clearing away dead animals or cleaning the sewages etc. Into many communities, each Varna and also the untouchables were divided which were called Jat or Jati. Each Jati was limited to the professions which were worthy of their Varna. The classificatory system assumes that certain qualities, traits, functions, powers and the characteristics are inherent in and definitive of each of the Varnas.

Once, India was colonized by British. In India, a legacy of their ideologies and culture was left behind by the British. Even in India, in most of the laws, the British influence is apparent. It is suggested by some of the scholars that the resulting depiction of the caste system was as much a product of racist theories of Europe and rather than cultural realities of India, the interests of the colonial rule. In the Vedas, there are several passages by which it is indicated that initially the four Varnas were based on the professions and was not determined simply by birth. The current rigid caste system during a later period came into place. In fact, the British strengthened the caste system in India because they saw the benefits in preferring some groups above others. The Brahmans were provided back special privileges that had been taken away by the previous Muslim rulers. Discriminatory practices, which were practiced amongst the various groups, were completely ignored by the British. So, indirectly the caste system was supported by the British even then the overall policy of the British towards the caste system was of non-interference. However, during the period of British rule in India, the caste system was eventually broken up greatly. A countrywide legal system and a widespread consciousness of rights took hold. For the Scheduled Castes, the vast machinery was developed under the British chiefly in the 1930s and 1940s. By passing various significant laws, the British brought changes to aid the marginalized lower castes. In the middle of the nineteenth century, the abolition of the slavery extended fundamental rights to the untouchables. However,
with the expressed discrimination of the social system, the general features of the legal system were not in concert and on a social level, the appraised inequality continued.

In the caste system a dent was made finally by the Industrial Revolution and also a new awareness was brought to the Indians that the social mobility might be possible. Urbanization was encouraged by industrialization, and new technologies were introduced. A more liberal outlook was given way by the rigid, age-old, caste-centered thinking in the urban areas, which without any distinction, encouraged the mixing of the castes.\(^{136}\)

The resolutions and orders confirming the right of Untouchables to the equal use of the Governmental facilities, wells and schools were passed in Bombay\(^{137}\) and Madras as well as in many progressive princely States. It was resolved by the Bombay Legislative Council that the Untouchables should be allowed to use all the public watering places, dispensaries, and schools.\(^{138}\) In 1932, the number of seats reserved in Parliament was made proportionate to the number of untouchables in the population. One in seven seats is occupied by an Untouchable representative in the Central and State legislatures through the process of reservations and quotas. Further, a conference convened on September 25, 1932, in Bombay for ratifying the Poona Pact\(^{139}\).

In 1938, the first comprehensive and penal act was passed by the Madras legislature for removing the social disabilities and making the discrimination against Untouchable an offence not only in regard to publicly supported facilities like wells, roads, and transportation, but also relating to “any other secular institution” to which there was the admission of the general public including hotels, restaurants, shops etc.\(^{140}\)

In addition to the caste system, from the Hindu religious fold, more than 50 million Indians belong to the tribal communities that are often distinct. These are the Adivasis, (literally, original inhabitants) who have origins preceding the Aryans and even the Dravidians of the South. Excluded from the mainstream development process, most live on the margins of existence. These tribes which are similarly notified in a Government schedule are also the targets of the affirmative action and hence referred to as the Scheduled Tribes.

Further, for the betterment of the untouchables two leaders fought. The first emerged as the leader of the nationalist movement, Mohandas Karamchand Gandhi
and by whom the eradication of untouchability as well as unity between Muslims and Hindus was linked with the aim of getting independence from British.\(^{141}\) The other reformer was an untouchable and a Columbia University educated lawyer and Statesman, Dr. B. R. Ambedkar.\(^{142}\) He wrote the world’s first affirmative-action programme into the Constitution. The untouchables and other underprivileged groups were provided proportional representation in the legislatures, educational institutions and Government jobs by this system of “reservations”, or “quotas”.

II. Evolution and Development of Affirmative-Action program

For making this delicate and highly sensitive issue more convenient, it is essential to differentiate the basic thoughts and the legal rationale of the affirmative action from many specific laws, regulations and practices which, under the affirmative action label, have developed in these different countries. It is also essential to look at the various provisions in great detail regulating affirmative action and the discrimination in these different countries. The reason for this is two fold: Firstly, it provides the better understanding of the various provisions that regulate the affirmative action and secondly, this study shows which countries have, in their Constitutions, explicitly provided for the affirmative action and the countries which do not have specific provisions for the measures of affirmative action, the judiciary is more open as opposed to a Constitution for allowing such programmes. This study examines the various court decisions in respect of the constitutionality of the affirmative action itself. This comparative study of the affirmative action program in practice is essential because it considers the general trends set in motion in different countries by these programs and the impact these programs have had on the society and also the actual goals to be achieved that it targets.

1. United Kingdom

The desire that all people should enjoy equality of treatment and opportunity is enshrined in the democratic psyche of the United Kingdom. The United Kingdom has implemented legal measures to secure an equal opportunity for individuals to enjoy complete societal franchise. In their quest of equality, the United Kingdom also required or permitted that certain earlier excluded and underrepresented factions should be afforded privileged treatment under the law. In the United Kingdom, such
measures are referred to collectively as positive action. The array of measures termed as positive action and positive discrimination in the United Kingdom are as follows:

1. **Equal Pay Act 1970**
   The history of equality and diversity legislation commences in 1970 with the Equal Pay Act, and takes us right up to present day. Equal Pay Act 1970 (Amended) had assured an individual a right to the equal contractual pay and benefits as a person of the opposite sex in the same job, where the man and the woman were doing: like work; work adjudged as equivalent under an analytical job evaluation study; or work that was proved to be of identical value.

2. **Sex Discrimination Act 1975**
   Sex Discrimination Act 1975, introduced the idea of indirect discrimination into United Kingdom law and set up an authoritative enforcement agency, the Equal Opportunities Commission. Sex Discrimination Act 1975 made it illegal to discriminate on the basis of sex. Sex discrimination was unlawful in employment, education, advertising or when providing housing, goods, services or facilities. It was unlawful to discriminate because someone was married, in employment or advertisements for jobs.

3. **Race Relations Act 1976**
   Race Relations Act 1976 building on two Acts of the preceding decade stressed on keeping away from indirect discrimination and creating of a powerful enforcement agency, the Commission for Racial Equality. The Race Relations Act 1976 and the Sex Discrimination Act, 1975 did not authorize positive discrimination but at the same time they did permit for positive action. Under both Acts if at any time in the previous 12 months, there were no persons of a particular sex or racial group doing particular job within an establishment’s labour force, it was lawful to offer access to training or to encourage and help members of the underrepresented group to undertake such work. Positive action policies as allowable within the 1976 Act were framed to cope with the problem of under-representation of ethnic minorities through the provision of encouragement and training opportunities, which would facilitate them to compete more efficiently for employment. There was no provision for the appointment of under-represented factions simply to realize ethnic balance. Positive action could be used within a programme of equality for achieving the objectives of
realizing fairer representation, but even here persons could only be appointed if they were competent qualification-wise and experienced for the appropriate posts. Hence, the law did not allow for positive discrimination or affirmative action: an employer could not attempt changing the balance of the workforce by selecting someone on racial grounds. The Race Relations Amendment Act 2000, which was precipitated by the McPherson Inquiry (1999) into the death of Stephen Lawrence, had strengthen the 1976 Act by extending protection against discrimination by public bodies and inserting a new and enforceable statutory general responsibility on public bodies to promote equality. This necessitated: British Race Equality policies for,

a. eliminating unlawful discrimination;
b. promoting good race relations between persons of different racial groups;
c. promoting equal opportunities.

The Race Relations Act 1976 (Amendment) Regulations 2003, were enacted under section 2(2)(a) and (b) of the European Communities Act 1972 and came into force on 19th July 2003 which implemented (in united Kingdom) Council Directive 2000/43 EC of 29th June 2000 (‘the Directive’) and incorporated provisions for problems concerning to such implementation. The Directive was concerned with the principle of equal treatment between individuals, irrespective of racial or ethnic origin, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of, goods and services which were available to the people, including housing. The Directive required amendment of the Race Relations Act 1976 (‘the 1976 Act’), specifically to reveal the provisions of the Directive which dealt with the definition of indirect discrimination, harassment, genuine and determining occupational requirements, the burden of proof in proceedings, and abolition of statutory provisions which were contrary to the principle of equal treatment. Regulations 3 and 4 set out a new definition of indirect discrimination, on grounds of race or ethnic or national origins, in those areas with which the Directive was concerned. Regulation 5 set out a new definition of harassment, on the grounds of a person’s race or ethnic or national origins, which would apply in the areas with which the Directive was concerned. Regulation 6 made it illegal for an employer to subject to harassment an employee or an applicant for employment, and removed, partially, the exception (from the discrimination in employment provisions) for employment in a private household.
Disability Discrimination Act 1995 addressed the discrimination that many disabled people faced. Different parts of the legislation took effect at different times, and the original Act had been subject to numerous amendments. Key concepts included reasonable adjustment and, more recently, the social model. In 1999, Disability Rights Commission Act set up a powerful enforcement body. In 2005, Disability Discrimination Act placed a positive duty on public authorities to promote disability equality, and required each to produce a disability equality scheme and regular disability equality impact assessments. The current equality laws had been very important, and over the last ten years, the Sex Discrimination Act 1975, Race Relations Act 1976, and Disability Discrimination Act 1995 had been strengthened and expanded.

5. Employment Equality (Sexual Orientation) Regulations
On December 1, 2003, Employment Equality (Sexual Orientation) Regulations came into force making unlawful to discriminate in employment on grounds of sexuality.

6. Employment Equality (Religion or Belief) Regulations
On December 2, 2003 Employment Equality (Religion or Belief) Regulations came into force making unlawful to discriminate in employment on basis of religious association.

7. Employment Equality (Age) Regulations
On October 1, 2005, Employment Equality (Age) Regulations came into force. On February 16, 2006, Equality Act received royal assent; extended religion or belief and sexual orientation regulations to cover service delivery as well as employment; placed a positive duty on public authorities to promote gender equality; and required each to produce a gender equality scheme (GES) and conducted regular gender equality impact assessments (GEIAs).

In 2007, Public authorities increasingly combined their race equality scheme, disability equality scheme and gender equality scheme into a single equality scheme, and their race equality impact assessments, disability equality impact assessments and gender equality impact assessments into single equality impact assessments.
Similarly, The Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission ceased to exist and from October 1, were brought together into the Equality and Human Rights Commission.

9. Equality Act 2010

In the Queen’s Speech, on December 3, 2008, it was confirmed that a new Equality Bill would be published in 2009 and that a single equality duty would require public bodies ‘to consider the diverse needs and requirements of their workforce, and the communities they serve’. The Equality Bill was published on April 27, 2009 and in the following weeks several consultation exercises were initiated in connection with it. The breadth of the United Kingdom approach has been confirmed by the Equality Act 2010, commencement of which has begun in July 2010\(^{143}\) with the substantive provisions, including the general positive action requirement, having come into force in October 2010.\(^{144}\) United Kingdom has enacted this legislation to impose or permit individuals and groups to take action to achieve de facto and de jure equality. From its original focus on gender and race,\(^{145}\) United Kingdom positive action has subsequently adopted provisions protecting individuals on a range of additional grounds.\(^{146}\) The Equality Act, 2010 is the most significant piece of equality legislation to be introduced for many years. It is therefore, to strengthen protection, advance equality and simplify the law. Ninety percent of the Act had come into force on October 1, 2010\(^ {147}\). The rest of it had included Public Sector Equality Duty (PSED), which had come into effect in April 2011. The Equality Act has brought together, and significantly added to and strengthened, a number of previous existing pieces of legislation, including race and disability. One of the key changes is that it has extended the protected characteristics to encompass:\(^{148}\)

a. age
b. disability
c. gender reassignment
d. marriage and civil partnership
e. pregnancy and maternity
f. race
g. sex
h. religion or belief
i. sexual orientation.
The Act has also made explicit the concept of ‘dual discrimination’, where someone may be discriminated against or treated unfairly on the basis of a combination of two of the protected characteristics.

The main provisions of interest to local Government are contained within the Public Sector Equality Duty (PSED), which has come into effect in April 2011. The Government’s consultation on the implementation of the duty has closed in November 2010. The consultation has focused primarily on transparency and accountability. Key aspects of the Public Sector Equality Duty (PSED) are:

a. a general duty to: (i) eliminate discrimination, harassment and victimization; (ii) advance equality of opportunity; and (iii) foster good relations
b. specific duties to: publish data, assess impact, set equality objectives; report progress at least annually
c. new transparency on data to drive culture change
d. Duty applies to listed public bodies and those discharging public functions (in respect of those functions), for example, third-sector bodies when discharging public functions
e. Clarification that procurement and commissioning can be used to drive equality.

A proposed socio-economic duty for public bodies was dropped by Theresa May, the Home Secretary and Minister for Women and Equalities, on 17 November 2010. The Act also contains a number of other provisions which will be of interest to local Government and its partners, particularly for human resources (HR) and adult social care. The Act extends anti-age discrimination rules to include goods, facilities and services, for example, stopping people from being unfairly refused of the insurance or medical treatments based on their age. Age discrimination provisions will not come into force until 2012 for the private sector and later still for health and social care. Chief executives of the South West Strategic Health Authority and Bristol City Council are leading a review on practical action to tackle discrimination in health and social care. In addition, there is order making power for the private sector in relation to employers with 250 or more employees, requiring publication of their gender pay gap. The Equality and Human Rights Commission (EHRC) is there to develop metrics for gender pay reporting with businesses and unions. There is also order making power for public sector bodies with more than 150 employees. This will require public authorities to report on their gender pay gap, ethnicity employment rate
and disability employment rate. Secrecy clauses on pay are banned. Positive action to allow employers to select candidates from under-represented groups is also provided. Where there is a choice between two or more equally-qualified candidates, provisions make it clear that positive action can be used in service delivery. Employment tribunals will have powers to make recommendations in discrimination cases which benefit the whole workforce.

The limited legislative provision for positive action in United Kingdom law has meant that there has been little judicial consideration of positive action by United Kingdom domestic courts. However, where positive actions have been challenged, the courts have treated such measures as unlawful discrimination. In the case of James v EastLeigh Borough Council,\textsuperscript{149} for example, the House of Lords held that the relevant legal test of permissibility was applied in direct discrimination claims, namely whether the complainant would have received the same treatment as the defendant ‘but for’ his or her sex, instead of considering whether the measures constituted lawful positive action. This case does not concern positive action in the general sense namely measures to allow women and minorities to overcome workplace and educational under representation and disadvantage, but it does illustrate the Court’s refusal to uphold arguably well-intended differential treatment.\textsuperscript{150} The Court’s lack of support of positive action is also evident from the case of Jepson v The Labour Party\textsuperscript{151} in which, again, the test for direct discrimination was applied to a policy of implementing all-women electoral shortlists. These decisions demonstrate that the court has focused on the legal prohibition of differential treatment on the basis of direct discrimination, reflecting the very limited area of operation for positive action allowed for in United Kingdom legislation.

A further judicial influence on United Kingdom positive action has been the European Court of Justice (‘ECJ’) because of its importance in interpreting the parameters of action which are available to United Kingdom law and because these parameters have been given a statutory basis in United Kingdom law through the Equality Act 2010.\textsuperscript{152} In the European Court of Justice’s first case concerning positive action, the court considered the permissibility of a policy which required the appointment of a female job candidate ahead of an equally qualified male candidate, on the basis of her gender.\textsuperscript{153} The European Court of Justice held that the policy constituted unlawful discrimination because of the absolute priority it afforded to
female candidates, thus ensuring equality of result, as opposed to equality of opportunity.\textsuperscript{154} The European Court of Justice’s decision in \textit{Kalanke}\textsuperscript{155} was subject to immediate criticism for the devastatingly narrow interpretation it applied to Article 2(4) of the Equal Treatment Directive, which seemed to prevent its use in permitting gender to be a tie-break factor in recruitment decisions.\textsuperscript{156}

A further judicial influence on United Kingdom positive action is that of the European Court of Human Rights which has decided that affirmative action measures are allowable under the non-discrimination provision of the European Convention on Human Rights and Fundamental Freedoms.\textsuperscript{157}

\textbf{Achievements of Affirmative Action Program}

The new scope and provisions in the Equality Act 2010 may encourage the United Kingdom to look to the United States of America for practical guidance of how to implement the new forms of action, and amid the less hostile background attitude towards affirmative action. However, in the United Kingdom these comparable forms of action may be able to be more successfully implemented within the United Kingdom than they have been in the United States of America.

\textbf{2. United States of America}

The principle of ‘affirmative action’ was introduced by the Civil Rights Act of 1964 into the political, administrative and judicial spheres of American society. In the United States of America, the affirmative action program is not quota based. For affirmative action, the legal authority in its original form was embedded in Titles VI, VII of the Civil Rights Act of 1964. Discrimination was banned by these two titles (whether negative or positive) in federally assisted activities and in employment respectively on the grounds of race, color, sex, religion or national origin. To promote equality in the education and employment, a series of the executive orders followed the Civil Rights Act, was issued. The Constitution of the United States does not contain any specific authorization for the affirmative action nor is a provision contained in it exempting affirmative action programs from the general equality provision.\textsuperscript{158} However, affirmative action programs which used race, gender-conscious or ethnic relief are constitutional.\textsuperscript{159} Such measures have been continuously upheld by the Supreme Court of United States of America for curing racism and sexism and also for lessening lasting effects of the discrimination.\textsuperscript{160} Thus, the “Right
to equal Protection” came to be recognized for all the people without any
differentiation as to color, race and ethnic origin etc. This “Equality Protection”
clause provides that:

“All the persons born or naturalized in the United States and subject
to the jurisdiction thereof are citizens of U.S. and States wherein they
reside. No State shall make or enforce any law which shall abridge the
privilege and immunities of citizens of U.S. 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.”

This clause applies to all the human beings irrespective of sex, race or
citizenship—as well as the artificial persons like the corporations. So, the “Equality
Protection” clause and the Civil Rights both can be viewed as mandating the
programme of the affirmative action which used racial classifications.

Various attempts were also made by a succession of Presidents for
overcoming the prejudices and the racism in the country and for bringing the civil
rights within the scope of law.

Executive Orders

(i). President Theodore Roosevelt (1901-1909)

In 1912, Southern black delegates were refused to accommodate by
Roosevelt’s Progressive Party. During World War I and the Republican ascendancy
of 1921, little relief to African Americans were offered by the demise of the
Progressive movement.

(ii). Warren G Harding (1921-1923)

Warren Harding, by whom in 1920, the vote of the American people was won,
opposed in theory, economic and political discussion, but not social segregation, and
no significant efforts were made for implementing these views. During this period,
within the Department of Interior, the most significant civil rights progress occurred.
And the first federal “Affirmative Action” programme (although the phrase was never
used) in conjunction with the Public Works Administration (PWA) was developed for
African Americans. For the sectors of the economy, where there was concentration
of the African American labour, the programme was specifically designed. This
programme did not include job training and upgrading of the skills as its part and therefore was not very successful.

(iii). Executive Orders 9980 and 9981
During the Truman and Eisenhower years, both of the administrations resorted to the executive orders (EO) for solving issues of civil rights. The first concrete act of Truman in respect of equal employment opportunity was his issuing of EO 9980 on July 26, 1948. A fair employment Board was created by Truman’s Order within the Civil Service Commission for ensuring,

“fair employment throughout the Federal establishment, without discrimination because of color, race, religion or national origin”.164

On that same day, the executive order 9981 was issued by Truman and under this order segregation in the armed forces was outlawed.165 On Government Contract Compliance, the committee was created by a second executive order of December 3, 1951 for determining whether the policies of non-discrimination were being observed by the Government contractors. In January 1953, Truman’s orders expired on leaving the office.

(iv). Executive Order 10479
Truman was succeeded by Dwight Eisenhower by whom EO 10479 was issued. The Presidents Committee on Government Employment Policy was created by this order to “receive complaints of alleged violations of non-discrimination to provisions of Government contracts”.166 The committee lacked enforcement powers and was not effective.

The Civil Rights Legislation
Throughout the 1960, the emphasis on the civil rights presidential election reflected the public acknowledgement of the gravity of racial issue, which was growing in the United States of America.

(i). President J F Kennedy and Executive Order 10952
First, in labour law in the 1935, National Labour Relations (Wagner Act), the actual term affirmative action emerged. In President Kennedy’s Executive Order 10952, the term “affirmative action” was first utilized in the public policy. In March, 1961, the Commission for Equal Employment Opportunity167 was created by the EO
10952, under which the federal contractors were required for taking affirmative action to ensure that a part was not played by the race, color, creed or the national origin in their treatment of employees or job applicants.\textsuperscript{168} President Kennedy granted the authority to Commission for Equal Employment Opportunity for imposing sanctions for the violations of the Executive Order and regarded this enforcement authority as a new “determination to end job discrimination once and for all”.\textsuperscript{169} In addition, the following statement was contained in the order—

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"....the contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, national origin or color”.\textsuperscript{170}
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In the executive orders, the concept of the affirmative action was not defined formally but this order stated that affirmative action was the employer’s obligation and responsibility and it was not a power which was delegated to the courts.\textsuperscript{171} But this order was proved to be a failure in defining “affirmative action” or for stating requirements of the employers regarding affirmative action. In 1961, hiring goals or targets were not referred to by affirmative action and it was enumerated that quotas were wrong and in Government they had never been proposed by anyone.\textsuperscript{172} Civil Rights legislation was proposed by Kennedy due to white-initiated violence in the South and it was opposed by the Congress. But after the assassination of Kennedy, the Civil Rights Bill was eventually passed.

**The Civil Rights Act**

The most important civil rights legislation which was similar to the executive order was the Civil Rights Act of 1964\textsuperscript{173} and it was signed by President Lyndon Johnson in 1964.

**President Lyndon Johnson and Executive Order 11246**

By issuing this order, Johnson set the stage for the more result-oriented and aggressive policies. On September 24, 1965 the President Johnson introduced the Executive Order 11246\textsuperscript{174} as a method of redressing discrimination. President Johnson issued Executive Order 11246 for giving effect to the Title VII of the Civil Rights Act 1964. As amended, this order bars the discrimination by certain federal Government contractors on the basis of race, color, sex or the national origin.\textsuperscript{175} The reach and coverage of the Order is broad. President Johnson emphasized the requirement for looking for the social reality for measuring whether the opportunity was real rather
than in name simply only insisting that affirmative action programmes served to achieve “not just equality as a right and a theory but equality as a fact and as a result”. Executive Order was more specific in respect of the requirements for the contractors and the penalties for its non-compliance. Unfortunately, the new order failed to define “affirmative action” and also to provide any precise criteria, for evaluating the compliance. It is specified by the order that the affirmative action would be extended to,

“employment, upgrading, transfer or demotion; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship”.

But this order neglected to indicate the manner of application of the affirmative action in these areas. On Oct. 13, 1967, the Executive Order 11246 was amended to include Affirmative Action for Women.

(ii). President Richard Nixon and the Philadelphia Order
In 1969, Richard Nixon after assuming office had initiated the Philadelphia Order whereby affirmative action was transformed into a gender and race-conscious national priority and the unacceptability of mindless quotas was stressed by him in his Philadelphia Plan and through more generalized plans which were later developed by his Department of Labour and Justice, but the goals and the timetables insisted by him were an entirely different and “proper means to implement the nation’s commitment to equal employment opportunity”. The Philadelphia Order was the most potent plan so far to guarantee the practice of fair and just hiring in construction jobs.

(iii). President Gerald R Ford
The Rehabilitation Act179 and the Vietnam Era Veterans Readjustment Act180 were enacted while Gerald R Ford was the president. During Ford’s presidency, the Age Discrimination Act181 was also passed and discrimination was barred by this act in hiring or firing of the older persons. Under the Rehabilitation Act of 1973,182 Governments’ contractors were also required for the handicapped individuals to prepare and comply with the affirmative action programmes and under the Vietnam-Era Veterans’ Readjustment Assistance Act of 1974, for the veterans of the Vietnam-Era.183
(iv). **President Jimmy Carter**  
President Jimmy Carter had issued Executive Order 12138 vide which created a National Women’s Business Enterprise Policy and requiring the different agencies to take affirmative action to facilitate Women’s business enterprises.

(v). **President Ronald Reagan**  
In 1983, Ronald Reagan in his term as president had issued Executive Order 12432 which directed concerned federal agencies with substantial procurement or grant making power to develop a Minority Business Enterprise development plan.

The above-stated are some of the prominent executive actions in the United States of America that have promoted affirmative action programs. But these were the corridors of justice through which mostly the affirmative action law had developed rather than through different enactments and executive actions taken by the United States Congress. An unending journey of the affirmative action jurisprudence started way back on May 17, 1954 with the case of **Brown v. Board of Education**\(^{184}\) of Topeka Kansas. Even though certain cases were not directly related to the affirmative action, but the important thing in respect of those cases is that they had a lasting effect on the affirmative action programmes.

**Judicial Journey of the affirmative action programmes**

The Supreme Court in a unanimous decision in the landmark case of **Brown v. Board of Education**,\(^{185}\) that segregation in the public schools is unconstitutional and this decision had paved the way for desegregation on the large-scale.

In 1971, under the case of **Griggs v. Duke Power Company**,\(^{186}\) the Supreme Court prohibited the employers from the discriminatory practices against the blacks and the use of test scores and the educational requirements which were shown to be not relevant to the job performance were also restricted.

In the year 1975, in **Albermarle Paper Company v. Moody**,\(^{187}\) it was decided by the Supreme Court that the companies could use the non discriminatory alternatives to testing in an effort for bringing the blacks into their workforce.

In 1976, it was ruled by the Supreme Court in **Washington v. Davis**\(^{188}\) that for predicting training performance, a valid test might be used without giving regard to its ability for predicting later job performance.

In 1978, in the Supreme Court case of **Regents of the University of California v. Bakke**,\(^{189}\) a quota system was declared illegal. It was also decided that
for achieving a diverse student body, an applicant’s race as a factor for determining admission could be considered by the colleges and universities.

In the year 1979, the Supreme Court in **Kaiser Aluminium Company and United Steel workers of America v. Weber**\(^ {190} \) had allowed the private employers for correcting past discrimination, to utilize racial preferences as a means in hiring and promotions (voluntary affirmative action plans).

In 1980, it was ruled by the Supreme Court in **Fullilove v. Klutznick**\(^ {191} \) that some modest quotas were perfectly constitutional and upheld a federal law requiring that 15% of funds for public works be set aside for qualified minority contractor for remedying the past discrimination.

In 1982, the Supreme Court by pronouncing judgment in **State of Connecticut v. Teal**\(^ {192} \) stated that an organization was not shielded by a bottom-line demonstration of no disparate impact from an investigation, of each of the components of the system of selection of the disparate impact.

In 1986, in **Wygant v. Jackson (Mich.) Board of Education**\(^ {193} \) as long as there was a discrimination history, racial preferences were ruled by the Supreme Court permissible in the context of hiring. Also for protecting the jobs of the newly hired black teachers, lying off of senior white teachers was deemed unconstitutional.

In 1987, it was upheld by the Supreme Court in the ruling of **Johnson v. Transportation Agency of Santa Clara County**\(^ {194} \) that over the better-qualified men and whites, to favour the women and the minorities was a way for improving balance in the workplace.

In 1989, in **City of Richmond v. J A Croson Company**\(^ {195} \), Richmond’s minority contracting programme was struck down as unconstitutional, requiring that by a “compelling interest” a State or local affirmative action programme be supported and be tailored narrowly for ensuring that interest is furthered by the programme.

In the year of 1990, in the Supreme Court case of **Metro Broadcasting, Inc. v. Federal Communications Commission**\(^ {196} \), the differences between strict scrutiny and intermediate scrutiny was made silent. For minority-owned businesses, a preference was approved in the broadcasting licensing.

In 1991 and in 1989, the effects of the Rehnquist Court rulings were reversed and new protections for the minorities and the women were provided, when the Civil Rights Act of 1991 was signed by President Bush.\(^ {197} \) A new Civil Rights Act was
passed by the Congress which stated that the statistical population make-up of a community did not have to be matched with the stated work forces.

In 1994, in *Adarand Constructors, Inc v Pena*198 Strict scrutiny became the criterion in achieving a compelling Government purpose. In admissions, at all the University of the California campuses, the University of California voted for ending preferential policies.199 A report was released by the Glass Ceiling Commission on the endurance of the barriers that denied the decision-making position/access of the women and minorities and a recommendation was also issued “that corporate America use affirmative action as a tool for ensuring that all qualified individuals have equal access and opportunity to compete based on their ability and merit”.200

In 1996, in *Hopwood v. State of Texas*201, at the University of Texas law school, race-based admission practices were struck down. The elimination of language was chosen by the California voters and under that, women and minorities were granted preferential treatment by initiative, Proposition 209.202 In the November election, by a narrow margin, California Proposition 209 was passed. All the public-sector affirmative action programmes were abolished by Proposition 209 in the employment, contracting and education in the State.203

In 1997, it was refused by the Supreme Court to hear the case of Proposition 209. The right was granted to the State by this refusal for abolishing race and gender based preferences in the institutions of the State.204 The Texas Ten Percent Plan was passed by the Texas legislature in response to Hopwood which ensured that admission had been guaranteed to the top ten percent of the students at all the high schools in Texas to the University of Texas and Texas A&M University system.205

In 1998, Washington Initiative 200 was passed banning the affirmative action in higher education, hiring and public contracting.206

In the 2000, throughout the country many Circuit Courts heard the cases in higher education regarding affirmative action, and also included the 5th Circuit in Texas (Hopwood) and the 6th Circuit in Michigan (Grutter and Gratz).207 Two different rulings in Michigan regarding affirmative action were made by the same District Court, with one judge who decided that the undergraduate programme was constitutional while the law school programme was found unconstitutional by another judge.

“One Florida” Plan was passed by the Florida legislature banning affirmative action. The Talented Twenty Percent Plan was also included in the programme that
provided guarantees to the University of Florida system, of the top twenty percent admission. Race as factor in colleges was banned by 2000 Florida in February. Education component of Governor Bush’s “One Florida” initiative was approved by Florida legislature, which ended programmes of admission based on affirmative action in all the colleges and the universities of the State.\textsuperscript{208}

Affirmative action has had a long drawn history, be it the orders of the Executive for the implementation of the correction of historical discrimination; or through the corridors of the justice, the constitutional jurisprudence; or even on the same issue, the scholastic debates. By looking at this rich history, important thing was observed that an interesting shift, especially in the area of the United States Supreme Court was made, from a lenient approach to a narrow approach which was characterized by the “strict scrutiny” test. The another important thing to be noted was that the legislative and the judicial history of the affirmative action was directly related and tied to the Civil Rights movement. In the United States of America, this movement was a political, social and the legal struggle by black Americans for gaining full citizenship rights and also for achieving racial equality. This movement was first and foremost a challenge to the racial segregation.

\textbf{Achievements of Affirmative Action Program}

In the United State of America, affirmative action programs have been proved to successful in reducing, but not fully eliminating the practices of the discrimination.\textsuperscript{209} It has been shown by the studies that affirmative action programs lead the employers for hiring more employees belonging to the minority communities and for paying higher wages to them.\textsuperscript{210} Particularly, before the Civil Rights Act of 1964, only 60 percent was earned by a black male worker of that of a white male worker; but in 1993, this percentage was increased to 75 percent.\textsuperscript{211} In 1978, 1.2 percent of the country’s judges and lawyers were made up by the blacks; but by 2000, this number had risen to 5.1 percent.\textsuperscript{212} The figure for physicians rose from 2 percent to 5.6 percent, for engineers from 1.1 percent to 5.5 percent, and for professors, from 2.6 percent to 6.1 percent.\textsuperscript{213} When the affirmative action programs were dismantled in Texas, in the context of university admissions, to the University of Texas for the fall of 1997, the number of blacks admitted fell to only eleven as compared to sixty-five the year before.\textsuperscript{214} Because of the rumors of declining minority enrollment, it was chosen by all the eleven not to attend.\textsuperscript{215} These facts while showing that opportunities
have been increased by the affirmative action still indicate that in United States, racial discrimination persists. In the early 1970s, at least 30 percent of the racial wage gap due to the discrimination was estimated. There is decrease in this differential, partly because of the equal opportunity legislation. While in the higher paying jobs, Blacks continue to be under-represented, but due to affirmative action policies, there has increased the workforce diversity. It is found by Leonard (1984) that, an increase in the minorities and the women between 1966 and 1977, in the workforce was accompanied by a rise in their relative marginal productivities. It is claimed by the Government of the United States that “in general, Affirmative Action programs have helped a number of Fortune 1000 companies and other major corporations for the women and minorities, break the glass ceiling.” In 1970, women accounted for 10.2 percent of the officials and manager, on the Employer Information Report (EEO-1) form which was submitted by the federal contractors. But in 1993, according to EEO-1 data, women were 29.9 percent of the all officials and managers.\(^{216}\) By differences in the education and the work experience, between black and white men, only about 50 percent of the wage gap and between black and white women, 33 percent of the wage gap is accounted for.\(^{217}\) In the United States, affirmative action measures have “not compensated sufficiently for the past discrimination because they have not produced significant redistribution of resources and power.”\(^{218}\) It is claimed that affirmative action has meant reverse discrimination on the whites, but in fact, privileges provided to the whites remains intact.

The acceptance of the affirmative action programs has also been hindered by the self-image as a meritocracy of the United States. It is suggested by the idea of merit that value-neutral measures such as, job histories, standardized tests and the educational credentials are to be utilized for determining by whom the access is attained to the scarce educational and professional positions.\(^{219}\) However, such “neutral” measures are deceptive for the accomplishment.\(^{220}\) The meritocracy is based upon the tests and practices and these tests and practices are often of the dominant group, and grow out of experiences, viewpoints and the cultures of that group.\(^{221}\) However, since income disparities continue to be significant, the program of affirmative action needs to be strengthened. In 15 years for the first time, the income of the average Latino household is less than two-thirds that of the average white household. In 1988, after slowly rising from 55 percent of the white income to 65 percent in the year 2000, there is again fall in the median income of the blacks to 62
percent of the median in 2003. The growth of black middle class and even the election to the highest position in the Republic, of one among them (blacks) would not automatically translate in the cities and suburbs into more integrated neighborhoods. As such, for truly equalizing opportunity for all, affirmative action remains essential. But the future affirmative action seems affirming the requirement of adopting race-neutral measures.

In terms of International obligations, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) have been ratified and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been signed by the United States of America. However, as “non-self-executing”, these treaties have been identified which means that before their provisions may be enforced as law, Congress must pass implementing legislation. But this has not happened to date.

3. South Africa

In December 1993, a new Constitution was promulgated into law after a long series of negotiations. A framework was provided by it for governing for five years while the Constitutional Assembly drafted a new Constitution to be implemented by 1999. The principles embodied in the Interim Constitution had to be complied by the final Constitution including a commitment to a multiparty democracy based on universal adult franchise, separation of the powers of the Government and individual rights without discrimination. Under this Interim Constitution, the first democratic election in April 1994 was held by the South Africa. In the elections in 1994 a regime of universal franchise was voted in. After the dismantling of Apartheid, the uphill task before the Republic of South Africa has not only been to increase diversity between the communities but more importantly, to put to an end to the severely oppressive and discriminatory tendencies activated by previous Regimes. With this vision in mind, a “Truth and Reconciliation Commission” was set up that submitted a set of suggestions in order to promote trust and mutual understanding between communities. The new constitutional order has a commitment at its core to the substantive equality and it seeks to map out a vision based on this commitment for the nation. This vision reflects the requirement for remedying the ills of the past and for establishing a
society which will be less divided and in which a constitutional democracy will survive and flourish.

Across various provisions of the Constitution of South Africa, the traces of the right to equality can be found.\textsuperscript{224} The foundation of the principle of equality\textsuperscript{225} in South Africa is laid down in Section 9 of the Constitution.

The Government which was led by African National Congress then embarked on a programme for promoting the reconstruction and development of the institutions of the country.\textsuperscript{226} During the five years of the presidency of Mandela, a significant milestone of democratization was the process of the Constitution making.

The Constitution of South Africa allows affirmative action as an ‘enabling clause’ by implication. To the equality clause, the affirmative action is said to be an exception or ‘fair discrimination’. Sub-section (4) of Article 9 has been upheld by the Constitutional Court by stating that even when the discrimination is indirect, this provision is contravened.\textsuperscript{227} In pursuance of this provision, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 was enacted.\textsuperscript{228}

\textbf{The employment Equity Act}

Close to five years after the disintegration of the Apartheid regime, the enormous disparities were observed to be existed in South Africa between traditionally disadvantaged groups and the others. In 1999, the persons belonging to the white economy held 96.4\% of the top managerial positions and in the three years preceding 1999, in the appointment of black persons 2.3\% increment was noticed to the senior managerial posts.\textsuperscript{229} So, to fulfill the objective of a State characterized by true equality,\textsuperscript{230} in 1998, the Parliament of South Africa enacted the Employment Equity Act. The objective of this Act is to ‘achieve equality in the workplace’ through the elimination of unfair discrimination and promotion of the implementation of policies of the affirmative action for ensuring the equitable representation in the employment of all the communities of the South Africa in proportion to its population.\textsuperscript{231}

\textbf{The Equality Act}

In pursuance of Section 9(4) of the Constitution of South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act (“Equality Act”) was passed in 2000 which states that ‘the national legislation must be enacted to prevent or prohibit unfair discrimination’. In furtherance of the letter and spirit of the
Constitution, the Equality Act was enacted.232 The object of the Equality Act was to ensure equality in the result or outcome, notwithstanding the fact that by granting unequal opportunities to the disadvantaged groups, this might be achieved.233 A general prohibition is contained in the Equality Act against unfair discrimination, as well as detailed specific provisions on the discrimination grounded on gender, sex, disability, harassment and hate speech.234 Affirmative action policies are expressly sanctioned by this Act and it also permits the State to treat those differentially who has been in the past discriminated against, like members of the black community and the women.

Certain other laws deserve analysis, which seek to bridge the inequalities between privileged groups and the historically disadvantaged groups. On the Transformation of the Public Service, the White Paper235 for example, recognizes the fact that one of the most important aspects of achieving the aim of an equal society is to ensure that in the public service, all communities are represented. The policies of affirmative action which seek to achieve this target are encouraged particularly those policies which seek to provide benefits to women, the black community and the people with the disabilities.236 In 2003, the Broad-based black economic Employment Act was enacted and its aim was the promotion of the black economic empowerment, for increasing the number of black entrepreneurs, and for achieving equitable representation in the workforce in all categories of occupation and levels.237

Achievements of Affirmative Action Program

As of 2004, almost one quarter in the South Africa’s top management positions and one half of those people in its middle management positions were black, a significant improvement from a decade earlier. Specifically, within the Government in the top posts, blacks have raised their numbers in great numbers.238 It has been reported by the South African Government that the Public Service in the country is now “very close to achieving perfect representation, edging its way to matching the population profile in both race and gender.”239 However, despite these challenges, among other things, many challenges remain including the practice of white-owned companies which prop up the black-owned companies and the fact remains to be seen that how the transfer of shares will be funded for the empowerment charters.240

However, the implementation of the legislation is not enough after decades of segregationist policies which outlaws the unfair discrimination. So, the concerted
effort from both public and private sectors is required for ensuring the discontinuance of the discriminatory practices and for ensuring compliance with the various legislations based on the affirmative action policies, the proper monitoring systems should also be in place.

4. Malaysia

After gaining independence in 1957 from Britain, a multiracial society was inherited by Malaysia as the majority of population with Malays, and Chinese and Indians as the minority. However, Malays and other indigenous groups known as Bhumiputera (sons of the soil), despite constituting majority of the population of the country were economically far behind the minority population of the Chinese. The Constitution thus, set out to provide special rights for ethnic Malays for helping remedy this imbalance, while also granting citizenship to the country’s Chinese and Indian residents. The Malaysian model of quota-based system rests upon the foundations of the Constitution rather than any ordinary legislation. Even though the equality provisions exist in the Federal Constitution which protected individuals from any kind of discrimination done by the State, but various provisions which established a special position for Malays, override these equality provisions. For example, Article 8(1) of the Federal Constitution provides that ‘all persons are equal before the law and are entitled to the equal protection of the law’. To benefit ethnic Malays, the creation of the affirmative action programs were made possible by the constitutional provisions.

On the other hand, it is recognized by Article 153 that the Yang di-Pertuan Agong (the elected head of the State) to safeguard Malays’ special position, is duty-bound, which had existed prior to independence of Malaysia. In Malaysia, the cornerstone of the affirmative action policy is formed by this provision.

Affirmative action policies have been upheld by the Malaysian Courts in favour of Malays on the ground that ‘provision of equality does not mean that the law cannot categorize persons and treat them differently’. It means that affirmative action policy to the rule of equality is not an exception in Malaysia; rather it is in consonance with this rule. The safeguards provided in the Constitution of Malaysia are available only in favour of ‘Malays’ or the natives of the States of Sabah or Sarawak. Malays have been defined as individuals who habitually speak the Malay language, profess the Islam religion and conform to Malay customs and:
(i) were before Merdeka Day (the day of Malaysian independence) born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore or is on that day domiciled in the Federation or in Singapore; or (ii) are the issue of such a person.247

The benefit of reservation provided is not merely an ‘enabling provision’ under the Article 153 but according the provisions provided, it is quite clear that the Yang di-Pertuan Agong cannot determine whether in a particular field, the reservation is essential or not but he can only decide about the nature and the extent of the reservation for Malays.248 According to the Constitution, there may be various forms of the reservation as is provided in Article 153. Reservation can take the form of public service quotas,249 reservation can be provided in the educational institutions,250 or the reservation can be provided in the form of granting of the licenses or the permits needed for carrying out a trade or business.251 In addition to this, In Malaysia, the land reservation is also provided for Malays by the Federal Constitution. According to this provision, any agreement for transferring the ownership of the land to the Non-Malays is null and void. At the International level, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) have not been signed or ratified. It has only ratified the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The reservation policy is the permanent feature of the Constitution of the Malaysia. The discretionary power of the Government is limited because at the time of the implementation of the reservation programmes, when there is ‘any change in the policy affecting the administrative action’, the Conference of Rulers has to be consulted by it.252 But any question which involved reservation under Article 153 cannot be scrutinized or questioned publicly.253 This limitation is imposed not only by Constitution, but is also enforced by the legislation.254 But, in Malaysia the safeguards provided for the protection of the indigenous people by the Constitution failed to fill the economic gap between the natives and the immigrants. More than 80% of the Malays population continued to reside in the rural parts of the country in the late 1960s. In Malaysia, in 1969, merely 1.5% of the share capital of the companies was contributed to by the Malays. In the year of 1970, among the Malays living in the rural areas, the incidence of poverty was 65% in comparison to 49% for the whole of
the population of the Malaysia. In general, the economic conditions of the Malays were backward. The disproportionate economic status of the native Malays as compared to the Chinese and the Indians caused grievances among the Malays and in turn fuelled the racial riots of 1969. Till 1970, emergency was imposed in Malaysia.

The Government announced a “New Economic Policy” to curb the simmering ethnic conflicts, an object of which was to increase the economic standing of the ethnic Malays with the hopes that this would reduce the tensions between them and the Chinese. As a leader, Tun Razak’s innovativeness was seen at its best during the critical period immediately after the riots. He was the single leader who was responsible for introducing the affirmative action policy embodied by the National Economic Policy. In 1971, the National Economic Policy was introduced with two specific purposes:

1. To eliminate the poverty by raising the employment opportunities and increasing the income-levels for all Malaysians, irrespective of the race;
2. To accelerate the process of restructuring Malay society for the correction of the economic inequality and for the elimination of the identification of the race with economic function.

These two objectives could be summed as the restructuring objectives and distributive objectives. On the touchstone of the ‘social contract’ theory, the National Economic Policy was justified. National Economic Policy was implemented in various ways. Quotas were established in the Educational institutions and the Public service. The attempts were also made by the National Economic Policy for carrying out the corporate restructuring on the large scale with the object of increasing the equity share of the Malays and the immigrants (Chinese and Indians) to 30% and 40% respectively, while at the same time reducing the foreign equity holdings to 30% in comparison to 62% in 1970. This meant that a company that wanted to expand or get an export license was under compulsion to sell to the ethnic Malays 30 percent of its shares or to issue new shares for ensuring a similar ownership percentage. In addition to it, 30 percent of the construction contracts of the Government were required to come from firms belonging to Malays. Lending was increased by the banks to the Malay population.

Quotas were created by the Industrial Co-ordination Act for the Malays in the domestic industry. Upon the private firms an obligation was placed by this Act for
employing Malays in certain cases. All firms whose share capital exceeded 1, 00,000 Malaysian Dollars or which hired more than 25 employees, whether private or public, were subject to the quota restrictions which were imposed by the National Economic Policy. In Malaysia, two guidelines were issued by a statutory body, the Foreign Investment Committee for the protection of the corporate assets of the natives:

(i). Guidelines for the purpose of Acquisition of Assets, Mergers and Take-overs and
(ii). Guidelines for the Acquisition of the Property by Local and Foreign Interests.

Even though these guidelines were without the force of law,262 still they placed a strong moral obligation on the industrialists in Malaysia.263

For achieving the 30 percent target and for benefiting the Malays, another component of the New Economic Policy was, in human resource development, a large scale programme including setting up a chain of junior colleges throughout the country and sending for tertiary education students overseas, for the purpose of enrollment in the local universities instituting quotas and granting scholarships and bursaries. The Government of Malaysia amended the Constitution after the ethnic riots of 1969, in a manner that was able for increasing just after three years the percentage from 39.7 percent to 52.7 percent in the university programs in the year 1970.264 Particularly, Malaysian universities were under the compulsion to reserve a “reasonable proportion of places” for ethnic Malay students and members of the faculty.265 Schools were changed to use Malay which had used English as the language of instruction.266 And in addition to it, for Malays and non-Malays different educational standards were set.267

In 1991, the National Economic Policy was replaced by the National Development Policy (NDP) as the broad new national project. Unlike the National Economic Policy, the emphasis of National Development Policy whilst reducing relative poverty was eradication of the hardcore poverty. The National Development Policy formed part of Prime Minister Mahathir Mohamad’s vision for achieving fully industrialized nation status for Malaysia by the year 2020 and drew widespread endorsement from the Chinese community. In the year 2001, the National Development Policy was succeeded by the National Vision Policy (NVP). These three policies are having the largely similar objectives and are collectively called as National Economic Policy i.e., ‘NEP’.
Achievements of Affirmative Action Program

Malaysia’s experiment with the affirmative action policy and its effects are somewhat ambiguous, because contributions have been made within the country by many factors for changing demographics in its educational and business sectors over the years and in turn, for example, in the 1970s less than 10 percent of the university undergraduates were ethnic Malay and almost 70 percent were Chinese; but the percentages are reversed today.  

But generally, Malaysia has emerged as a model for the successful implementation of the reservation based on quota. Only After 17 years of the implementation of the National Economic Policy, amongst the natives, the incidence of rural poverty had been halved, and rate of the overall poverty had decreased from 49 percent to 17 percent. In the last three decades, the ownership of corporate assets has seen a drastic increase by the Malays. However, on the top of this, there was a significant effect of the affirmative action policy which was introduced on the changing educational demographics, on the increasing number of the ethnic Malays in the universities with the help of a strict set-aside system that provided for the hiring of ethnic Malay and for the admissions of the ethnic students. Almost 30,000 Malaysian students, most of them ethnically Chinese were led by the exclusiveness of this program to go abroad for the degrees of the university each year.

Affirmative action program received an attack when the minister of education of the country made an announcement that the minimum academic standards which were required for gaining admission in the university had been met by few ethnic Malays. Nevertheless, official affirmative action programs had been dismantled by Malaysian universities by June 2003, and now admissions decisions are made by them without taking into account ethnic origin. Even then the number of Malay students seems to be as large as non-Malay counterparts in the institutions of higher learning.

In the end, it can be concluded that at the end of the twenty-year time frame of the National Economic Policy, the Malays in Malaysia in 1990s are certainly better off, socially and economically than they were in 1960s. The Malays have certainly got benefits from the programmes of affirmative action under the National Economic Policy. Although at the end, it can be stated even the National Economic Policy had not been successful in the achievement of 100 percent of the stated target but its overall impact and the achievements can be described as phenomenal.
Although since the mid-1970s, inter-ethnic and rural-urban inequality as well as overall income inequality had declined, intra-ethnic income inequality has begun to increase since 1990. As the foundation of the economic policy, the continued use of the ethnicity could only be undertaken with the risk of greater discontentment among the Malay community. Intra-Malay inequality can only be addressed by giving larger attention on the eradication of hardcore poverty as has been undertaken by the National Development Policy rather than on poverty between races.

5. Brazil

In Brazil, the first step for ensuring the de-facto equality was acceptance. At the place of pursuing a policy of national color blindness, the focus on race by Brazil has led to the economic and social exclusion of members of certain racial groups. Several provisions for securing the equality of its citizens are contained in the Federal Constitution, 1988. It is recognized by Article 5 of the Brazilian Constitution that ‘all persons are equal before the law, without any distinction whatsoever’, and one of the fundamental objectives it contains is “to promote the well-being of all, without prejudice as to race, origin, sex, color, age and any other forms of discrimination”. The equal access to education is also guaranteed by the Constitution and it mandates that the admission is based on the quality of merit in the university. Education is to be based on “equal conditions of permanence and access in the school,” and the State provides guarantee, “according to individual capacity, access to higher levels of education, research and artistic creation.” However, in the past decades, it has been noticed by the civil rights activists that racial discrimination continues to pervade Brazilian society inspite of the existence of the equality provisions provided in the Constitution (inspired by the significant international conventions). From the fact, this is quite evident that while 45 percent of the population is formed by the black community in Brazil, it constitutes only 2 percent of its university going student body, and more than 90 percent of the diplomats and the judges of the country are white. From the International community strong criticism was invited by these startling social realities, eventually compelling the Government of Brazil for finally recognizing the racial discrimination prevalent in the country. To the Committee of the United Nations on the Elimination of Racial Discrimination in 2003, it was stated by the Government of Brazil that the myth of a nationality in the country was
propagated which was characterized by the harmonious and the perfect fusion of three races responsible for the construction of a “racial democracy” for many decades.

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Elimination of All Forms of Discrimination against Women (CEDAW) have been ratified by Brazil. The Constitution of the country provides that the force of law is vested in the international treaties, noting, “In this Constitution, the rights and the guarantees expressed do not exclude others deriving from the principle adopted by it and the regime, or from the international treaties in which the Federative Republic of Brazil is a party.”

In May 2003, in addition to it, a ministry was established by the Government of Brazil, called “Special Secretariat for Devising Policies for the Promotion of Racial Equality.”

**Classification of Race**

After acceptance, the next step was the classification. System were sought to be devised on the basis of which affirmative action policies were to be executed. However, in Brazil, categorization is based more on the pigmentation of one’s skin, rather than on one’s racial origin. As a result, sometimes it comes to pass that even with dark skin a ‘white’ individual is de facto considered a part of the historically exploited and suffered group. This factual situation has made the citizens of Brazil more conscious about their skin color. By this method of categorization, the privileged were allowed to exploit the quota system but on the other hand, depriving a number of those persons by whom State sponsored assistance might be required.

The system of classification of Brazil has another exclusive feature that it is not a watertight system, where as white or black individuals may be classified. Such rigid system has been termed as requiring the drawing of a precise ‘color line’.

Under this system, individuals are classified as black even though only subtle traces of black ancestral heritage are found. However, in Brazil, there is segregation of various racial groups with some groups like, mulato, pardo, marenco than others being ‘whiter’.

The most unique feature of the system of classification of Brazil which is third in number is that at the macro level, there is no restriction of such type of categorization to the Government, but also individuals themselves are permitted to be
classified at the micro level. The Brazilian Institute of Geography and Statistics ("IBGE") is the official body that has classified the citizens of the Brazil. Several groups has been identified based on their skin color by the IBGE including amarelo (yellow for Asians), indígena (‘indigenous’ for natives), pardo (‘gray-brown’), branco (‘white’) and preto (‘black’) while determining the population. However, in Brazil, systems of self-classification are used by the citizens for referring to one another in practice. In 1976, it is revealed by a survey that in Brazil there are 134 ways for the self-classification of one’s race. The tendency has been that the fellow citizens are referred to as ‘whiter’ by the people than is suggested by their actual racial position. For example, a black individual may be referred to as Moreno (‘brown’) than a preto or Negro.

**Reservation in Public Universities**

With affirmative action, Brazil has begun to experiment only recently. In Brazil, in various spheres reservations or percentage based quotas exist and operate. For example, in television programmes and the advertisements, quotas have been established for the black community. In Brazil, at the workplace, racism is also addressed by the social welfare legislation. However, in Brazil, the most fiercely implemented system of reservation operates in the area of certain universities of Brazil.

The educational inequalities were responsible for wage gap of 48 percent and inequalities of income of 26 percent by the end of the twentieth century in Brazil. Students who were poverty ridden and could not afford to get education in the private schools were not able to come in competition with those students by whom a quality private school education and the specific tuitions were received for the vestibular examination (by which admission into public universities is gained). Consequently, into the public universities, out of one and a half million students who got admission annually, only 3 percent of them identified themselves as relating to the black or mixed race, while only 18 percent got the admission from the public schools (where most black and mixed race students study).

Hence, to ‘level the playing field’ a compelling requirement was felt and in 2001, in the universities of Rio de Janeiro and North Fluminense, a system of reservation was introduced by the State Legislature of Rio De Janeiro. At first, for Afro-Brazilians, a quota of 40 percent was provided, 50 percent for students of public
schools\textsuperscript{290} and 10 percent for physically challenged students.\textsuperscript{291} For the 2002 admissions process, the system was implemented and under this rule, the first class of admitted students, entered the universities in 2003.\textsuperscript{292} An onslaught of legal challenges was led by these laws with plaintiffs who claimed that these laws were unconstitutional. The most important of these was a challenge which was brought before the Supreme Court by the National Confederation of Educational Establishments (CONFENEN).\textsuperscript{293} It was alleged by the National Confederation of Educational Establishments that the constitutional guarantees to equal protection and access to education were violated by the laws and, because the burdens of the program were more than its benefits and other less severe measures could have been utilized, the principle of proportionality was violated.\textsuperscript{294} From Rio State two constitutional challenges were filed before the Rio Court of Appeals as well by a congressman. The laws were modified before the decision of these cases. For the universities, two years later the reservation policy was replaced by a new model. Under the new law, which was passed in 2003, 20 percent seats were reserved for the students coming from the State-run schools, 20 percent of the seats were reserved for the black students and for the students belonging to other minority communities and only 5 percent were reserved for the handicapped students.\textsuperscript{295} Under the new reservation policy, Self-declaration by the students was no longer the only way for the determination of the eligibility for the reserved seats. But, in addition to the self-declaration, according to the universities standards the students must also be ‘socially and economically deprived’ in order to be eligible for the race-bases quotas.\textsuperscript{296}

To the new law as well, challenges have been filed by National Confederation of Educational Establishments,\textsuperscript{297} while an amicus curiae brief has been jointly filed by a group of organizations to the Supreme Court defending the practice of affirmative action.\textsuperscript{298} Suit has also been filed by the congressman from Rio State challenging the legislation which was revised. Elsewhere, its own affirmative action policy has been adopted by the State of Mato Grosso do Sul. 20 percent of the incoming spaces for the blacks and 10 percent for the Indians are set aside by its program.\textsuperscript{299} Those students, by whom applications are moved for the seats for blacks, are under obligation to submit a personal photograph and to sign a declaration relating to their color.\textsuperscript{300} Those, by whom applications are moved for the Indian seats, are under compulsion for showing an indigenous identification card and a declaration of indigenous descent from the Agency for Indian Affairs of the country.\textsuperscript{301} Their own
quota systems have been adopted by the other universities as well. The State University of Bahia started reserving 40 percent of seats for the students of African descent in 2002 from the public school system.302 And in 2005, this University of Bahia began to set aside 43 percent of its seats for the students of the African descent and from the public schools.303 The State University System of Rio de Janeiro started in 2003 holding 20 percent of its places for the poor students of African descent and 20 percent for students from the public school.304 As of 2004, the Federal University of Brasilia started reserving 40 percent of its seats for students who identified themselves as of African descent and a photograph as confirmation was sent by them; the Federal University of Parana began holding 40 percent of its seats for the students by whom declaration was made to be of African descent and another 20 percent for the public school students.305 Five federal universities and four State Universities have adopted and then maintained quotas systems as on May 2004.306

Reservation Policy at the Private Universities
A law was adopted by Brazil on January 13, 2005 for providing tax breaks to the private universities if as many as 20 percent of their seats are reserved by them for the poor students.307 President Luiz Inacio Lula da Silva explained reportedly, “We’re not doing people favours”.308 “We’re paying a debt build up over 500 years”.309

Universities are encouraged by the law to provide scholarships for the admitted students, something which was not done by the public universities.

Reservation in the Government
An order was issued by the Minister of Agriculture of Brazil in September 2001, mandating that 20 percent of his staff be black and that firms with which his agency had made contracts be made up of 20 percent persons of African descendents and another 20 percent women.310 The federal Supreme Court soon followed establishing a similar affirmative action hiring target.311 At the same time, about the constitutionality of the affirmative action was spoken out publicly by the president of the Court, explaining that affirmative action programs were necessary to fulfill guarantees of equality. Affirmative action was brought by then-President Fernando Henrique Cardoso in December 2001 to his own Governmental agencies, mandating that 20 percent of the positions would be reserved for blacks and browns that did not
require civil service examinations.\textsuperscript{312} It was also made clear by the Ministry of Justice that firms with 20 percent black or brown employees would only be contracted by it. 20 percent of the job-training budget was reserved by the Labour Ministry for courses targeting Afro-Brazilians.\textsuperscript{313}

At the Instituto Rio Branco diplomatic training school affirmative action program has also been instituted by the Ministry of Foreign Relations. However, a quota system was not established by this program but a scholarship was created (2,500 Brazilian Real monthly -- approximately US$ 850) for the students of African descent instead. In 2002, only .7 percent of the total population of the incoming students passed the final selection stage.\textsuperscript{314} In 2004, the scholarship numbers were increased to 40 by the school and an internal mentoring system was created for providing guidance for the students throughout their careers.\textsuperscript{315} For the promotion of Racial Equality, a National Policy was established by President Luiz Inacio da Silva in 2003, which has set out for establishing quotas for certain Government jobs. That same year, a law was approved in the Local Government by the Sao Paulo City Council for developing quotas for the people belonging to African descent.\textsuperscript{316}

**Achievements of Affirmative Action Program**

In Brazil, in the relatively new affirmative action, some of the preliminary effects may be noted. First, it has been argued by the critics of the program that under the quota system, some students admitted may be unprepared to compete academically; by contrast, others argue that in the university setting, quota students are capable to thrive once.\textsuperscript{317} The University of the State Of Bahia has released the data which suggests that students are prepared to compete and succeed with opportunity. Under the quotas program, in 2003, students who entered, earned grades on the average of 7.7 out of 20 (just .2 percent lower than the average of the students overall) and Portuguese language majors under quotas actually performed .4 percent higher than their counterparts, who were under non-quotas, at 8.8 out of 10.\textsuperscript{318} Second, but perhaps more critically, many of the students admitted to the quota seats, remain not able for attending school because of the lack of financial resources and a dearth of the funds of scholarship.\textsuperscript{319} But still it is correct to argue that for evaluating the reservations in Brazilian Universities, it may be too early post 2003, a socially progressive model of positive discrimination is posited not merely based on skin color or race, but also on socio-economic status by the new reservation policy.
6. Pakistan

In Pakistan, the quota system was implemented initially as a measure which was temporary. This system was introduced for opening up opportunities in the short run for the underdeveloped regions and communities so as for enabling them to compete with the relatively developed regions as well as communities in the long run. So, a specific time period concerning the quota system was stipulated by the legal provisions after which it was to be scrapped. However, as a result of extension in the specified time many times over, the quota system continued to be in place.

There have been three major quota systems in operation in Pakistan. A regional/provincial model of recruitment was provided for by the first system which was introduced in September 1948.

<table>
<thead>
<tr>
<th>Region/Province</th>
<th>Quota</th>
<th>Population%</th>
</tr>
</thead>
<tbody>
<tr>
<td>East Bengal</td>
<td>42</td>
<td>56.75</td>
</tr>
<tr>
<td>(West) Punjab</td>
<td>24</td>
<td>28.00</td>
</tr>
<tr>
<td>Karachi</td>
<td>2</td>
<td>1.50</td>
</tr>
<tr>
<td>All other provinces and princely States of West Pakistan</td>
<td>17</td>
<td>13.75</td>
</tr>
<tr>
<td>Potential migrants from India</td>
<td>15</td>
<td>(9.80)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(included in the above)</td>
</tr>
</tbody>
</table>

It is instructive to watch that out of the total population of Pakistan, East Bengal accounted for 56.75% and it got a share well below its demographic strength. Similarly, Karachi, actually received a share which had a population of around in 1951 one million, and this was 50% more than its share in the national population. The new policy guaranteed an additional share of 15% in the services for potential migrants from India. This provision unduly favoured migrants, in view of the locals, taking into consideration their over-representation in the services before independence.

In the due course, after abolishing the provision for the quota of migrants, the provision for introduction of the principle of merit as the final and the ultimate object of the official policy was brought in. Therefore, in November 1949, a revised quota system was implemented along the following lines:
<table>
<thead>
<tr>
<th>Category</th>
<th>Quota%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Merit</td>
<td>20</td>
</tr>
<tr>
<td>East Bengal</td>
<td>40</td>
</tr>
<tr>
<td>Punjab (including Bahawalpur)</td>
<td>23</td>
</tr>
<tr>
<td>Karachi</td>
<td>2</td>
</tr>
<tr>
<td>All other provinces and princely States</td>
<td>15</td>
</tr>
</tbody>
</table>

The revised quota system on the ground changed little. Jobs were almost guaranteed by the provision for merit for candidates from either Punjab or Mohajirs. Certain categories were only redefined and the basis in general was rationalized by it for the categorization of candidates. In the quota system of 1949, the share of non-Punjab areas of West Pakistan and East-Bengal was slightly decreased in each case by 2 percent. This loss actually represented a benefit for the migrants of Punjabi as well as of Mohajir origin by whom 20 percent of jobs were captured which were kept aside for the purpose of recruitment on the merit. Their inclusion was guaranteed almost by their skills and their acknowledged superior educational qualifications under this provision in the services. But into the services, this pattern of recruitment actually reflected the inflated share of the persons belonging to the migrant groups settled in various provinces instead of persons belonging to the core communities living there. The original purpose of bringing the candidates from the communities which were under-developed at par with their competitors from the communities which were developed was failed to be served by the region-based quota system.

The time-span for the application of the quota system was extended by the 1956 Constitution by 15 years, up to March 1971. After this, a 10 year period was provided by the 1962 Constitution for the quota system and it was to end in 1972. A development of dire political consequence took place before the end of that period when the quota system was extended by the Government of Yahya’s martial law (1969-71) within the province of Sindh to the urban and rural sectors. This new formula provided 60 percent and 40 percent representation to the rural and the urban population of that province in both provincial and federal services respectively. From the popular legitimacy of the Pakistan Peoples Party Government, the formal provisions of the law in respect of the ethnic preferential policies gained a new lease of life based on a mass mandate. Sindh’s were served well by the new policy in as much as doors for their entry were opened up by it, despite in terms of lack of their
performance and quality on a competitive basis, into the educational institutes and the services.

The quota system was not only kept alive by the 1973 Constitution but the period of its enactment was also extended by another 10 years. Protection was provided by this Constitution to a large number of people who, during the One Unit period (1955-1970), had settled in Sindh and had now become the bonafide residents of the province. They were recruited in large numbers into the services, especially the police. In addition to it, the provision of seats had been scaled down by the 1973 Constitution to be filled from 20 percent to 10 percent on merit. The share of constituent parts of post-Bangladesh Pakistan was rescheduled by the 1973 Constitution. The new commitment for providing the proportionate representation to the underprivileged communities was reflected through the provision that all the provincial/regional quotas to the 1000th fraction, were to be worked out. For the first time in the history only in 1973, the shares of Sindh, the North Western Frontier Province (NWFP) and Baluchistan were defined neatly. It was recognized in 1970s that a fixed ratio of jobs recruited should be given to the Northern Areas on an all Pakistan basis. The Federally Administered Tribal Area (FATA) was also included in the new schedule for quota where the mainstream law of Pakistan did not apply. Sensitivity towards people of these regions, who were not fully absorbed in one way or another in the mainstream of social and political framework, was shown by the State of Pakistan. For these regions, the quota for jobs was meant for bringing their elites into the national circuit in the jobs and in education at the expense of the Southern part of the Pakistan, especially the urban Sindh. For Karachi, a separate share was not provided by the new quota system.

A new quota has been demanded by the Premier Mohajir Party, the Mohajir Qaumi Movement (MQM) according to the latest population figures and it was also claimed that in order to bring down the number of Mohajirs, the results of the censuses conducted in 1972 and 1982 were grossly tempered with. As long as, the actual figures in Sindh for urban and the rural sectors were not known, the structure of the quota system could not be changed. In 1981, literacy rates for Pakistan in general and Karachi, the premier Mohajir city, were 23.3 percent and the 55 percent respectively. That meant a greater demand for jobs for the latter. But, for the two provinces, the quotas were 19 percent and the 50 percent respectively. And the census figures on which these quotas were based, were obsolete themselves. The
official policy of positive discrimination, within Sindh, according to the 60:40 ratios in favour of Sindhis for rural and urban sectors, combined with the increasing number of the upcountry migrants who were domiciled eating into the urban quota for producing a high level of accumulated anger in the Mohajir youth.

The Judicial Move on Affirmative Action Policy

On the basis of regional quotas, the system of preferential policies was challenged not only from the political platform reflecting an ethnic perspective of the Mohajir Qaumi Movement but also from the strictly Islamic and legal points of view. Initially, vide judgment dated 14 June 1989, it was held by the Federal Shariat Court that in view of Article 203-B(C) of the 1973 Constitution, according to which both the Constitution and the Muslim Personal law had been taken out of the jurisdiction of the Court, the quota system could not be challenged. However, later it was declared by the Federal Shariat Court vide judgment dated 31 August 1973 which had provided quotas under rule 14 of the Civil Servants (Appointment, promotion and transfer) Rules, to the injunctions of Quran and Sunnah, was repugnant. It was declared by the Lahore High Court Bench at Rawalpindi in 1994 that in addition to being repugnant to Islam, on 15 August 1993, after the expiry of a period of 20 years as given in the Constitution, the memorandum in question had any way lapsed. It was decided by the Court that after this date, the continuation with the quota system was without any lawful authority, unconstitutional and illegal. The holding of the Central Superior Services (CSS) was stayed by the Lahore High Court on 22nd October 1997 which was scheduled for 15 November on a plea that the provision which was specified by admission forms which were issued to the candidates of the Central Superior Services for various quotas violated Article 27 of the Constitution. In 1993, the quota system which was enshrined in the 1973 Constitution had ended after 20 years. It was declared by the Article 27(1) of the Constitution that,

“*No citizen otherwise qualified for the appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the grounds only on race, religion, caste, sex, residence or place of birth.*”

All this was meant that in Pakistan, the mainstream legal and judicial opinion in the late 1990s in favour of elimination of the quota system moved fast. About this
line of thinking, the political opinion in Baluchistan, the North Western Frontier Province (NWFP) and the rural Sindh continued for showing reservations.

Following its first electoral victory, during the MQM movement in the decade in the 1987, the local bodies’ elections, and the issue of quotas has been at the heart of a bitter controversy. It was now increasingly felt by the Punjab-based public opinion and the power structure which, to the idea of a policy of reserved seats because of the demands of other provinces, had initially adjusted that this policy’s efficacy had run out and politically its cost had become unbearable. However, the national Governments have been dependent on the support provided by the smaller provinces in one way or another, which were elected in 1988 and 1990, 1993 and 1997 and thus, shied away only for appeasing the Mohajir Qaumi Movement (MQM) from alienating them. During the 1997 elections, the dependence on the MQM of the Pakistan Muslim League (PML) for the establishment of the coalition Government in Karachi was acute. The way of taking a step towards the elimination of the quotas was paved by all this which was the corner stone of the electoral agenda of the Mohajir Qaumi Movement (MQM).

The caretaker Government of Mairaj Khalid in January 1997 took the critical move towards the direction of the removal of the quota system. It was decided by the cabinet on the recommendations of a task force reviewing the discretionary powers which were vested in the ministries/divisions that to the educational institutions, admissions should be regularized. This meant: no quotas; selection to be on the basis of the decisions of the committee and not on an individual basis; and no quotas for the defense services. It was ordered by the Prime Minister Nawaz Sharif that all federal and provincial discretionary quotas for jobs, admissions to schools/colleges, allotment of plots, and grant of scholarships should be abolished forthwith. There was confusion about whether the discretionary quotas which were listed to be eliminated, included provincial/regional/district quotas as well, whether under that category foreign and self-financing students fell, whether all or any of these categories were ‘reservations’ or ‘quotas’ which were to be continued or discontinued. It is unlikely that in the near future the debate about the policies of the affirmative action from the public fora will disappear.
7. Sri Lanka
The purpose of examining the scope and impact of the affirmative action policies in Sri Lanka can be achieved through an examination of the three themes, university admissions policies, language policy, and the employment in the State sector.

1. University Admissions Policy
In Sri Lanka, in 1970, standardization by media was introduced. To use the jargon of administrators “Media-wise standardization” was a device for weighing the marks of the candidates so that from each language group, those qualifying for the purpose of admission would be proportionate to the number who, in that language sat in the examination. It was argued by the proponents of the measure that the difference in the performance must be attributed to the qualitative differences between Sinhalese and the Tamil students in teaching, facilities or marking and the “standardization” was merely a way for mitigating the effect of such inequality.

In the next year i.e., in 1971, the principle of standardization of marks was extended from language medium to the subjects as well.

In the Year 1974, there was the introduction of the modified scheme named “district quota” system for the first time. According to the administrative districts, eligible students were classified from which they had taken the General Certificate of Education (Advanced Level) examination. The students were selected in the order of the merit of standardized marks. From each course of study, the number of places available was allocated in proportion to their general population to the districts.

In the year of 1976, at the first place, in each course 70 percent of the places were filled on an all island basis according to the order of merit as determined by the standardized marks which were obtained at the General Certificate of Education (Advanced Level) examination. On a district basis, the remaining 30 percent filled. At the second place, in this year, the concept of ‘educationally under-privileged districts’ was introduced and one-half of the places to be filled on the district basis i.e., for the students from 10 districts, 15 percent of the total number of places was reserved classified as being “educationally under-privileged”.

On 4 August, 1977 by a new Government the reversal of the university admissions policy of the United Front (UF) Government which was controversial, was announced just after the offices had been taken by it. The new Government
abandoned the “standardization” based on the language in which students sat in the examination for getting the entry to the university. On the basis of such change indeed, the proportion of Tamil students who entered scientific courses in 1969-70 and 1970-71 under the system of open competition equaled or exceeded the 35-40 percent.329 There was increase in the number of Sinhalese entering the universities, especially from the rural areas. From this stage onwards, there was change in the university admissions policy of the Sri Lanka from one of ethnic preferences to one of regional preferences favouring the rural areas—without giving any regard to the ethnicity or the religion. In the early 1970s, a modification of the scheme of the preferences on the basis of districts which was first introduced was now elevated to the position of the central feature of the admissions policy of the university.

In 1978, there was the abandonment of the standardization and it was decided by the Government that on the basis of raw marks, admission would be provided as was the practice prior to 1970. It was decided that a student candidate who would have obtained the admission to the university should not be deprived of any such admission, had there been a standardization of marks owing to the abolition of standardization. The number of the underprivileged districts was raised to 11 with the inclusion to the category of the Batticaloa district.

In the year 1979, it was decided by the Government that admission should be made only on the basis of the raw marks and that the places which were available in 1979 should be filled in accordance with the following formula:

(a) in each course of study 30 percent of the places were to be filled on an all island merit basis.

(b) in each course of study 55 percent of the places were to be allocated in proportion to respective populations of the administrative districts which were 24 in number and filled on a district merit list.

(c) in each course of study, the remaining 15 percent of the places were to be allocated to the 12 administrative districts in proportion to their respective populations which were deemed to be “educationally under-privileged”. On a district merit list these students were also chosen.

In 1980, the number of the underprivileged districts was increased to 13 with the inclusion of the Puttalam district.

In the year of 1985, it was decided by the Government for changing the district and underprivileged district quota which was as follows:
(a). the national merit quota to remain at 30 percent.
(b). to increase the district quota from 55 percent to 65 percent, and
(c). to reduce the number of the districts from 13 to 5 and also to decrease the under-privileged district quota to 5 percent from 15 percent.

In 1987, a review committee was appointed by the University Grants Commission (UGC) for investigating and reporting in the admission policy of the university on possible changes. By this time, the select committee which was appointed by the Parliament itself also examined the problems which were relating to the admission policy of the university. The University Grants Commission review committee recommended that “the greater emphasis should be provided on the merit element in the admissions formula than it has at present and that for the educationally-underprivileged districts in the district quotas as well as in the quotas, a corresponding and progressive reduction be made till they were eliminated over a 6 or 7 years period starting at the end of 1987.” By the end of 1991, the quota for “underprivileged districts” was to be abolished and by the end of 1995, the “district quotas” themselves. By the end of 1987, there was to be a progressive increase in the merit quota to 40 percent and at a time a 10 percent progressive increase in the merit quota till the “district quotas” were eliminated by the academic year 1994-95. The proposals of the committee were adopted by the University Grants Commission but just with one change. It was recommended by the commission that in 1992 for considering the impact of the proposed changes, a further review should be made.

In 1990, the number of the districts which were considered as “educationally under-privileged” was raised to 12.

In the year of 1996/97, Jaffna was added to the list of under-privileged districts.

2. The Language Policy

The change in the language policy introduced in Sri Lanka in favour of the Sinhalese majority in the mid and late 1950s could be treated as part of a policy of the affirmative action. But from the moment the change in the language policy was given the legislative form efforts were made in many key areas of the State policy, for modifying it in the favour of recognizing the language rights of the Tamils who were in minority. The modification of National Language Act Number 33 of 1956 began in earnest in 1958 with the result in the implementation of the Language Policy. The
language reform which was introduced in 1956 had very few elements—of a policy of affirmative action—indeed if any at all. In the process of education one result of this policy was the evolution of two language streams starting first of all in the primary schools and through the 1940s extending into the secondary education, and in the 1960s, culminating in the university education. This policy reform applied to all the parts of the island. From the education reform of the 1930s and 1940s, this right stemmed and was entrenched well by the mid-1950s. In Sinhala or Tamil, the right to an education from the very inception was treated as a group right at the place of an individual right. More to the point, their right was not imperiled by the ‘Sinhala Only’ Act of 1956; indeed the education of Tamil children proceeded through the Tamil language apace over the decade 1956-66. Till the 1970s, in schools, the English medium continued.

But the Muslim children had the right for pursuing their studies in the education system in any one of the three language media—Sinhala, Tamil or English—a privilege enjoyed by no other group in the country. Although the rhetoric of language policy did not conform to the reality but the rhetoric of its own had a life.

The ‘Sinhala Only’ policy of the 1950s was consolidated by the Constitution of 1972 unequivocally and the essentially subordinate role of the Tamil language was emphasized: while the use of the Tamil language was recognized and permitted within the limits which were set out in the Tamil Language (Special Provisions) Act Number 28 of 1958 and thus, under the provisions of the act, the regulations drafted were “deemed subordinate legislation”. Quite deliberately the reference was directed at the Tamil Language (Special Provisions) Regulations which were adopted by the Parliament in 1966. The language policy in practice in these spheres did not change in any significant way, from what it was prior to 1972; indeed at all there was no change.

A more conciliatory language policy was deliberately sought by the framers of the Constitution of 1978 and they gave it very high priority. On January 1, 1979, in Sri Lanka, in the implementation of language policy there marked a new phase. Indeed with full circle that policy had come under the colonial rule from the English only, from 1944 to 1956 to the Sinhala and Tamil, from 1956 to 1978 to ‘Sinhala Only’ and on to Sinhala and Tamil with English as well from 1978 onwards. With the Constitution of 1978 much of the ambiguity in the language law and in the official policy of language had been settled despite in the terms of the lack of precision like “official” and “national language”, and “link language.”
Ten years later to the Constitution, the 13th amendment certified on November 1987 raised Tamil to the level of an official language and in addition to it English was given the position of a link language. The 16th amendment clarified and indeed consolidated the provisions of the 13th amendment (certified on 17 December 1988).

In 1989-90, the important policy decision was taken by the United National Party Government under President R Premadasa for establishing an Official Languages Commission with wide powers for overseeing the implementation of the official language policy. On 21 December 1991, the Official Language Commission appointed with the passage of the Official Language Commission Act Number 18 of 1991 than the Commission of 1951-53 has wider powers which were enjoyed relating to the implementation of the language policy because the latter was not a legal entity but the creation of the administration. The legal framework was provided by the Act for monitoring and supervising the implementation of the official language policy of the country. The Tamil minority in Sri Lanka—indigenous and Indian—have always the right to an education through the medium of Tamil language in whatever part of the country they live. This right extends to the university and technical education. By 1987-88, a de facto status was elevated to a de jure fact. Yet to the Sinhala majority, the political benefits of these working arrangements have proved to be just as elusive as the quest for ‘Sinhala Only’ because in the country it has never been publicly or officially acknowledged by the main representatives of Tamil political opinion that the reality of the language policy had deviated from its rhetoric over the years.

3. State Employment

There is little justification for treating the State employment as part of a system of the affirmative action and also that dominance of the Sinhalese in the public sector employment in Sri Lanka is the result of a deliberately introduced system of policies of the affirmative action.

The fact of the matter is that the economic resources of the Northern Province were scarce and in the last quarter of the 19th century, it was quite clear that in the traditional occupations based on land, the increasing population could not be accommodated. Therefore, the Tamils turned much more to the State employment and the professions than to plantation agriculture and trade, in search of avenues of employment. Till the 1930s, the Tamils did not face much competition from the side
of Sinhalese at least when the advantageous position in the State employment by the Tamil first became a point of bitter division in the politics. So, by the early years of the 20\textsuperscript{th} century, the Tamils had come to be recognized as singularly dependant on the Government service and precisely they had no deep roots for that matter to defend their position because in the plantation economy or the trade of the island, they were moved in the public service all the more zealously. But in 1930, Tamils faced competition from Sinhalese more significantly and in the Government, their advantageous position in politics became a point of contention and division. They became exceptionally vulnerable and exceptionally sensitive to the changes and reforms made in the language policy, to educational reform, and changes in the mechanisms in order to determine admission to tertiary education in a country in which education expansion in the university lagged far behind the expansion of the primary and the secondary education.

After independence, with the rapid expansion of the educational opportunities, there was increase in the competition especially in the Sinhalese areas. The prospects of the Tamils were greatly reduced in their search in the Government service for positions by this. For a while in some of the professions—medicine, engineering and law, their advantageous position was retained by them—but by the early 1980s it was lost. It was preferred by them to believe that it was a matter of discrimination; in fact, at the secondary level, it was the natural result of an expansion of education in the areas of Sinhalese. In the State service, after 1956 the drop was very marked in the number of Tamils. After 1984, there was the contribution of many factors to this sharp decline in numbers:

1. first, there was the large-scale emigration of the Tamil youth to the western countries like Canada, to Australia, and Britain principally from all the strata of the society, and also to the Scandinavian States (largely to Norway and Sweden) in the wake of the ethnic conflict of Sri Lanka;

2. Second, to the Denmark, Switzerland in the Western Europe and to Canada and France there had also been a steady stream of “economic refugees”. In addition to it, the collapse of the civil administration for the State employment opportunities for the Tamils in parts of the East and of the North in the island had greatly decreased;

3. third, since the mid-1950s, and the late 1970s, the expansion of the private sector was on a scale and the State employment was no longer as attractive as it was once in comparison to the private and it was due to the greater flexibility in the wages
and promotions, greater recognition provided to the personal initiatives and merit, and above all, the freedom of the private sector from the political interference. Nevertheless, forms of affirmative action as remedial measures—were required for getting the public services of the country for reflecting the ethnic profile in the composition of its cadres more accurately.

**Achievements of Affirmative Action Program**

In Sri Lanka, affirmative action policies are confined alone to the university admissions, and only to the admissions process in that regard to the undergraduate education. They do not operate for the appointments to the staff of the universities, or to the promotions of the staff from grade to grade in the post-graduate education.

This very limited exercise introduced as a temporary measure had survived in the affirmative action for over 25 years, and there is no sign for its abandonment of it any time soon. As it had been seen that many substantial changes took place in the system and one more element is added with every mutation to a complex system of the vested interests through which its survival has been secured.

But the base is much broader and deeper of the university system than it was in the early 1970s, and it can be said no longer that the competent and deserving students from the remote and the rural areas of the country in the competition for the admission are at a decided disadvantage, especially to the professional faculties. On the contrary, the evidence is overwhelming that greatly increased access has come to the higher education at a tremendous price. One of the results of the admissions system is that the concept of the academic merit has gone by the board. Quality has been sacrificed in the hard choice between quality and quantity to a much greater extent in the third world than in most other systems of the university. The three-tier system of the university admissions of the Sri Lanka which was devised for protecting and fostering the interests of the students from the rural areas has now become a formidable obstacle to the development of a national pool of the competent students who in their capacity measure up to the standards of their peers in other parts of the third world in administration and in research to cope with the challenges of the technological world of the modern era.
8. India
On the caste system, the strongest and the most systematic attack has come in the twentieth century through the Constitution of India, adopted on November 26, 1949. The structure of the Indian Constitution is said to be characteristically British.

“The machinery of government is essentially British and the whole collection of British Constitutional Conventions has apparently been incorporated as conventions.”

Indian Law is largely based on English common law because of the long period of British colonial influence during the period of the British Raj. The Constitution of India guarantees the right to justice, equality, liberty and dignity of all its citizens. From ancient caste distinctions which were based on Hindu philosophy and traditions of the religion, it has been a long journey to the constitutional pledge of a democratic Government for all the human beings with dignity, equality and justice. The Constitution founders of India designed the constitutional policies to offset the entrenched discriminatory practices. Therefore, equality as a cardinal value came to be embraced by the independent India against the background of elaborate and clearly perceived inequalities. The result has been an array of programmes that are here termed as policy of Protective or Compensatory Discrimination. The constitutional provisions authorize the protective discrimination policies and permit departures from the norm of equality, like evenhandedness, merit and indifference to ascriptive characteristics.

Into three broad categories these array of protective discrimination programmes can be divided roughly:

(a). Reservations in Legislative Bodies
Article 330 of Indian Constitution provides protection in terms of political representation. In the Lok Sabha, the seats of the Scheduled Castes and Scheduled Tribes in proportions to their population in the particular State are reserved. In the Lok Sabha and the legislative assemblies of the States, the reservation of seats in favour of Scheduled Castes and Scheduled Tribes is provided with the purpose of ensuring the representation of minimum number of these categories of persons in the legislative bodies. Initially, these reservations were provided for the period of only 10 years under Article 334 from the commencement of the Constitution. But since then, this duration has been extended continuously by 10 years each time.
(b). Reservation in Government Services
As a measure of protective discrimination, reservation in Government services has been incorporated under Article 16(4) of the Constitution of India. Under the head of “Right to Equality”, this particular provision comes. For giving effect under Article 14, to the general right to equality, a freedom from discrimination is secured to all the citizens by the Constitution of India on the grounds of religion, race and caste. The State is further forbidden, in the specific application of the guarantee of this equality; from discriminating against any citizen on the grounds of residence, birth, descent, class, language and sex. There has been the abolishment of the untouchability and against discrimination the citizens are protected even on the part of the institutions and the private persons. After guaranteeing under Article 14 the general right of equality, the Constitution defines the term equality in terms of justice by the provisions of non-discrimination contained in Article 15(1) and 16(1) and proceeds for incorporating the preferential treatment provisions for providing the permission to the State for achieving the equality by providing preferential treatment to the disadvantaged sections in all its dealings and particularly in the field of public employment. While equality of the opportunity in the matters of employment or appointment for all the citizens is guaranteed by Article 16(1) under the State to any office, and the provisions under Article 16(2) provide that no citizen shall be ineligible for or discriminated against on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, in respect of any employment or office under the State. Article 16(4), which provides for the protective measure of reservations of seats in the Government employment, lays down that nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts for any Backward Class of citizens which is not adequately represented in the opinion of the State in the services under the State.

(c). Reservations in Educational Institutions
Under Article 15(4), the provisions in the educational institutions for reservations to the deprived sections of the Scheduled Castes and Scheduled Tribes have been secured in the Constitution of India. State is specifically barred by Article 15(1) from discriminating on the grounds of race, caste, sex, place of birth or any of them against any citizen. But on the other hand, Article 15(1) lays down that the State is not prevented for the advancement of any socially and educationally Backward
Classes from making any kind of special provision. The use of Article 15(4) has exclusively been made to provide reservations in the educational institutions. Part XVI of the Constitution lays down specifically “reservation” program in detail in favour of Scheduled Castes and Scheduled Tribes.\textsuperscript{334}

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the international Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have been ratified by India. In the International law, the concept of the affirmative action is generally referred to as “special measures”.\textsuperscript{335} During the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Government made the first mention of these “special measures”. It was suggested by India that in the text of Article 2, an explanatory paragraph should be included specifying that—

“Special measures for the advancement of any socially and educationally backward sections of the society shall be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear.”\textsuperscript{336}

**In Public Sector and University Admissions**

A Backward Classes Commission was established in 1953 for creating a list of the groups, it believed to be “Backward” and for the purpose of requiring an improvement in the status.\textsuperscript{337} (Despite the fact that in India the affirmative action is often referred to as a way for helping “Backward” sections, this term should not be seen as pejorative.\textsuperscript{338}) In 1963, it was made clear by the Supreme Court of India that for these Backward Classes a maximum of 50 percent of seats could be reserved.\textsuperscript{339} In 1980, a second Backward Classes Commission, which was also known as Mandal Commission issued a subsequent report.\textsuperscript{340} This Commission recommended by using the decision delivered by the Supreme Court as guidance\textsuperscript{341} that for the Scheduled Castes,\textsuperscript{342} Scheduled Tribes\textsuperscript{343} and Other Backward Classes,\textsuperscript{344} a total 49.5 percent of the jobs of federal Government should be set aside. Stressing that for remedying the negative effects of the caste system, a lack of discrimination and stated policy of equal opportunity were not sufficient, it was said by the Commission:
“People who start their lives at a disadvantage rarely benefit significantly from the equality of opportunity. Equality of opportunity is also a social principle, because it ignores many invisible and cumulative hindrances in the way of the disadvantaged.”

After months of hearings by the Supreme Court, it was not until 1992 that there was implementation of this report. About the benefits that affirmative action would provide in favour of certain groups, many people were unhappy and took to the streets in violence. Today, in the universities, the civil service, and the legislature, seats are kept reserved in favour of the Scheduled Castes and Scheduled Tribes to their percentages in rough proportion in the population. Specifically, for the Government service, quota for the Scheduled Castes is 15 percent and for the Scheduled Tribes, it is 7.5 percent. In the same way, in the Lok Sabha (House of the People) and in the State Legislative assemblies seats are reserved in each State in favour of the members of Scheduled Castes and Scheduled Tribes in proportion to their populations. For the Other Backward Classes, twenty seven percent of the seats at the universities and in the Government jobs are reserved, though in legislatures they are not reserved (since in many States they make up a majority of the population and are already represented in politics). Because explicitly, the Government is charged by the Constitution for Backward Classes with the implementation of the affirmative action programs, on the use of affirmative action per se courts of India have not heard challenges. Instead the concentration of the courts has been more upon the determination about who comes within the four walls of the protected classes. For example, in one prominent case, it was held by the Supreme Court that the implementation of the recommendations of the Mandal Commission was constitutional. Significantly, it was also held that there must be the exclusion of the well-off portion of the population while determining which members of a class should get benefits of the affirmative action. In another significant judgment provided by the Supreme Court, it was recommended that the identification of Other Backward Classes solely on the basis of the caste will be unconstitutional and further it was held that there must be exclusion of the creamy layer from the benefits of the reservation.

Both class and caste in accordance to the Court are important for the purpose of the determination of the members, who should get the benefits of the policy of the
affirmative action. It was held by them that the potential beneficiary could not have parents who earn above a certain income, and it was also insisted that the parents who had reached in the Government or military, high-rank reserved positions could not be claimed by their children.\textsuperscript{356} It was also made clear by this decision that “a permanent body, in the nature of a Commission or a Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes, and sections in the list of Other Backward Classes can be made, should be established.”\textsuperscript{357} Since then a National Commission has been established by the Government for Scheduled Castes and Scheduled Tribes, and it was later split into two separate Commissions.

**Achievements of Affirmative Action Program**

Approximately, 65 percent of the population in India is obtaining the benefits of the affirmative action programs in the form of reservations.\textsuperscript{358} The reservation system of India has brought the beneficiaries of the affirmative action into the middle class and the mobility of the members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes has been increased.\textsuperscript{359} The members of these groups have been provided the opportunities of participating at all the levels in the Government but still the problems remain.\textsuperscript{360} This policy of the reservation has not gone without costs. In fact, the costs have been enormous. Amongst those who have been deprived off the jobs would have got lot of frustration which in the presence of the preferential policies, undermining the efficiency of the administration, underlining the differences and leading invidious discriminations, making the beneficiary groups dependant and blunting the development and the initiative etc of the members of the beneficiary groups could be recognized to be the costs of the policies of the preferential treatment. Keeping in view these costs which have been insolubly bound to the policy, this policy needs to be changed or totally abolished.

**Comparison of affirmative action policies**

A comparative analysis of the legal, constitutional, and political systems of other countries is very relevant. The comparative analysis helps in promoting a better understanding of own situation of a country and also assists in the proper evaluation of the institutions of its own. This comparison assists not only in the interpretation of the Constitutions but also helps in the enforcement of the human rights.\textsuperscript{361} Further, in case of a controversial topic like affirmative action which has posed a great deal of
difficulty, such a problem can be solved only with the help of a comparative study. \[362\] In this chapter, deep comparative study of the affirmative action in United Kingdom, United States of America, South Africa, Brazil, Malaysia, Pakistan, Sri Lanka and the Republic of India is made. This study has looked at the reasons for the affirmative action; the legal standing of the affirmative action; the present day application of the policy of the affirmative action as well as the future of affirmative action in these countries.

In the United States of America, the affirmative action campaign was a means for stopping racial discrimination or discriminatory practices against the non-whites. First of all, unlike India and South Africa, in the United State of America, affirmative action is not a legal concept which by pointing to a single section of the Code of United States can be easily explained or articulated. It is mixture of the case law, statutes and the regulations. In the United States of America, various executive orders and/or judgment pronounced by the courts are integral to the implementation of the affirmative action program. The United States program is much younger and relies a great deal on the voluntary efforts. But the presence of an enforcement mechanism is a significant strength of the affirmative action program of the Unites States of America. Unlike South Africa, the affirmative action program in United States of America is not quota-based. A “quota” refers to a certain percentage or number of a population. The quota system stipulates that “a defined percentage of minority groups (defined by race or gender) to be admitted to schools or hired and promoted. In this system, a more qualified candidate could be turned down in favour of a minority candidate. The Civil Rights Act of 1964 prohibited racial quotas.”\[363\]. In the United States of America the whole concept of legal rights has been developed in individual terms. So, in the United States unlike India, there is individual rights approach. The case for the reverse discrimination in the United States has been made out in the name of policy and utility rather than in the language of rights. But in the meantime, in the United States, affirmative action policies have come under systematic attack; indeed in many parts of the United States particularly in California, for reversing these policies a systematic process has begun.

India, Pakistan, Malaysia and Sri Lanka in the South East Asia had been parts of the British Empire, especially in the case of India and Pakistan and the colonial empire in the case of the Sri Lanka and Malaysia. All these countries have adopted the policies of the affirmative action in the aftermath of the transfer of power. In India, on
the State a commitment was imposed to such policies by the Constitution adopted at the Independence, through the Article 15(4) and 16(4) by which the introduction of “preferential treatment for the Backward Classes of people” was sanctioned. While in the Constitutions of Pakistan or Sri Lanka, there was no such incorporation of the preferential policies.

In all these countries, affirmative action or preferential policies have certain common features as well as certain distinctive features as well. India’s affirmative action policies had a clear caste orientation, which were designed for the benefits of the “Backward Classes people” for the amelioration of the condition of the untouchables, referred to as Scheduled Castes (SCs) in the Constitution of India. In the line of beneficiaries, there were also Scheduled Tribes as well as a very vaguely defined category like “Other Backward Classes” or OBCs, who were also the caste groups. In Pakistan, the distinctive feature of the reservation policies of the country was their regional focus.

India has the longest modern history of affirmative action among the countries now practicing the policy. India’s affirmative action policies have a clear caste orientation. This policy has a history that precede independence when three southern states of India establishes a policy of reserving positions in the state level civil service bureaucracy for the untouchables. In 1948, a national policy of reservations for the untouchables and tribals was written directly into the Indian Constitution by B.R. Ambedkar, the brilliant Dalit leader who was the Chairman of the drafting committee of the Constitution. The Indian reservation policy divides the beneficiaries into three broad categories. This policy establishes 15 percent quota for the untouchables (labeled as Scheduled Castes), 7.5 percent for tribals (termed as Scheduled Tribes) and the third category called “Other Backward Classes” provided with a quota of entry level Government positions and in educational institutions, percentage varies from State to State on the basis of their social, economic and educational backwardness after an array of Apex courts’ Judgments and extensive litigations. The quota applies to Government and public sector jobs, seats in educational institutions that receive public funds and electoral constituencies at all levels of Government in case of Scheduled Castes and Scheduled Tribes. Notably to this date, India does not apply affirmative action to employment in the private sector, although political pressure is mounting in this direction. The United States of America, in contrast, has applied affirmative action in both the private and public sectors, although application
in the private sector has been conditional on the size of the firm and its eligibility for federal or state Government contracts. In the South Africa, the discriminatory laws apply to both Government sectors and the private individuals.

In the South Africa, the Constitution allows for the designated groups for the affirmative action measures. So, unlike in United States of America, in this country affirmative action program is constitutional. Affirmative action is permitted by the Constitution of South Africa; unlike Malaysia, the State is not compelled by this Constitution for the implementation of the affirmative action policies. It means that in respect of affirmative action the provision is an ‘enabling clause’, which in the Government vests a certain amount of the discretion regarding the implementation of the affirmative action program. Unlike many other Constitutions, the South African Constitution seeks for protecting socio-economic rights. These socio-economic rights include the right to basic education including adult basic education. Provision is also made in it for the individuals who believe that they have been unfairly discriminated against for taking their grievances to the court. Anti-discrimination legislation does not allow unfair discrimination or the reverse discrimination. South African affirmative action is a lawful means for remedying the past discriminatory practices. Therefore, the goal, in the South Africa, of the affirmative action program is speeding up the creation of a representative and equitable workforce and assisting people who were disadvantaged historically by adopting unfair discrimination for fulfilling their maximum potential. Land reform programs, legal aid to the indigent of South Africa and the housing schemes are included in the affirmative action measures. In South Africa, unlike in India, the more flexible “numerical goals” are adopted which ensured that a suitably qualified candidate as opposed to an unqualified candidate would be appointed for filling in a fixed quota. As opposed to India, employers in South Africa, for a specific position, are implored for looking at the most suitably qualified candidate. Contrasted with the affirmative action programs adopted in Brazil and Malaysia, the most important aspect of the Employment Equity Act of South Africa is that a percentage-based quota system is not provided for by it. The affirmative action programs in South Africa are aimed primarily at the black majority who has due to apartheid system, suffered great injustices. In South Africa, we are not dealing with the minority but with the majority, which has been subjected to State-organized discrimination along with the prejudice. So in South Africa, the intended beneficiaries of the policy of the affirmative action are Black people, women and the
people with disabilities who for performing a specific job are suitably qualified. As compared to rigid system prevalent in Malaysia (where the consent of the Conference of Rulers is necessary for the modification of the law of the reservation), simple revocation is facilitated by the process adopted by the Government of the South Africa when it is felt that the purpose of the affirmative action policy has been achieved by it. Unlike India, in the United States of America and South Africa the direct and specific beneficiaries of the affirmative action measures need not have been the actual victims of the past discrimination.

The principal difference between Brazil and the other countries which were the colonies of British Empire—Brazil was a Portuguese colony. Like South Africa and Malaysia, in Brazil, the affirmative action legislation is aimed at benefiting a numerically majority group. Like the black community in South Africa, in Brazil, the ‘dark-skinned individuals’ are the majority groups which were subjected in the past to the discrimination. The reservation policy of Brazil is unique owing to the fact that persons are permitted by it to self-classify their race. Unlike other color conscious States, in Brazil categorization is based more on the pigmentation of skin of that person, rather on the racial origin of a person. Unlike in United States of America, the prevalent system, under which the individuals may be classified either as white or black, is different from that prevalent in the Brazil, according to which individuals are segregated into different racial groups, like mulato, marenso and pardo. Unlike South Africa, percentage based quota exist as well as operate in many spheres of Brazil. The hurdle was encountered by Brazil of having to dispel the myth of it being a ‘racial democracy’. In Brazil, the affirmative action does not have an express constitutional mandate and the interpretation of the equality provisions are done permissively for enabling reservation. Like South Africa, the affirmative action laws of the Brazil are relatively flexible and they may be revoked as any other statute by the parliament of the country (or in the case of a constitutional provision, in the same manner as any other constitutional provision is revoked). In Brazil, a socially progressive model of positive discrimination is posited by the new reservation policy which was based not merely on the skin color or race, but also on the socio-economic status of the citizens.

Like Brazil and South Africa, the distinction to provide for the reservations and the affirmative action programs is possessed by Malaysia for its majority native population—referred to as Bhumiputra, or ‘Malaya’. Unlike South Africa and Brazil, the preferential constitutional provisions are rigid in nature as the Conference of
Rulers needs to be consulted in case of any change to be made in the policy affecting the affirmative action. No discretionary power is vested in the Government in case of the implementation of the reservation programs. Therefore, reservation policy in Malaysia is almost a permanent feature of the Constitution of Malaysia. Unlike United States of America, no question involving the reservation in Malaysia is open to the public questioning or scrutiny under Article 153. Unlike India and United States of America, in questions of preferential policy, the judiciary has been dormant in Malaysia. But the most unique aspect of Malaysian program of affirmative action has been a scheme of wealth redistribution that apportion via state purchase of shares of Malaysian corporations to a trust fund on behalf of the native Malays. Unlike Brazil and South Africa, in affirmative action policies of Malaysia, there is an unmistakable ethnic content. Unlike other countries, as a model, Malaysia has emerged for the successful implementation of the quota-based reservations and has achieved to a large extent the objectives of its affirmative action policies. While in the Constitutions of Pakistan and Sri Lanka, there was no such incorporation of the preferential policies.

The preferential policies which were adopted in Sri Lanka have been restricted alone to the university admissions, and in scope are far limited than the preferential policies adopted in India and Pakistan, and much more so than those in vogue in Malaysia. The regional content of the university admissions policies of Sri Lanka cut across ethnic and the religious identities.

In all these countries, time-bound preferential policies have proved to be much more durable than were thought or intended to be. Alone Pakistan is currently engaged in a determined effort at the abolishment of its system of preferences and it also seems likely in this to succeed. These policies adopted by these countries often change in the course of time in character. In India the “caste” oriented preferences have become now more complex. Now there exists pressure for the admission to the benefits provided under preferential polices from the groups which were originally excluded from the beneficiaries. These demands for inclusion (especially problem of political mobilization) into different groups made by members of different communities have resulted into caste-war like situation. There is now demand for the inclusion of Muslim minority whose poorer sections are as socially backward and economically depressed as the poorer sections of the caste hierarchy of India who were the real beneficiaries of the preferential policies. There is also considerable pressure in India for the extension of the preferences to women on gender basis. The
extension of the benefits under these policies beyond caste to religious minorities—the Muslims and the Christians—and to women has made setting any viable timetable for their abolition impossible. In Sri Lanka, where there are restrictions of these policies to the university admissions only, the systematic rise in the districts which were entitled to preferential treatment, brings together, from rural areas, a formidable array of vested interests of Sinhalese, Tamil and Muslim in defense of the continuation of the system of the affirmative action.

On the other hand, in Sri Lanka, where the original factors providing a rationale for the introduction of the fundamental/basic change in the university admission policies, have long since changed to the point of being irrelevant to any sensible defense of the system, there is as yet no political ambition for the abandonment of these preferences. The introduction of affirmative action policies are identified by the ethnic conflict of Sri Lanka as one of the principal factors in the alienation of the minority population of the Tamil people, and the eruption of the ethnic conflict which was very violent.

Unlike all the above-stated countries, Equality Act 2010 of United Kingdom has brought together previous anti-discrimination legislation prohibiting discrimination on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The limited legislative provision providing for positive action in United Kingdom law has meant that by United Kingdom domestic courts, there has been small judicial consideration of positive action. Conversely, where positive actions have been challenged, the courts have treated such measures as illegal inequity.

**Conclusion**

The above study reveals that Affirmative action comprises a set of positive anti-discriminative measures wished for insuring access for members of group who otherwise would be excluded or underrepresented in preferred positions in a society. Therefore, affirmative action often functions as a means of desegregate elite. It is also noticed that usually, affirmative action takes two major types namely “preferential treatment” and “quotas”. Preferential treatments add explicit or implicit points for being a member of a target group and on the other hand quotas or reservations are fixed allotments designed for members of the target group. The affirmative action in the first form i.e. preferential treatment continues to be applied in the United States of
America while in India, Malaysia, South Africa and Brazil it primarily takes the form of quotas or reservations.

This comparative analysis is very useful in that the experiences in these countries about the affirmative action may be helpful in informing India about the long term consequences of the affirmative action and in adopting the basis for the better management of the affirmative action. Looking at the experiences of India in comparison with the United States of America, an affirmative action program is not fair if it creates a quota; creates preferences for the unqualified individuals unlike South Africa; rejects or selects any student or employee only on the basis of the race or gender without regard to merit; if it creates circumstances of unfair discrimination by providing a large amount of reservation quota in the favour of the individuals who were segregated on the basis of caste or race; or if it continues even after the achievement of its purposes. Affirmative action will only work properly if it is fair because the objective of the affirmative action policies is always about removing injustices and not about revenge or extortion, if it is flexible and more importantly, it remains a useful weapon or tool for the purpose of widening the economic and educational opportunity. But in India, affirmative action policies has enabled a very small portion or strata of the society of India to move towards a semblance of economic and social equality. Unlike South Africa and United States of America, in India affirmative action simply means numerical quotas and the quotas in India are intrinsically rigid. The reservation system in India in favour of the Backward Classes seems to be leading to a situation of the unfair reverse discrimination. Unlike South Africa, in India for filling quotas candidates from the lower classes are accepted even if they are not suitable qualified or fully trained. In India, the case identification has become a subject of the political, legal and social interpretation. Unlike any other country, the caste identities have been made more prominent by India’s affirmative action policies when the intention was to diminish the stratification by caste. Like South Africa, the reservation policies in India will have to be so arranged that, if the advancement of the Backward Classes is be achieved, it must not materially affect the right of the equality of the opportunity. For solving the problem of the unequal opportunity there should be reservations based in India on poverty and physical disability irrespective of the caste, religion or tribe. The new anxiety for insertion (especially problem of political mobilization) into dissimilar sections made by members of different beneficiary communities has resulted into caste-war like
condition. For this, there is a pressing requirement to take a lesson from Sri Lankan situation where there was introduction of affirmative action policies, recognized by the ethnic clash as one of the chief factors in the unfriendliness of the minority population of the Tamil people, and the outbreak of the ethnic conflict which was very violent. Like South Africa, the affirmative action program in India should be easily amendable according to the changes in the legal, social and political condition of Indian society. Like United States of America and Pakistan, this policy in India should be so flexible that if required, it should be totally ended or the caste based criterion needs to be changed with the economic criterion because of the change in the social and political circumstances of the country. Like United Kingdom, enactment of the ‘Equal Opportunity’ Laws” in India is the need of the hour.

In conclusion, it can be said that the adoption of the affirmative action policies in these eight different countries differ in contents as the differing needs of the socio-economic circumstances demand. However, the fundamental commitment of the quest for just and equal socio-political order remains the same. But regardless of the vast number of ways these laws and polices may be applied, it is quite obvious that they are often critically required for making real any promises of equality. However, this comparative approach becomes useful in those experiences for learning from such practices; in one country helps enrich another country. In this regard, even though it is significant to look at the experiences of other countries but the approach of one country must not be adopted by the other country without giving due consideration to its own specific history and the Constitution.

The present laws and policies of reservation are creating caste war like situations in India thus requires immediate corrections. India could not achieve in almost 65 years of its independence which can be achievable within the period of 10 years if the policy framework is so designed for removing the inequality of different segments of the society. Though there are array of laws and numerous policies for the protection and upliftment of the target groups but still the country has failed to achieve the desired goals that too inspite of the existence of the umbrella of Constitutional Guarantee of right to equality. This is all indicative of the fact that the laws and policies are not well planned, inadequately formulated and badly implemented. The time has come when the laws and policies of reservation should be made need based. The poverty is the root cause of all the ills and is a world
phenomenon now. The present era is materialistic one therefore, all the laws and polices of reservation are needed to be based upon the economic criteria only.

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1 The term affirmative action has different meanings and definitions which flow, and are derived from an individual’s view of the legitimacy of the use of race-conscious or sex-conscious preferential remedies for unlawful discrimination. Alternative terminology used to define or describe affirmative action includes, but is not limited to “reverse discrimination”, “affirmative discrimination” or “quotas” as in the Indian context.


4 Marx op cit 198 at 27.


8 The Supreme Court in E P Royoppa v. State of Tamil Nadu AIR 1974 SC 555 stated that Article 14 (to the Constitution of India) embodies a guarantee against arbitrariness in State action and ensures fairness.


10 Ibid.


14 The African Charter on Human and Peoples’ Rights was born on 26th June 1981 in the Kenyan capital(adopted by Organisation of African Unity), the first regional human rights treaty, was also based on the Declaration.

15 Proclaimed by the General Assembly of the UN 20 November 1963 and adopted in 1965 (Articles 1 (4) and 2 (2)). This Convention is the only one that defines racial discrimination, but it does not apply to ‘distinctions, exclusions, restrictions, or preferences…between citizens and non-citizens’ (Article 1) (Kurt Glaser & Stefan Thomas Possony, Victims of Politics: the State of Human Rights, 23-24(Columbia University Press, 1979).

16 Adopted by the UN on 18 December 1979.

17 Dr. S. K. Awasthi and R. P. Kataria, Law relating to protection of Human Rights, 8(Orient Publishing Company, New Delhi, Millennium Edition, 2001) International Covenant on Civil and Political Rights, entered into force March 23, 1976 Article 2 (referring the obligation to take “such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant”).


19 Ibid. at page 21 Article 2(1)(d).

20 Ibid.

21 Ibid. at page 20 Article 1(4).


23 Ibid. at Article 2(2).

24 Human Rights Committee, General Comment 18, paragraph 10.

General Comment, 18, paragraph 9.


Ibid. at Article 13 paragraph 2(c).

Ibid. at paragraph 2.


Committee on the Elimination of Discrimination against Women, General Recommendation Number 5, Temporary special measures(Seventh Session, 1988)as is given in Klaus Dieter Beiter, The Protection of the Right to Education by International Law,113(Martinus Nijoff Publishers, Leiden, 1st edn. 2006).

Ibid.


Ibid. paragraph 15.


Ibid. at Article 1(a).

Ibid. at Article 1(b).

Article 2:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participations in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those
provided by the public authorities, if the institutions are conducted in accordance by the competent authorities, in particular for education of the same level.

Article 5, paragraph 2, which points out the duties of States in education against racism and contains a clause on general affirmative action: States should take “appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children.”

Ibid. at Articles 2-3.


Ibid. at paragraph 152.


The Germantown Protest against Slavery 1688 is the first known public objection to slaveholding and the slave trade in the British mainland colonies of North America. See Rose Nicholas W A Documentary History of Slavery in North America (1976).

By reference to South African history, these things were occurring in the USA at about the time the British first occupied the Cape in 1795.

Dred Scott v. Sandford 15 L ED 691.

State v. Mann (1829) 2 Dev.263 (NC).

The American Civil War from 1860-1865 tested whether or not secession was possible.

Slaves in rebellious areas of the United States were freed by President Lincoln’s Emancipation Proclamation as of January 1, 1963. See ABRAHAM LINCOLN, “Great Speeches 98”, 1991. Slaves in all of the United States were freed via the Thirteenth Amendment in 1865. United States of America Constitution Amendment XIII.

Ronald L.F. Davis, “Creating Jim Crow: In-Depth Essay”, available at http://www.jimcrowhistory.org/history/creating2.htm (visited on January 25, 2009). Beginning in the 1880, in the US history, Jim Crow laws were statues which were enacted by the Southern States and municipalities that legalized the segregation between blacks and whites. Negroses were segregated and kept in the restaurants, hotels, colleges, bathing beaches, churches, parks, trams and even in the stores apart from the whites. Labour market outcomes continue to be lower for Blacks than that for Whites. They had to travel in the special carriages, called “Jim crow cars” in railways. There was prohibition of Marriages between whites and Negroses. Negroses were imprisoned on fabricated charges, and the labour who was convicted, was leased out to the contractors.


US Constitution Amendment XIII.

US Constitution Amendment XIV.

US Constitution Amendment XV.

Generally Act of July 16, 1866 ch 200 14 stat.173.

The Civil Rights Act 1866 (The CRA).

Chapter 114, sections 3-5 Stat. 336, 337 and 1875.

109 US 3 1883. Concluding that Congress had no power under the Thirteenth or Fourteenth Amendments to enact the 1875 Act, the Court held that the Fourteenth Amendment did not authorize Congress to create a code of municipal law for the regulation of private rights and so the attempt at a country that recognizes civil rights was totally ignored.

(1896) 163 US 537.


See e.g., Gong Lum v. Rice, 275 U.S. 78 (1927).


These included the establishment of the special courts to process the law offenders as rapidly as possible (the basis of segregated courts in the twentieth century), the laying out of special ‘locations’ or ghettos in Kimberley where urban blacks had to live (the basis of municipal segregation practices).

Monica Hunter Wilson and Leonard M Thompson (eds.) History of South Africa to 1870 (Philip David, Cape Town,1982).

The British Government, acting largely at the behest of the missionaries and their supporters in British in the 1820s, abolished the Hottentots Code. Specifically, Ordinance 50 of 1828 stated that “no Khoi-Khoi or free black had to carry a pass could be forced to enter a labour contract.”

The close compounds were first developed on the diamond fields as a means of migrant labour control.


These included political rights, freedom of movement and residence, property rights, freedom to work and to practice occupations, freedom of marriage and other family rights.

Other laws included for example The Native Resettlement Act 19 of 1954; The Group Areas Development Act 69 of 1955; The Native (Prohibition of Interdicts) Act 64 of 1956 etc.

The International Convention on the Suppression and Punishment of the Crime of Apartheid DEFINES Apartheid as follows “For the purpose of the present Convention, the term “the crime of apartheid”……as practiced in Southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them——
(a) Denial to a member or members of a racial group by one racial group or groups of the right to life and liberty of person—
(i) By murder of members of a racial group or groups;
(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel inhuman or degrading treatment or punishment;
(iii) By arbitrary arrest and the illegal imprisonment of the members of a racial group or groups;
(b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
(c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
(d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
(e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
(f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

An early example being the recognition of black trade unions to stabilize labour.


In 1912, the South Africa Native National Congress was formed in Bloemfontein and eventually became known as the African National Congress (ANC). Its goals were the elimination of restrictions based on color and the enfranchisement of and parliamentary representation for blacks. In the early 1960s, following the protest in Sharpeville in which 69 protestors were killed by police and 180 injured, the ANC and the Pan-African Congress (PAC) were banned. Nelson Mandela and many other anti-apartheid leaders were convicted and imprisoned on charges of treason. The ANC and the PAC were forced underground and fought apartheid through guerrilla warfare and sabotage.


116 Article 89 of the Federal Constitution of Malaysia, which provides for land reservation for Malays.
118 The Lei Aurea (‘Golden Law’) adopted on May 13, 1888, was the law that abolished slavery in Brazil. It had only two provisions—Article 1: From this date, slavery is declared abolished in Brazil—and Article 2: All other provisions are revoked. It was sanctioned by Isabel, Princess Imperial of Brazil. The Lei Aurea is also regarded as an immediate cause for the fall of monarchy in Brazil.
120 Laura Helene and Zaza Curran, “Public Policy Responses to Exclusion: Evidence from Brazil, South Africa and India”, (Overseas Development Institute, London, Sept. 2005).
123 The Buddhist Sinhalas were constituted around 74 percent of the total population and the Sri Lankan Tamils and the Indian Tamils together were made around 20 percent of the total population. The third category plantation, where caste continues to be a predominant mode of social organization is that of “Indian Tamils”. They are called Indians because they were taken to Sri Lanka by the British rulers from southern India during middle of the 19th century to set-up tea/coffee plantation. Though politically a marginal group, they make for more than 6 percent (roughly 1.3 millions) of the total population of the country and nearly 80 percent of them continue to be a part of the plantation economy.
125 Ibid. at 27.
127 According to Rose H A Caste (1945) 4ed at 976-86 the word was used by the earlier Portuguese travelers in the sense of tribe or even race, being often applied to the lowest Indian classes in contradistinction to their overlords.
129 Jogendra Nath Bhattacharya, Hindu Castes and Sects (Thacker, Spink & Co., Calcutta, 1896) available at http://www.archive.org/stream/hinducastesands00bhatgoog/hinducastesands00bhatgoog_djvu.txt
131 Ibid.
134 On the general character of the legal system see Mark Galanter, Competing Inequalities—Law and the Backward Classes in India (1984) at 1968b.
135 Legal enforcement of slavery was outlawed by the Indian Slavery Act V of 1843; possession of slaves was made a criminal offence by the Indian Penal Code Act XLV of 1860 section 370.
137 Now known as Mumbai.
138 Government of Bombay (State Committee) (1930) at 52.
139 By which the following resolution was adopted—“This Conference resolves that henceforth, amongst Hindus, no one shall be regarded as an untouchable by reason of his birth, and that those who have been so regarded hitherto will have the same right as other Hindus in regard to the use of public wells, public schools, public roads, and all other public institutions…….”
140 Madras Removal of Social Disabilities Act, 1938 (XXI of 1938).
141 Hugh Owen, Gandhi (University of Queensland Press, St. Lucia, 1984).
142 Dr. Ambedkar tried to root out the worst excesses of the caste system by making discrimination against untouchables a criminal offence. M. S. Gore, The Social Context of an Ideology—Ambedkar’s Political and Social Thought (Sage Publications, 1993).
143 The Equality Act 2010 (Commencement No. 1) Order 2010, No. 1736 (c. 91). See also The Equality Act 2010 (Commencement No. 2) Order 2010, No. 1996 (c. 104) and The Equality Act 2010 (Commencement No. 3) Order 2010, No. 2191 (c. 109).
144 The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transition, Transitory and Incidental Provisions and Revocation) Order 2010, No. 2317 (c. 112).
145 Sex Discrimination Act 1975 (c. 65) (‘SDA’), ss. 47 and 48 and Race Relations Act 1976 (c. 74) (‘RRA’), ss. 37 and 38.
147 The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transition, Transitory and Incidental Provisions and Revocation) Order 2010, No. 2317 (c. 112).
148 Equality Act 2010 (c. 15), s. 4.
150 The case involved the provision of free swimming to individuals ‘of pensionable age’ which meant that women enjoyed the benefit at 60 years old, whilst men had to wait until 65 years.
151 Jeppson and Dyas-Elliot v The Labour Party [1996] IRLR 116 ET.
152 Equality Act 2010, ss. 149 and 158 – 159.
154 ibid para 22.
156 Ibid.
157 ECHR, art. 14, Nov. 4, 1050, 213 UNTS 221, which is directly incorporated into United Kingdom law through the HRA 1998.
159 In terms of court-ordered affirmative action, the school desegregation cases are perhaps the most familiar example. The U. S. Supreme Court has upheld such race-conscious remedies as school-busing and racial quotas in schools assignment as means of desegregating schools districts formerly segregated by law. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) (upholding the judicially mandated use of districting quotas and busing to achieve racial balance in desegregating public schools).] Additionally, the Supreme Court has unequivocally upheld the authority of a district court to “[order] affirmative action in appropriate circumstances as a remedy for past discrimination” [in employment] see NAACP v. Town of Harrison, 940 F. 2d 792, 807 (3rd Cir. 1991) quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 463-465 (1985) (first alteration in original). See also Castle v. Rubin, 78 F. 3d 654, 657 (D.C. Cir. 1996); United States v. City of Warren, 759 F. Supp. 355, 366 (E. D. Mich. 1991); Rasheed v. Chrysler Corporation, 517 N.W. 2d 19 (Mich. 1994). “If the court finds that the respondent has intentionally engaged in ……an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate Further that Affirmative action is often implemented and enforced by the courts through judicially approved consent decrees. See., Huguley v. Gen. Motors Corporation, 52 F.3d 1364, 1372 (6th Cir. 1995).
163 Created in 1933 by Title II of the National Industrial Recovery Act, the PWA was designed to relieve unemployment through massive construction projects for housing, schools, courthouses, hospitals and other public buildings, but was not as radical as it appeared.
165 The order requires that there be “equality of treatment and opportunity for all persons in the armed services without regard to race, color, national origin or religion”.
169 Ibid.
175 In 1967, he added gender to the list of categories.
176 Executive Order 11246 section 202 (1).
178 Smelser America Becoming: Racial Trends and their consequences.
185 Ibid.
186 (1971) 401 US 424
190 (1979) 443 US 193
199 Weiss op cit 39.
202 Section 31 is added to Article I of the California Constitution as follows—Section 31 states that—
203 (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, ethnicity, color or national origin in the operation of public employment, public contracting, or public education.
204 Clause (e) of Proposition 209 permits gender discrimination that is “reasonably necessary” to the “normal operation” of public education, employment and contracting.
206 Initiative 200 ordered public agencies to stop giving preferential treatment on the basis of the sex, race, color, ethnicity or national origin. It effectively ended affirmative action by State and local Governments in hiring, contracting and school admissions. Washington State Initiative 200 is roughly modeled after California’s Proposition 209, which is designed to eliminate “preferences” in State and municipal hiring and recruitment to the State University system.

207 California Civil Rights Initiative, Proposition 209 on the November 1996 ballot, which was passed on November 5th by fifty-four percent of California voters.

208 Ibid.


211 Ibid.

212 Ibid


219 Ibid


222 http://www.civilrights.org/issues/labour/details.dfm?id=27761

223 See Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421 (1986) See also powell, Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium, Eur. Ct. H.R.Judgement of July 23, 1968 Series A, No. 6 (Merits) ______? A (4) (upholding Belgium’s policies favouring Dutch languages in certain regions, given that the policies are aimed at achieving “linguistic unity” and avoiding discord) ……? B.(10). See paragraphs 54-56 (finding a violation based on proportionality where a child out of wedlock was denied equal rights to his parents’ assets).


225 Section 9 of the Constitution defines “Equality as;

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, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4.) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5.) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is establishment that the discrimination is fair.”


230 Preamble to the Employment Equity Act, Number 55 of 1998.
231 Section 2, Employment Equity Act, Number 55 of 1998.
237 definition of ‘broad-based black economic empowerment’ under Section 1 of the Broad-Based Black Economic Empowerment Act, 2003. See also Section 2 of the Broad-Based Black Economic Empowerment Act (objectives of the Act).
239 Ibid.
242 Ibid.
244 Malaysian Constitution also states that
   “Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or establishing or carrying on of any trade, business, profession, vocation or the employment” (Malaysia Constitution Article 8 (1)).
At the same time, Constitution makes it clear that it does not prohibit
   “any provision for the protection, well being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service”( Malaysia Constitution Article 8 (2)).
245 According to Article 153(1), “It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and the natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.”
   Article 153(2) states that “Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and the federal law in such manner as may be necessary to safeguard the special provision of the Malays and the natives of any of the States of Sabah and Sarawak to ensure the reservation for Malays and the natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of Scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or license for the operation of any trade or business is required by federal law then, subject to the provisions of that law and this Article, of such permits and licenses.”
247 Article 160(2), the Constitution of Malaysia.
248 See Article 153(2), Constitution of Malaysia.
249 Article 153 (2), Constitution of Malaysia.
250 Article 153(2), Constitution of Malaysia.
251 Article 153(6), Constitution of Malaysia. Article 153(6) states, “Where by existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licenses, as may be required to ensure the reservation of such proportion of such permits or licenses for Malays and the natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable, and the authority shall duly comply with the directions.
252 Article 38(5), Constitution of Malaysia.
254 Article 10(4), Constitution of Malaysia.
261 A Malay firm is defined as one that is at least 51 percent owned by Malays. See United Nations Development Program, Human Development Report 2004, at 70. See also Lan Cao, The Diaspora of Ethnic Minorities: Beyond the Pale? 44 WM, AND MARY L. REV. 1556 (2003).
264 A Malay firm is defined as one that is at least 51 percent owned by Malays. See United Nations Development Program, Human Development Report 2004, at 70. See also Lan Cao, The Diaspora of Ethnic Minorities: Beyond the Pale? 44 WM, AND MARY L. REV. 1555 (2003).
265 A Malay firm is defined as one that is at least 51 percent owned by Malays. See United Nations Development Program, Human Development Report 2004, at 70. See also Lan Cao, The Diaspora of Ethnic Minorities: Beyond the Pale? 44 WM, AND MARY L. REV. 1556 (2003).
267 Ibid.
268 Ibid.
272 Committee on Elimination of Racial Discrimination, Reports submitted by the States Parties under Article 9 of the convention, CERD/C/431/Add.8,16 October 2003.
275 Brazil Constitution 1988, Article 3(iv).
276 Brazil Constitution 1988, Article 206(i).
279 Brazil Constitution 1988 Article 208 (v).
280 Brazil Constitution 1988, Article 5(LXXVII) (2).


284 Laure Helene and Zaza Curran, “Public Policy Responses to Exclusion: Evidence from Brazil, South Africa and India”, Overseas Development Institute, September 2005.


287 Brazilian Law 9455/97.


289 Laure Helene and Zaza Curran, “Public Policy Responses to Exclusion: Evidence from Brazil, South Africa and India”, Overseas Development Institute, September 2005.


291 Lei N.……….. 3708, de 09 de Novembro de 2001, Estado do Rio de Janeiro, Brazil.

292 See Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information. See also Marion Lloyd, in Brazil, a New Debate over Color, CHRONICLE OF HIGHER EDUCATION, and February 13, 2004.

293 Ibid.

294 Ibid.


299 Ibid.


301 Ibid.

302 Ibid


304 Ibid.

305 In 2002, a quota of 40 percent for each of these groups had been introduced.


308 Andrew Hay, Brazil’s Poor to Get Private University Quotas, Reuters, January 13, 2005.

309 Ibid.

310 Ibid.


312 Ibid

313 Ibid

314 See Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro-Descendants in Brazil and Uruguay, Background Information.
321 MQM, Constitutional Petition in the Supreme Court of Pakistan, Part 1, 1994, pp 4-5.
323 Writ Petition, Mohammed Kamran Khan v. Secretary Establishment and Federal Public Service Commission Islamabad in the Lahore High Court Bench at Rawalpindi, Number 21109/94, lit 3, para J.
324 Ibid., para K, N.
327 Prime Minister’s Secretariat, Islamabad, Number F-1/SAPM dated 28 February 1997.
328 Director Acad-1, University Grants Commission Islamabad to Ministry of Education, Islamabad, 7 May 1997; and Deputy Registrar (Academic) NED University of Engineering and Technology, Karachi to the Director Academics, University Grants Commission, Islamabad 14 June 1997.
330 Report from the Select Committee appointed to enquire into and Report on the Grave and Unsettled Conditions Prevailing in all the University Campuses in Sri Lanka and to make Recommendations with Regard to the further Functioning of the University Campuses. Parliamentary series, Number 107, 16 December 1987, published in mimeographed form. The proceedings of the committee and the minutes of evidence referred to on the cover were not published. Indeed the report itself was not printed.
331 While the students entered the universities on the basis of the language medium in which they sat the qualifying examination for admission to the universities, they had a free choice in regard to the medium of instruction in they preferred to read for university examinations once they gained admission.
332 Article 21(1) of the Constitution of 1978.
333 Sir Ivor Jennings, Some Characteristics of the Indian Constitution: being lectures given in the University of Madras during March 1952 under the Sir Alladi Krishnaswami Aiyer Shastriabapoorthi endowment, 2(Oxford University Press, Madras, 1953)
334 Indian Constitution at Article 16(4).
337 Indian Constitution at Part XVI.
339 Clark D. Cunningham, Affirmative Action: India’s Example, Civil Rights Journal, Fall 1999.
341 Clark D. Cunningham, Affirmative Action: India’s Example, Civil Rights Journal, Fall 1999.
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346 Ibid.
349 Ibid
352 Ibid.
354 Ibid.
359 Ibid at 71.
360 Ibid at 71.