

Understanding the Constitution of India and positive discrimination

Tameshnie Deane^{*}

1 Overview

India is a democratic country facing the not so unique challenge of achieving equality in the form of special provisions for all of its citizens.¹ Special provisions are those steps taken by the Indian government for certain classes of the Indian population in order to reach the goal of social equality as laid down by the Constitution of India.² The goals of social justice and equality refer particularly to the standing of 'Scheduled Castes', the 'Scheduled Tribes' and to a limited extent, 'the Other Backward Classes'.³ However, the term 'equality' needs to be defined in this context. 'Equality before the law' is not the same as 'equal protection of the law'.⁴ It is the latter, more positive concept that is upheld by the Constitution of India in the achievement of equality for all of its citizens.⁵ In India, the focus area of such measures ranges from employment in the public sector to the reservation of seats in government and education. The inducement towards affirmative action has a dual purpose. Firstly it aims to maximise diversity at all levels in society, and

^{*}BProc (University of Natal Durban), LLB (University of Natal Durban), LLD (UNISA). Associate Professor, Criminal and Procedural Law, College of Law.

¹For example, even a developed democracy like the United States of America is no exception and has implemented affirmative action policies to deal with the issue. South Africa too faces the challenge of harmonising a country damaged by the outcomes of apartheid and ensuring that justice is served for the less privileged sections of the society at the cost of individual merit and the equality of all citizens before the law.

²The Constitution of the Republic of India of 1950 is the world's lengthiest written constitution (with 395 articles and 8 schedules) and was passed on 1949-11-26. It has been in effect since 1950-01-26. The Directive Principles of the Constitution underline that 'the State shall promote with special care the educational and economic interest of the scheduled castes/tribes and shall protect them from social injustice and all forms of exploitation'.

³Article 46 of the Constitution of India obligates the state to promote with special care the educational and economic interests of the weaker sections of the people, in particular, of the scheduled castes and scheduled tribes.

⁴Article 14 of The Constitution of India guarantees equality before the law and equal protection of the law.

⁵Article 16(1) and 16(2) of the Constitution guarantees equality of opportunity.

secondly to redress disadvantages due to discriminatory practices. The principle of equality in this sense refers to attempts to create equal opportunities for persons who have been previously disadvantaged. Positive measures therefore seek to ensure greater equality of opportunity,⁶ and this aim implies that the needs of these different groups of people often necessitate different treatment, ultimately leading to the realisation of socio-economic equality among all citizens of India.⁷

This article looks at the Republic of India's version of what is referred to as 'affirmative action' in South African legal parlance. It attempts to give the reader an understanding of the functioning and challenges of affirmative action and the difficulties in the implementation of the Indian Constitution's affirmative action programmes. It also highlights some of the many problems faced by the Indian courts and to give readers with similar agendas an overview of the advantages and disadvantages of a programme that has already been implemented. The reason for looking at the Indian system of affirmative action is that the Indian system of positive discrimination has now been in place for over fifty years. Any democratic constituency that is implementing such a programme can only benefit by drawing upon India's methods and wealth of experience with regard to the implementation of affirmative action programmes in the form of reservations.⁸

2 Caste discrimination

For centuries, India's people have experienced social discrimination based on the institution called the 'caste system'.⁹ Each caste is historically linked to an occupation and represents a strict social hierarchy of status into which people are born and can never change their caste identity.¹⁰ Therefore, caste is inherited and sanctioned by

⁶Edwards *When race counts: The morality of racial preference in Britain and America* (1995) 29.

⁷Deshpande *Affirmative action in India and the United States world development report* (2006).

⁸Reservation is a form of affirmative action whereby a percentage of seats are reserved in the public sector, union and state civil services, union and state government departments and in all public and private educational institutions, except in the religious/ linguistic minority educational institutions, for the socially and educationally disadvantaged communities and the Scheduled Castes and Tribes. The reservation policy is also extended to the Scheduled Castes and Scheduled Tribes for representation in the Parliament of India. The central government of India reserves 27% of higher education seats for the socially and educationally disadvantaged. Individual states have the power to legislate further reservations. Reservation in most states is at 50%, which is the maximum amount declared constitutional by the Supreme Court. De Zwart 'The logic of affirmative action: Caste, class and quotas in India' *Acta Sociologica* (2000) 43 at 235.

⁹Many castes are traditionally associated with an occupation, such as high-ranking Brahmins; middle-ranking farmer and artisan groups, such as potters, barbers, and carpenters; and very low-ranking 'untouchable' leatherworkers, butchers, launderers, and latrine cleaners. There is some correlation between ritual rank in the caste hierarchy and economic prosperity. Members of higher-ranking castes tend, on the whole, to be more prosperous than members of lower-ranking castes. Many lower-caste people live in conditions of great poverty and social disadvantage. Heitzman and Worden (eds) *India – A country study* (1995).

¹⁰At the top of the caste system are the *Brahmins*, who are the priests and arbiters of what is right and wrong in matters of religion and society. Next are the *Kshatriyas*, who are soldiers and

religion. Beneath the four main castes is a fifth group, the Scheduled Castes, who are not considered to belong to any caste. They are the untouchables, the *Dalits*,¹¹ which means 'crushed', 'downtrodden' or 'broken'. A *Dalit* is not considered to be part of human society, but as something less than human. The *Dalit* people of India have been the most widely oppressed caste for more than three thousand years and yet they comprise nearly a quarter of the total population.¹² Discriminatory, cruel, inhuman, and degrading treatment of a vast section of the community has been justified on the basis of caste. These community members generally perform the most menial and degrading jobs. The rules attached to caste hold that the people of the 'lower caste' pollute the people of the higher caste even with their presence. If 'higher caste' Hindus touch an untouchable or even pass within such an individual's shadow, they must undergo a rigorous series of cleansing rituals.¹³

Many of India's discriminatory practices can be traced back to the practice of the caste system. Indeed, India's affirmative action measures are a direct response to this system of caste.¹⁴ Legally the government disallows the practice of the caste system and various efforts have been made to provide redress for these underprivileged sections of the country. The policy uses reservations or quotas to safeguard their representation in educational institutions, in the legislature, in governmental aid, loans and other developmental assistance.¹⁵

3 Positive discrimination measures

The continued practice of caste discrimination has denied a large section of Indian society certain rights and this has kept them economically, socially and educationally disadvantaged and created widespread disparities between this section and the rest of the society. The situation that emerged underlined the need for special measures to uplift their status.¹⁶ The Constitution of India therefore provides for the protection and promotion of their social, economic, educational, cultural and political interests to remove the disparities and to bring them on par with other sections of the society.¹⁷

administrators. The *Vaisyas* are the artisan and commercial class, and finally, the *Sudras* who are the peasant class.

¹¹*Dalit* is a term for people historically stigmatised as so-called 'untouchables' or the 'downtroddens'.

¹²Deane *Affirmative action: A comparative study* (2006).

¹³Benton *India and Pakistan* (1972).

¹⁴Bouglé *English translation in the introduction in contributions to Indian society* (1958) V (II).

¹⁵In its Preamble, India's Constitution forbids negative public discrimination on the basis of caste.

¹⁶This understanding is clearly reflected in the Constitution of India itself where a chapter under the title 'Special provisions relating to certain classes' in Part XVI has been incorporated. Special provisions have also been made for the Scheduled Castes and Scheduled Tribes in Part X of the Constitution.

¹⁷In addition, many articles in Parts III, IV, IX and IXA, and in the Fifth and Sixth Schedules of the Constitution reinforce these arrangements.

The Constitution of India authorises the identification of historically disadvantaged castes entitled to affirmative action in employment and other benefits.¹⁸ These are known as the Scheduled Tribes and Castes. Scheduled Castes (SCs) and Scheduled Tribes (STs) refer to the Indian population groupings that are explicitly recognised by the Constitution of India, previously called the 'untouchables'. SCs and STs together comprise over 24% of India's population, with SCs at over 16% and STs over 8% as per the 2001 Census.¹⁹ The persons most likely to benefit from these programmes are the *Dalits* as they are the persons most adversely affected by this system of caste.

Untouchability²⁰ has its roots in the caste system. Untouchability and its victims, the 'untouchables of India', cannot be understood in isolation from the Hindu caste system, for untouchability is a product of this system. The centuries-old Hindu caste system still remains a major component of Indian social structure. The untouchables are treated in different ways in different parts of India.²¹ Even though the caste system has been formally abolished under the Indian Constitution, discrimination and prejudice against the *Dalits* in India continues. The government has therefore taken significant steps to provide opportunities in the workplace and in education through reservations in educational institutions and in government offices for the SCs and the STs.

4 The Constitution of India and reservations

The introduction of affirmative action programmes is authorised by articles 15(4) and 16(4) of the Indian Constitution. Article 15 bars discrimination but article 15(4) permits the legislature to make special provision for the members of the SCs and STs. Article 15(4) was incorporated into the Constitution of India through the Constitution of India (First Amendment) Act, 1951 and has enabled several states to reserve seats for SCs and STs in educational institutions, including technical, engineering, and medical colleges.²²

¹⁸This includes the *Dalits* and tribes who are members of indigenous groups historically outside the caste system.

¹⁹'Census of India' *India at a glance: Scheduled castes and scheduled tribes population* (2001).

²⁰More than 160 million people in India are considered 'untouchable' – people regarded as tainted by their birth into a caste system that deems them impure and subhuman. People who worked in ignominious, polluting or unclean occupations were likewise seen as unclean peoples and were considered as untouchable.

²¹In some regions the attitude towards the untouchables was harsh and strict, while in other regions it was less so. In regions where the attitude was less strict the untouchables were seen as unclean and so their dwellings were kept at a distance from the settlements of the four *Varna* communities.

²²With regard to art 16(4), the claims of Scheduled Castes and Scheduled Tribes, as per art 335 of the *Constitution of India*, shall also be taken into consideration, consistent with maintaining efficiency of administration, in the making of appointments services and posts in connection with the union or of a state.

India is pursuing affirmative action for the so-called socially and educationally backward classes mainly in the form of reservations. Seats are reserved according to the proportion of the population of SCs and STs to the total population. The seats are 'reserved' in the sense that candidates who stand for them must belong to the designated groups.²³ These legislative reservations are the only ones that are subject to a constitutional time limit. It was originally provided that such reservations should expire ten years after the commencement of the Constitution.²⁴ However, a glance at the Constitution of India shows that the SCs and STs have been enjoying the facility of reservation in promotion since 1955.

The most notable of all preferential policies is the reservation of seats in elective legislative bodies. The Constitution of India specifically provides reserved seats in proportion to the population figures of the SCs and STs in the *Lok Sabha* (the lower house of Parliament)²⁵ and the *Vidhan Sabhas* (lower house of the state legislatures).²⁶ There are, however, no reservations in legislatures for Other Backward Classes (OBCs).²⁷ All the other constitutional provisions for preferences are merely authorisations empowering the State to make special provision for disadvantaged groups.²⁸ The Constitution also provides for the reservation of seats for the SCs and STs in every Municipality.²⁹ Articles 330-340 focus on seat reservations and special representation for SCs and STs in the *Lok Sabha* and the Legislative Assembly of every state.³⁰

Articles 16 and 335 of the Indian Constitution makes provision for preferential treatment in matters of employment in public services as well. Article 16, which provides equality of opportunity for all citizens in matters relating to employment or appointment and prohibits any discrimination on grounds of religion, race, caste, sex, descent, place of birth, residence or any or all of them, has made a very special provision which permits Parliament to make any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. It is through this provision that reservations have been made in appointments and promotions for SCs and STs and for OBCs in the matter of recruitment.

However, the Indian Supreme Court in the case of *Indra Sawhney v Union of India*³¹ observed that the reservation of appointments or posts under article

²³Galanter *Competing inequalities – law and the backward classes in India* (1984) 374-375.

²⁴Article 334 of the *Constitution of India*.

²⁵Article 330 of the *Constitution of India*.

²⁶Article 332 of the *Constitution of India*.

²⁷The Constituent Assembly definitively rejected political safeguards for religious and other minorities. See Galanter (n 23) 44.

²⁸In particular see art 243D of the *Constitution of India*.

²⁹See art 243T of the *Constitution of India*.

³⁰Article 330 of the *Constitution of India*.

³¹*Indra Sawhney v Union of India* (1993) AIR (SC) 447.

16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion.³² In view of the commitment of the government to protect the interest of the SCs and STs, the government decided to extend the existing policy of reservations to promotions.³³ To carry this out, the Seventy-Seventh Amendment Act of 1995 inserted a new clause in article 16 to the effect that article 16(4A) would provide for reservations in promotion for the SCs and STs.

This benefit of reservation in the matter of promotion has therefore been extended to SCs and STs under article 16(4)(a); article 16(4)(b) has made further provision to include backlog vacancies as a separate category in any year when determining the ceiling of 50% reservation in respect of the total number of vacancies available for that particular year.³⁴ Article 335 provides that the reservation provisions shall be made taking into consideration efficiency of administration. However, the State has been empowered through a specific amendment to the Constitution,³⁵ to relax qualifying marks in any examination³⁶ or lower the standards of evaluation for the purpose of enforcing reservation in matters of promotion to any class or classes for positions in the public sector.

The Constitution reflects a two-sphere strategy towards achieving equality and changing the status of the SCs and STs. The first stage relates to protective and compensatory discrimination measures while the second relates to developmental measures.³⁷

4.1 The First Stage

The first stage includes the legal or regulatory measures for enforcing equality and removing disabilities and the enforcement of reservation provisions in public services, representative bodies and educational institutions.

³²In *General Manager S Rly v Rangachari* (1962) AIR (SC) 36; *State of Punjab v Hiralal* (1970) 3 AIR (SC) 567; *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v Union of India* (1981) 1 AIR (SC) 246 it was held that reservation of appointments or posts under art 16(4) included promotions. This was overruled in *Indira Sawhney* (n 31) where the Court held that reservations cannot be applied in promotions. See also the cases of *Union of India v Varpal Singh* (1996) AIR (SC) 448; *Ajitsingh Januja v State of Punjab* (1996) AIR (SC) 1189; *Ajitsingh Januja v State of Punjab* (1999) AIR SC 3471; *MG Badappanavar v State of Karnataka* (2001) 2 (SC) 666 which also dealt with the issue of reservations in promotion.

³³The Constitution of India (Seventy-Seventh) Amendment Act 1995.

³⁴In the case of *MR Balaji v Mysore* (1963) AIR (SC) 649, the Court put a 50% cap on reservations.

³⁵With the Constitution of India (Eighty-Second) Amendment Act a proviso was inserted at the end of art 335. *M Nagraj v Union of India* (2007) AIR (SC) 71 held the amendments constitutional.

³⁶*S Vinodkumar v Union of India* (1996) 6 AIR (SC) 580 held to relax qualifying marks and standards of evaluation in matters of reservation for promotion was impermissible.

³⁷According to arts 341 and 342 of the Indian Constitution, the groups belonging to the 'scheduled' categories are to be specified by presidential decree. Parliament may include or exclude groups from the list of Scheduled Castes.

As regards the 'protective' sphere of this stage, 'untouchability' was legally abolished and its practice in any form forbidden by various laws. The Indian Constitution itself has provided an elaborate framework for eliminating those customs and practices, including provisions in laws which authorised and strengthened 'untouchability' practices and other discriminatory and cruel customs intended to degrade persons in society based on their caste. Laws were passed to eliminate these discriminatory provisions and bolster the Indian Constitution.

One such law included the Untouchability Practices Act of 1955 which was enacted in pursuance of article 17 of the Indian Constitution. This was subsequently reinforced and amended in 1976 and renamed the Protection of Civil Rights Act of 1955,³⁸ to make it more effective.³⁹ The Protection of Civil Rights Act was enacted to enforce the abolition of 'untouchability' under article 17. This Act punishes conduct that amounts to the observance of 'untouchability'.⁴⁰ Anti-untouchability propaganda and the Protection of Civil Rights Act are part of the attempt to relieve untouchables from the social disabilities under which they have suffered. Strictly speaking, these measures may not be called compensatory discrimination in the formal sense of the term, but in substance it is a special undertaking to remedy the disadvantaged position of the untouchables.

However, this Act proved to be ineffective for various reasons; for example, the Social Justice Minister of India, Meira Kumar, pointed out that the conviction rate in cases registered under the *Protection of Civil Rights Act* is a mere 3.75%. Besides which, up to 77% of crimes against *Dalits* remain pending despite the existence of special and designated courts.⁴¹ Non-compliance and the lack of enforcement of these laws resulted in the establishment of the Protection of Civil Rights Cell which was instituted to respond to a lack of convictions under the Protection of Civil Rights Act.⁴² The Act was also vulnerable to abuse as it was easy to make allegations, for example, that someone was called by his or her caste name without needing to provide any proof thereof and this adds to the ineffectiveness of the measure.⁴³

³⁸The *Protection of Civil Rights (Anti-Untouchability) Act of 1955* but will be referred to as the *Protection of Civil Rights Act*.

³⁹The abolishment of 'untouchability' or discrimination was made enforceable through this *Protection of Civil Rights Act*.

⁴⁰Sections 3-7 of the *Protection of Civil Rights Act of 1955*.

⁴¹Union home minister Shivraj Patil, acknowledged that the system was not delivering justice and existing laws safeguarding the rights of backward classes may have to be changed or tightened. Ways to injustice paved with 'good laws' *The Telegraph* (2005-01-12).

⁴²A Special Protection of Civil Rights Cell, which functions as a Committee, under the Home Department of India is required to visit the places where the 'untouchability' offences take place and investigate the cases registered under the *Protection of Civil Rights Act* and submit the report to the Government. This Cell in the State Police Headquarters is required to register complaints relating to Scheduled Castes and Scheduled Tribes. At district level also, such a Cell functions in each district Headquarter. Since the promulgation of the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* the cell has shifted its focus primarily to cases of atrocities.

⁴³The situation arose whereby members of the lower castes would merely make an allegation under the Protection of Civil Rights Act, without any proof needing to be led and this led to a system of

So, soon after that Act came into force, there was a general feeling of dissatisfaction with its impact as the legislation failed to serve the purpose for which it was enacted. The punishments imposed under the Act were likewise inadequate. The government of India, therefore, appointed a Committee to study, *inter alia*, problems of untouchability *vis-à-vis* the working of the Untouchability (Offences) Act, 1955 and to suggest changes to it.⁴⁴

As a result of the high incidence of recurrent acts of violence against helpless *Dalits* throughout the country, a special law was enacted for their protection called the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which provides for strong punitive measures to act as a deterrent against future crimes against the SCs and STs.⁴⁵ The necessity for the enactment of this Act had arisen because the Protection of Civil Rights Act of 1955 and the normal provisions of the Indian Penal Code⁴⁶ were found to be inadequate safeguards. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was pioneering legislation in many ways. It provides, *inter alia*, for the appointment of special courts, punishment for neglect of duties by officials, forfeiture of property of perpetrators, confiscation of arms from the dominant castes in the area, declaration of particular areas prone to the perpetration of atrocities, and even requires the distribution of arms to the downtrodden.⁴⁷

It is a fact that discriminatory practices against the *Dalits* do persist and this results in more inequality,⁴⁸ especially as the absence of effective enforcement of the legal provisions is one of the main causes. In this context, articles 15(4) and 16(4) of the Indian Constitution refer specifically to the social and educational advancement of disadvantaged groups. However, economic advancement

abuse by the lower caste. These cases were merely filed for the purposes of achieving some form of compensation. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 33 of 1989 has attracted similar accusations of misuse, including allegations that cases are filed merely as a means of collecting state compensation, as prescribed under the Prevention of Atrocities Rules, 1995, or to harass upper caste members of rival political parties.

⁴⁴The Committee's report was submitted in 1969. The *Sixth Report of the National Commission for Scheduled Castes and Scheduled Tribes* (1969) 8-17 may be consulted for more details on the Constitutional provisions.

⁴⁵The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was promulgated to prevent the commission of atrocities against the members of the Scheduled Castes and the Scheduled Tribes. The Act also provides for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

⁴⁶The Indian Penal Code of 1860.

⁴⁷There are special courts to provide speedy trials and special prosecutors to conduct cases. In 1999 rules were enacted under the Act to strengthen the investigation process and make provision for the payment of compensation to victims. This Act also contemplates formation of special courts for trial of such offences which are enumerated in the Act.

⁴⁸Mayell India's 'Untouchables' face violence and discrimination (2003) *National Geographic News* at http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html. (accessed June 2009).

naturally accompanies social and educational advancement. Under the Indian Constitution, the protective discrimination programme has been designed specifically to remedy social disadvantages by way of the distribution of state advantages. A constant endeavour has to be made for the theoretical justifications for positive discrimination to be matched by effective implementation.

To protect the category of SCs and STs more effectively, further legislation was introduced. Policies of reservation and representation were adopted to improve the access and participation of these sectors of society in the economic, educational and political spheres. These laws further forbade the enforcement of degrading and humiliating practices imposed on the SCs and the STs. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, which eliminates the degrading practice of manual scavenging of human excreta by members of the SCs is the most important among them.⁴⁹

The compensatory discrimination aspect of this stage is reflected in the establishment of provisions for the reservation of posts in public services, the reservation of seats in legislative bodies at the Central, State and *Panchayat Raj*⁵⁰ institutions and municipal bodies, the reservation of seats for admission to educational and professional institutions, including quotas and the relaxation of eligibility qualifications. These provisions have the intended objective of creating opportunities and bridging the vast gap that existed between these groups because of the cumulative effect of their disadvantages over the years, and the rest of the society in these areas.

There are basically three main kinds of benefit for the beneficiaries of affirmative action. The first is what may be described as political reservation. This means that a certain number of seats in Parliament and in the state legislatures is reserved for members of the scheduled castes and tribes in approximate proportion to their strength in the population. Political reservation in Parliament and in the state legislatures is only for the benefit of the SCs and the STs and not for the OBCs. Political reservations are written into the Constitution of India and the provisions reveal the ambivalence of the makers of the Constitution as well as of policy makers in contemporary India. While, these constitutional provisions

⁴⁹Further laws were enacted to prevent employers from appropriating the fruits of labour, from denying freedom of choice and resorting to other forms of exploitation of their employees. These labour laws have impacted positively on the Scheduled Castes more than any other group in society owing to their poor economic conditions and low social status. Prominent among them were the Bonded Labour System (Abolition) Act, 1976, Minimum Wages Act, 1948, Equal Remuneration Act, 1976, Child Labour (Prohibition and Regulation) Act, 1986, Inter-State Migrant Workmen Regulation of Employment and Conditions of Services Act, 1979.

⁵⁰India is a country where there are literally hundreds of villages. '*Panchayat*' means an assembly (*yat*) of five (*panch*) respected elders chosen and accepted by the village community to sit on the village committee. *Panchayat Raj* or Rule of the Village Committee ensures greater participation of the people and has sometimes led to the more effective implementation of rural development programmes.

were made mandatory in 1950, it was decided that they would apply only for ten years. Since then, the Constitution has had to be amended every decade to further extend the political protections for the SCs and STs.

The special provisions relating to Parliament and the SCs and STs have been extended on the basis of article 330. This is to bring about a representation in Parliament that is proportionate to the population status of the above classes. In terms of the First Schedule of the Representation of People Act, 1950, there are 79 seats reserved for the SCs and 41 reserved for the STs in the *Lok Sabha*.⁵¹

The second kind of reservation which is even more contentious than political reservation is job reservation. Job reservations apply mainly to government appointments at union and state level and also to organisations which are substantially funded by the government. The provisions for job reservation apply not only to the SCs and STs but to the OBCs as well. Over the years there has been an extension of job reservations for the benefit of the OBCs. The quota system sets aside a proportion of available positions for members of the designated classes. Those not belonging to the designated communities can compete only for the remaining positions, while members of the designated communities can compete for all positions (reserved and open).⁵² This has now become the most contentious positive measure adopted by India. The question is whether the wholesale extension of job reservations for the OBCs accords with the spirit of the Constitution or not. For job reservations, unlike political reservations, the provisions are not mandatory; they are enabling provisions. The Constitution says that the state *may* take such measures as are necessary for the special benefit of the OBCs. A distinction has to be made between mandatory provisions and enabling provisions. Mandatory provisions, like the one relating to the reservation of seats in the *Lok Sabha* under article 330, are those that must be applied. Enabling provisions, like the one under article 16(4) relating to reservations in employment, are those that may be applied, depending upon conditions and circumstances. Enabling provisions are necessary where preferential policies may be challenged on the ground that they appear inconsistent with other provisions, such as those that relate to equality of opportunity for all citizens irrespective of caste.⁵³

Over time, the difference between mandatory and enabling provisions has become indistinct mainly due to the rhetoric of social justice. Even the courts

⁵¹The *Lok Sabha* or the House of the People refers to the lower house of the Parliament of India. A lower house is one of two chambers of a bicameral legislature, the other chamber being the upper house.

⁵²For example, when two out of ten clerical positions in the railways are reserved for ex-servicemen, those who have served in the Army can compete both in the General Category as well as in the specific quota.

⁵³Béteille *Matters of right and policy* (2005) Seminar at <http://www.india-seminar.com/2005/549/549%20andre%20beteille.htm> (accessed July 2009).

developed a tendency to treat all provisions relating to positive discrimination as mandatory. This was consistent with the shift from the treatment of reservations as a matter of policy to its treatment as a matter of right. A system of mandatory numerical quotas left very little scope for autonomous or semi-autonomous institutions such as the universities to devise their own programmes of affirmative action.

Finally, there is reservation in education. Education has long been identified as key to achieving the advancement of the SCs and STs. The underlying theory is that under-representation of the designated groups is a legacy of the Indian caste system. Reservations are intended to increase the social diversity of campuses and workplaces by lowering the entry criteria for certain identifiable groups that are grossly under-represented in proportion to their numbers in the general population. Caste is the most generally used criterion to identify under-represented groups. However, there are other identifiable criteria for under-representation, for example, gender (women are under-represented), state of domicile⁵⁴ and rural people, for example.⁵⁵ In line with article 15(4) of the Constitution of India, which empowers the State to make special provision for the educational development of SCs, the Indian government currently allows for the reservation of 15% of seats for SCs in universities and colleges. This policy covers enrolment in various undergraduate and graduate courses of general, technical, medical and other branches of professional education. Reservations may also extend to the allocation of places in dormitories. State governments observe different rates of reservation, based on the size of their scheduled caste populations.

Along with these measures, central and state governments have also instituted scholarship or stipend programmes, as well as initiatives to furnish SCs with special tutoring, books, midday meals, stationery and uniforms. Created in 1956 by an Act of Parliament, the University Grants Commission oversees the implementation of these policies in institutes of higher education.⁵⁶ This Commission has routinely published guidelines to encourage and aid state governments in filling reservation quotas entirely; for example, the percentages for the minimum qualifying level of schedule caste candidates are lowered by approximately 5%. Where reserved seats remain vacant, universities are advised to increase the relaxation of entry requirements for admissions.⁵⁷ These are

⁵⁴With few exceptions, all jobs under state government are reserved to those who are domiciles under that government. For example, in the Indian state of PEC Chandigarh, 50% of seats are reserved for Chandigarh domiciles only.

⁵⁵Some reservations include but are not limited, for the physically handicapped, sports personalities, dependants of armed forces personnel killed in action, those who have served in the armed forces and those born from inter-caste marriages.

⁵⁶National Commission for Scheduled Castes and Scheduled Tribes Annual Report – 1996-97 and 1997-98 at 60.

⁵⁷Ministry of Human Resource Development, Department of Education of India, Annual Report – 1996-97 at 196.

contentious since reservation applies not only to the arts and sciences, but to medical and engineering schools as well. The logic of reservations or of positive discrimination in India is that special opportunities should be created for some over and above the general provisions for equality of opportunity for all.

4.2 *The second stage*

The second stage takes the form of the focused and comprehensive development of the scheduled castes and tribes which operates through the allocation of funds and benefits under various development programmes for members of these communities in order that they improve their economic conditions. With the detailed arrangements in place to protect SCs, it has become necessary to monitor whether these benefits are reaching the targeted communities and whether safeguards are being enforced. Watchdog institutions have been set up to check on these objectives. These watchdog bodies are entrusted the responsibility to oversee the effective functioning of laws and programmes for their target groups.

The National Commission for SCs and STs is a constitutional body devoted exclusively to the scrutiny of the performance of government agencies in the delivery of rights and entitlements to these groups. Four such institutions have been set up. While the National Commission for SCs and STs has been set up under the Constitution itself,⁵⁸ the National Human Rights Commission⁵⁹, the National Commission for Women⁶⁰ and the National Commission for Safai Karamcharis⁶¹ were created by separate Acts.⁶² The National Human Rights Commission and the National Commission for Women cater to complaints of all sections of society irrespective of caste within their specified mandate. Both the National Human Rights Commission and the National Commission for Women have felt handicapped by a limited capacity to deal with the huge tasks assigned to them and the volume of complaints they receive, particularly as they when they

⁵⁸To ensure that provisions made for Scheduled Castes and Scheduled Tribes in the Constitution of India, laws and programmes were to be implemented sincerely, the Constitution provided for the appointment of a Special Officer under art 338 to investigate matters relating to the safeguards and to report to the President.

⁵⁹There is also the National Human Rights Commission constituted under the Protection of Human Rights Act 1993, which *inter alia* looks into the grievances relating to violations of human rights.

⁶⁰The National Commission for Women was constituted in January 1992 in pursuance of the National Commission for Women Act 1990.

⁶¹*Safai Karamchari* are scavengers and means a person engaged in, or employed for, any sanitation work and includes his dependents, or one who is wholly or partially employed for the manual handling of human excreta and includes his dependents. The National Commission for Safai Karamcharis was constituted through the National Commission for Safai Karamcharis Act, 1993 for a period of three years initially. It is not a permanent Commission, but its tenure has been extended from time to time.

⁶²The Protection of Human Rights Act, 1993, National Commission for Women Act, 1990 and National Commission for Safai Karamcharis Act, 1993 respectively.

do not have field set up of their own whilst the other commissions make similar complaints. By and large, the watchdog institutions have been highly ineffective.

Notwithstanding these complaints, the objective of this two-stage approach is an attempt by the government to eliminate violence against the *Dalits* and to gradually help to eliminate conditions which lead to this violence and, over a period of time, promote equality in society.

5 Time frame for reservations

Initially, the framers of the Constitution provided that the special provisions would fall away twenty years after the promulgation of the Constitution. They anticipated that the progress of the disadvantaged groups during that time would have removed significant disparities between them and other groups in society. However, in 1969 the Twenty-third Amendment extended the affirmative action measures until 1980. The Forty-fifth Amendment of 1980 extended them again until 1990, and in 1989 the Sixty-second Amendment extended the provisions until 2000. The Seventy-seventh Amendment of 1995 further strengthened the states' authority to reserve government service positions for Scheduled Caste and Scheduled Tribe members.

Further, article 334 of the Constitution of India lays down that the provisions of the Constitution relating to the reservation of seats for the SCs and STs shall cease to have effect on the expiration of a period of fifty years from the commencement of the Constitution. Accordingly these reservations were to have ceased after fifty years,⁶³ but the Fourth-Fifth Amendment to the Indian Constitution Act 1980 extended this by a further ten years, and this extension has been perpetuated by the Constitution for a further decade thereafter.⁶⁴

The drafters of the Constitution of India's (Seventy-Ninth Amendment) Act 2000 stated that there was a need to continue with reservations for the SCs and STs for a further period of ten years. It was stated that although the SCs and STs have made considerable progress in the last fifty years, the reasons which weighed with the Constituent Assembly in making provisions with regard to the aforesaid reservation of seats and nomination of members, for example, the presence of discriminatory practices against the scheduled castes and large-scale inequality, continue to exist.⁶⁵

6 Analysing the constitutional provisions

Like many other Constitutions and anti-discrimination legislation, the Constitution of India does not contemplate affirmative action and special treatment as a

⁶³The Constitution of India, art 334.

⁶⁴The Constitution of India (Sixty-Second Amendment) of 1989.

⁶⁵Statement of Objects and Reasons Appended to the Constitution (Eighty-Fourth Amendment) Bill of 1999 which was enacted as the Constitution (Seventy-Ninth Amendment) Act of 2000.

general principle of operation. With a view to making justice, including social, economic and political justice, effectively available to all, the Constitution of India makes special provision for certain members of society. It contains several provisions for the protection and amelioration of the lot of the SCs, the STs and OBCs. In accordance with constitutional provisions and various laws, the state grants *Dalits* a certain number of privileges, including reservations (quotas) in education, government jobs and government bodies. The implementation of legal provisions contained in the Protection of Civil Rights Act⁶⁶ and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act attempts to protect these castes from discrimination.⁶⁷ The Constitution therefore permits positive discrimination in favour of the SCs, STs and OBCs.⁶⁸ It specifically provides for reserved seats in the lower house of Parliament⁶⁹ and in the lower houses of the state legislatures for the SCs and STs.⁷⁰ The Constitution of India itself does not define these groups, nor does it provide detailed standards by which they may be determined. In the case of SCs and the STs, it does prescribe an agency and a method for designating them.⁷¹ Not only are the OBCs left undefined in the Constitution, but no such method or agency for their determination is provided.⁷²

Affirmative action schemes are in place in many countries including South Africa. Research undertaken at Harvard University indicates that while affirmative action programmes are beneficial to the underprivileged, they must be adopted in a manner that is seen to be fair.⁷³ Like the South African Constitution⁷⁴, the Constitution of India provides a blueprint for an egalitarian society. The Constitution of India is not based on the premise of hierarchy, but on the premise of equality. The Indian Constitution recognises that you do not just erase or cancel out age-old inequalities simply by adopting new principles in a Constitution. Something more is needed to redress the inequalities of the past, and this is what affirmative action or positive discrimination is designed to do. The object is to reduce the level of inequality in a society which has had a hierarchical order over a very long period of time.

The Constitution of India makes provisions for positive discrimination in favour of the SCs and STs which constitute about 23% of India's population. Besides

⁶⁶The Protection of Civil Rights Act of 1995.

⁶⁷The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989.

⁶⁸The Supreme Court in *Indra Sawhney v Union of India* (n 31) 217 upheld the implementation of separate reservation for other backward classes in central government jobs.

⁶⁹Article 330 of the Constitution of India.

⁷⁰Article 332 of the Constitution of India.

⁷¹See arts 15(4); 164 and 340 of the Constitution of India.

⁷²CERD Report of India Concluding Observations of Caste (1996) para 7. Also see the case of *M Nagaraj*(n 35) which defines who is considered 'backward'.

⁷³University of Michigan *The compelling need for diversity in higher education* (2006) at <http://www.vpcomm.umich.edu/admissions/research/> (accessed July 2009).

⁷⁴Constitution of the Republic of South Africa no 108 of 1996.

reserving parliamentary seats for them they were given advantages in terms of admission to schools and colleges, jobs in the public sector, various pecuniary benefits for their overall development, and so on. The Constitution indeed guaranteed the fundamental right of equality of all citizens before the law but it also categorically lays down that nothing in the Constitution 'shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'.⁷⁵

Even though the State is not limited to reservations as a method of giving preference, affirmative action measures seem to be focussed on reservations alone. Only in the area of government employment is reservation constitutionally specified, but even there reservations may be accompanied by other preferential devices for example fee concessions, the waiver of the age limit, etc. Importantly, the *Balaji* case disposed of the idea that a limitation on the extent of reservations must rest upon the construction of the word 'reservations' in article 16(4) and established that such limits are applicable to reservations under article 15(4) as well.⁷⁶ The question arises as to whether or not there are similar constitutional limitations on the quantity of other kinds of preference. However, judicial control over the extent of such preferences is far less clear than those governing reservations.⁷⁷

Further, although there is a constitutional duty to protect the interests of the 'weaker sections' of society, the Constitution of India does not explicitly obligate the government to employ any particular method to achieve this.⁷⁸ Except for reserved seats in the legislatures, the quantum of preferential treatment is unspecified. The Constitution also does not explicitly provide any limitation on the extent of preferences. In spite of the broad and unrestricted language of articles 15(4) and 16(4), a doctrine of constitutional limitation has emerged in dealing with those preferences which take the form of percentage reservations of government posts and places in educational institutions.⁷⁹

Preferential policies are usually constructed to benefit clearly identified underprivileged persons like the designated groups in South Africa and the minority groups in the United States of America. However, for India's socially and educationally backward classes this was not the case. The Constitution of India provides the legal opportunity for preferential treatment for their benefit even before it was clear who the socially and educationally backward classes were. So even though the Constitution provides for the preferential treatment of the socially and educationally backward classes it does not clearly identify them.

⁷⁵Article 15 (4) of the Constitution of India. Vimal *Constitutional safeguards* (1974) (177) 16-21.

⁷⁶*Balaji v Income Tax Officer* (1962) AIR 123 (SC).

⁷⁷*Galanter* (n 23) 442.

⁷⁸There is no provision in the Constitution of India that the State needs to reserve a minimum number of posts in government service or seats in educational institutions, nor divert any minimum part of its resources to benefits for backward groups.

⁷⁹See the case of *Venkataramana v State of Madras* (1951) AIR 229 (SC).

In parliament and in state legislatures political reservation is only for the benefit of the SCs and the STs and is mandatory. However, when the provisions were made obligatory in 1950, it was determined that this would be valid only for ten years, so they would last for a single decade only. However, since then the Indian Constitution has had to be amended every ten years to continuously extend political reservations for the SCs and STs. Job reservation pertains mainly to government appointments at union and state level and also to organisations which are significantly subsidised by the government. The provisions relating to job reservation apply not only to the SCs and STs, but also to other backward classes as well. It has happened that over the years there has been an extension of job reservation for the benefit of the other backward classes. This has now become the most controversial among India's positive or affirmative action measures. The question is whether the wholesale expansion of job reservation for the other backward classes is in harmony with the will of the Constitution or not. Provisions governing job reservation are not mandatory, unlike those relating to political reservation they are enabling provisions, since the Indian Constitution states that the state may take such measures as are necessary for the special benefit of the other backward classes.

Having regard to the conditions of SCs and STs, the Constitution has been amended from time to time, and the period of ten years has been extended. At present it provides that the reservations will now cease after sixty years, ie, after the year 2010.⁸⁰ There seems to be no end in sight for India's affirmative action policies.⁸¹

These positive discrimination measures are constitutionally enshrined and cannot be challenged legally and their applicability to government seats has ensured SCs and STs representation in the political sphere much more strongly than if there been no positive discrimination measures.⁸² However, the implementation of the programme in government jobs and educational institutions is mechanical. Reservations in public employment or in admissions to the institutions of higher education often operate as guaranteed minimums rather than as allocations of places over and above those gained on merit. Therefore the net amount of preference they award routinely declines as members of the preferred groups gain places on merit. However, the same cannot be said of reservations in the legislatures. While they were subject to a constitutional time limit of ten years, the same has been extended for the last fifty years.

In India, quotas and job allocations or reservations have not brought equality, dignity, or even safety for India's untouchables.⁸³ In order to make certain that affirmative action is constitutional; one has to reject the idea of strict numerical

⁸⁰See art 334 in the Constitution of India (Seventy-Ninth) Amendment Act of 1999.

⁸¹Jaffrelot *Reservations and the Dalits at the crossroads* (2008) http://casi.ssc.upenn.edu/india/iit_Jaffrelot.html (accessed January 2008)

⁸²*RK Sabharwal v State of Punjab* 1995 AIR (SC) 1371.

⁸³In villages, the social stigma remains too strong to be obliterated by laws alone.

quotas. These reservations or quotas seem to be baseless and are there purely for political gain. Further, rather than leading India towards a 'casteless' society, the policy of reservation and quotas seems to have reinforced caste identities. Affirmative action that opens up new opportunities and makes available the resources and the seats in employment and universities is the path that should be followed. The question remains how this is to be achieved. One of the ways in which this can be achieved is by ensuring the development of skills.

If the reservations are to continue they will have to address various issues. Fundamental rights recognised in the Constitution can be enforced only against state actors and nothing happens in the event of inaction on the part of the state. The private sector, where a great number of women and designated groups are employed, is not covered by constitutional standards. The policy of positive discrimination, to be successful, must target the corporate sector as well.⁸⁴ Further, most institutions get away by simply stipulating the mandatory quota; given the lack of a monitoring agency, there is neither the accountability to fill the quota nor penalties for loopholes used to avoid quota restrictions. Follow-up support programmes to enhance the performance of quota entrants are non-existent. Thus, mandating the requisite number of seats is often the beginning and end of the implementation of the Indian affirmative action programme.⁸⁵

Despite the creation of centrally based commissions to monitor reservations and other schemes, the Constitution of India gives great liberties to the individual states to determine the quantity and limits of reservation. The relevant clauses give states the authority to formulate and implement policy to facilitate 'the advancement of any socially and educationally backward classes of citizens' but it is decidedly vague. The reason for this is that no concrete definition of 'backward' is provided therein either. Although articles 15(4) and 16(4) state the extent or scope of the policies, the Constitution of India itself does not lay down how the Indian policies of protective discrimination are to be implemented. This has led to some legal uncertainty and to the direct involvement of the superior courts.⁸⁶ Article 32 of the Constitution guarantees one the right to approach the Indian Supreme Court directly and by appropriate proceedings for the enforcement of any of the fundamental rights. The Constitution of India has further detailed provisions in Part XVI dealing with the 'Special Provisions relating to Certain Classes'.

⁸⁴Galanter *Competing inequalities: Law and the Backward Classes in India* (1991) 54.

⁸⁵Reservations are legal and binding. In the event that discrimination continues, the state can be compelled to abide by the provisions of the Constitution of India. In the event that a class of persons feels that their rights are not being advanced, the group as a whole could take this to court and enforce the reservation quotas in terms of the Constitution of India. This does not however apply to the private industry.

⁸⁶This refers to the Indian Supreme Court in New Delhi and the more than twenty state-based high courts.

As can be seen, the fact that the Constitution of India provides for affirmative action programmes in an elaborate manner has not laid to rest the controversies surrounding this issue. In fact, the issue raises questions of great importance to legal theory and philosophy. One such problem relates to the merits of the affirmative action candidates. When looking at the Indian courts' approach to this issue, even though they have emphatically rejected the notion of appointing unsuitably qualified candidates to positions or admitting them to universities and colleges, they have endorsed the approach by providing for strict quotas and reservations. The problems relating to this issue then arise with the appointment of an affirmative action candidate on the basis of a quota system. Affirmative action programmes ought to aspire to help the underprivileged sectors of society by allowing them to catch up with the standards of competition set up by society at large. However, it is submitted that numerical quotas or reservations are intolerable as they impose unfair burdens on those excluded and they involve or, more importantly, are perceived as involving the suspension of standards.

In India, the need really is to make these affirmative action programmes more effective, instead of confining them to reservations alone. Other programmes should be followed, for example, programmes for special training and the development of skills, and measures to encourage the previously disadvantaged to pursue excellence should be taken up. Reservations or quotas alone can never be the answer.

The debate about positive discrimination in India is hostile and increasingly violent. On the one hand the policy is defended as ethically correct as it is meant to compensate for centuries of injustice perpetrated against large sections of the community merely on the basis of their social origin. On the other hand, the policy is attacked as an injustice whereby one person is punished for the sins of someone else. However, the centuries of discriminatory practices against members of society have left them decidedly disadvantaged. The only way to level the playing field is by positive discrimination measures. The problem in India is that the positive discrimination measures are largely confined to reservations or quotas. What is needed is a broader approach to achieve equality of opportunity. Even so, there is definitely no question of discarding affirmative action programmes in favour of the socially disadvantaged persons as the designated beneficiaries are still very much disadvantaged. Abandoning affirmative action programmes at present will not lead to justice or equality. It is neither practical nor desirable to do so.⁸⁷ Affirmative action is part and parcel of a just society, so there should be no question of abandoning affirmative action programmes for the designated groups at present. However, these programmes must be carried out in a way that is constitutionally acceptable.

The reservation system in India seems to be a drastic measure taken to achieve the goal of equality. The reality is that there are no set criteria to select

⁸⁷Ryan and Evans *The Commonwealth government* (1984) 15-16.

persons outside of the backward classes. When a policy involving preferential treatment, reservations or affirmative action is adopted, the reservation policies in India will have to be so arranged that they do not materially affect the right of equality of opportunity, if the advancement of the backward communities is to be achieved.⁸⁸ Affirmative action policies must therefore ensure that the preferential relief employed to correct a particular situation is the least drastic means of remedying discrimination.⁸⁹

Looking at India's system of achieving equality through its use of quotas and reservations, some cautionary lessons may be learned. For example, affirmative action is now over fifty years old and each year that equality is not achieved, the period for affirmative action is extended. The government in countries that implement affirmative action must have reasonable goals within set time frames to achieve the elimination of discrimination. Measures put into place must be monitored, and those that do not achieve their stated goals must be abandoned. The quota system is not a good system, and merely causes more resentment amongst the non-beneficiary groups. Further, there is ongoing pressure to increase the number of beneficiaries by adding more categories. This creates the risk that affirmative action will be used first and foremost to bring together voting blocks, and will create hopelessness and antipathy among members that do not belong to the SCs, STs and the OBCs.⁹⁰

What is certain is that affirmative action programmes are *the* measures to employ to eliminate the present and continuing effects of past discrimination and to lift the limitations in access to equal opportunities, which limitations have impeded the access of various classes of people to posts in public administration. Measures such as affirmative action or reservations are implemented to remedy the ongoing ill effects of previous inequalities stemming from discriminatory practices against various classes of people, which have resulted in their social, educational and economic backwardness.⁹¹ The policy also addresses the ongoing discrimination caused by persistent societal discrimination and attacks the continuation of such injustices.⁹² This is the axis on which affirmative action revolves. For equality to be achieved, affirmative action is required. However such affirmative action must be carried out in a constitutionally valid manner and affirmative action can be provided at a more comprehensive level taking into account various factors of exclusion such as caste, economic conditions, gender, kind of schooling received, etc. However, this comes with its own problems because then one moves onto ground where proof of discrimination is required.

⁸⁸Anand *Equality, justice and reverse discrimination* (1987).

⁸⁹See, eg, *MR Balaji v State of Mysore* (n 34); *Amlendu Kumar v State* (1980) 1 AIR (Pat) 7.

⁹⁰Cunningham 'Race, Class caste? Rethinking affirmative action' (1997) (1) *Michigan LR* 1296-1310.

⁹¹Justice Sawant in *Indra Sawhney v Union of India* (n 31) par 23.

⁹²Singh *Affirmative action programmes: A comparative study of India and the United States of America* (2002-2003).

What is being suggested is that affirmative action can work only if not focused purely on reservations or quotas. A comprehensive scheme of affirmative action measures would be more beneficial than reservations alone when seeking to address the concerns of social justice.