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# UNDERSTANDING AFFIRMATIVE ACTION

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*Affirmative action policies are adopted by various states for promoting diversity in the society or as a reparation for the evil injustices which has occurred to them or their kin in the past. These policies are used to provide an equal playing field for the marginalized sections of the people who have not been fortunate enough to be provided with the adequate tools for the pursuit of happiness. Affirmative action is, therefore, a practical means to provide for the ideal ends of equality. This paper seeks to understand the use of such policies and the rationale behind them. Moreover, the interpretation of these policies by the courts has been mentioned by the author.*

## 1.1 INTRODUCTION

Merriam Webster defines the term Affirmative Action as:

*"The use of policies, legislation, programs, and procedures to improve the educational or employment opportunities of members of certain demographic groups (such as minority groups, women, and older people) as a remedy to the effects of long-standing discrimination against such groups".*[631]

Stanford Encyclopedia of Philosophy defines the term as:

*"...Positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded. When those steps involve preferential selection—selection on the basis of race, gender, or ethnicity—affirmative action generates intense controversy."*[632]

R.A Lee in His essay, *"The Evolution of Affirmative Action"* states:

*"....Affirmative Action is generally conceptualised as being one step beyond the concepts of non-discrimination and equal opportunity, moving towards the more proactive stance of anti-discrimination"*[633]

Affirmative Action, in essence, usually occurs when an organization devotes its resources to make sure that people are not discriminated against on their basis of their gender or ethnic group. It has the same goal as equal opportunity. It is used as an active measure not only to subvert, but also to avert discrimination.[634] These policies are generally implemented in the educational, employment and political sectors. It is an attempt "at redistribution, an endeavour to accomplish a restricted but essential reallocation of employment and earnings within the current legal framework. Making the law function as a tool for social transformation as a long-term civil rights strategy."[635]

[631] affirmative action, https://www.merriam-webster.com/dictionary/affirmative%20action/ Viewed on 18/04/2025.
[632] Affirmative Action, https://plato.stanford.edu/entries/affirmative-action/ Viewed on 18/04/2025.
[633] Wasson, Gabriel Patrick. "Affirmative Action: Equality or Reverse Discrimination?." (2004).
[634] Crosby, F. J. (1994). Understanding affirmative action. *Basic and Applied Social Psychology*, *15*(1-2), 13-41.
[635] Mckenna And Feingold, Taking Sides: Clashing Views on Political Issues; McGraw-Hill/Dushkin; 17th edition

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The term is usually termed as an initiative taken by the Government to increase the representations and standards of living for the depressed sections of the society. Although, this term is not in vogue in India. Instead, the common term used for such policies is 'Reservation', but the author feels that the drafters of the Indian Constitution had the same intent while using the said term. Affirmative Action[636] is the species while Reservation is its genus. The aim of Affirmative Action is always equality.[637]

Asbjørn Eide states that it is *"preference, by way of special measures, for certain groups or members of such groups (typically defined by race, ethnic identity or sex) for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms."*[638]

In its beginning, the early 20th century, the term was meant to literally act affirmatively—not allowing events to run their course but rather having the government (or employers) take an active role in treating employees fairly. Thus, the government must be an active participator in employment of the workmen.[639]

The term found its inception in the United States of America in 1935. The Congress had enacted the National Labor Relations Act (NRLA) Act, 1935 (also known as the Wagner Act) which guaranteed the rights of private workers to form trade unions and established the National Labor Relations Board which shall remedy any violation by ordering the employer to take "*affirmative action*" including reinstatement with or without back pay, to make the employee whole, on account of discrimination of an employee by an employer on accounts of union activities.[640] It meant that "an employer who was found to be discriminating against union members or union organizers would have to stop discrimination, and also take a formative action to place those victims where they would have been without the discrimination."[641] In other words, affirmative action was a used compensatory measure to remedy the evils of discrimination.

The term was also used by John F. Kennedy while issuing the Executive Order 10925[642] which mandated the contractors employed by the federal governments not to discriminate based on race, creed, color or national origin. The contractors would also "take affirmative action to ensure that applicants are employed"[643].

Although the real meaning behind affirmative action is to be found in the Title VII of the Civil Rights Act, 1964[644]. An act aimed at eradicating discrimination in private employment. Not only did it eviscerate discrimination of the grounds of race but also on the grounds of race, color, national origin, religion and even sex[645]. The American History finds its roots in slavery which predates to 1619 till 1965 about which the author shall discuss about in the next chapter.

The UN Declaration on Minority Rights endorsed the approach for Affirmative Action.

Article 4 (Relevant Portions) of the declaration have been reproduced below:

> 1. States shall take measures where required to ensure that *persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.*

[636] The term also come to mean 'Positive Discrimination'- Britain and India, 'Reverse Discrimination', 'Equality of Result', 'Quota system', 'Majority-Minority Districting', 'Standardization'- Sri Lanka, 'reflecting the federal character of the country'- Nigeria, 'Sons of Soil'- Malaysia and Indonesia. For more, see Thomas Sowell, *Affirmative Action Around the World, an empirical study.*
[637] Vijapur, A. P. (2006). International protection of minority rights. *International Studies*, *43*(4), 367-394.
[638] Åkermark, A. S. (1997). *Justifications of minority protection in international law* (Vol. 50). Martinus Nijhoff Publishers.
[639] The History Behind the Supreme Court's Affirmative Action Decision, https://www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531/ Viewed on 18/04/2025.
[640] West, M. S. (1998). The historical roots of affirmative action. *La Raza LJ*, *10*, 607.
[641] Skrentny, J. D. (1996). *The ironies of affirmative action: Politics, culture, and justice in America*. University of Chicago Press.
[642] Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961)
[643] 26 Fed. Reg. 1977 (1961)
[644] Ibid.
[645] Although the term sex was not originally part of the act, it was proposed as an amendment on the bill. For more, kindly see: West, M. S. (1998). The historical roots of affirmative action. *La Raza LJ*, *10*, 607.

5. States should consider appropriate measures so that persons belonging to *minorities may participate fully in the economic progress* and *development in their country*.[646]

Although the term, has not explicitly been used in the original document, but the wording seems to denote that the minorities (especially the marginalized groups) would only be able to exercise their socio-political rights when they are at par with the other members of the society. Hence, the upliftment of such groups becomes necessary.

The international treaties such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also aims to provide for 'special measures'[647]. Article 1(4) of the CERD maintains that the state should take special measures for the equal enjoyment of human rights. However, such measures would be discontinued after they have completed the objective for which they were taken for (i.e., Equality). The CEDAW, on the other hand, aims to achieve "de-facto equality".

The basic concept of affirmative action arises from 'equity' or "the administration of justice to what was fair in a particular situation, as opposed to rigidly following legal rules which may have a harsh result."[648]

Louis J. Pojman in his essay "The Case Against Affirmative Action"[649] has indicated the two forms of it:

- "Weak Affirmative Action" which seeks to promote equal opportunity by employing race as a tie breaker between 2 equally qualified applicants for employment college admission or some other position in society. The said goal is to provide for equal opportunity to compete, and not for equal results and
- "Strong Affirmative Action" where preferential treatment solely on race or caste is heeded to, while ignoring the possibility that the applicant might be indeed less qualified than a non-minority applicant.

### 1.2 Rationale behind Affirmative Action

The major question which rises is that when other methods can be used to combat discrimination, then why should Affirmative Action be used? What is the need to invoke such drastic measures which is an anathema to meritocracy and can potentially stifle the growth of a country?

The need for affirmative action derived for the fact that it does not rely on the aggrieved parties to come forward on their own behalf. Relying on victims to advocate for themselves would not be a good idea as they would not be able to articulate themselves and they would also not be willing to speak up till they are very angry. Further, they would be very reluctant to bring attention to their situation for the fear of retaliation or because they feel pessimistic about winning the lawsuit.[650] Thus, these affirmative action programs enable organizations to detect any biases as they help in systematic monitoring and can combat such bias at its very inception. It would be impractical to monitor any such biases if such mechanism was not in place.

Barbara Bergmann[651] states that this policy has three main objectives:

i. To overcome discrimination
ii. To increase diversity within the labor force
iii. To reduce poverty among groups historically victimized by discrimination.

[646] UN Declaration on Minority Rights.
[647] Vijapur, A. P. (2006). International protection of minority rights. *International Studies*, *43*(4), 367-394.
[648] Skrentny, J. D. (1996). *The ironies of affirmative action: Politics, culture, and justice in America*. University of Chicago Press.
[649] Louis J. Pojman, "The Case Against Affirmative Action" . International Journal of Applied Philosophy 1998 Volume 12.
[650] Crosby, F. J., Iyer, A., & Sincharoen, S. (2006). Understanding affirmative action. *Annu. Rev. Psychol.*, *57*(1), 585-611.
[651] Bergmann, B. R. (1999). The continuing need for affirmative action. *The Quarterly Review of Economics and Finance*, *39*(5), 757-768.

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The justification of affirmative action is broadly divided into two arguments given below:

*Diversity Argument*:

The idea behind this argument is that having more people from different cultural backgrounds in education and jobs shall provide for a "greater common good". A common good of the institution itself and for the society in general[652]. It would be greatly beneficial if every person from different background were allowed to express their point of view in each subject which would eventually lead to more discussions and which would, in turn, broaden everyone's viewpoint. Further, history has proved over and again that when only people from certain cultural or intellectual backgrounds have led the country, it has led to fatal results. Therefore, especially in a democratic machinery, it becomes imperative that representations from across the country is considered. But this idea is not only restricted to politics and is applied in all field. Studies indicate that "diversity has resulted in positive learning outcomes for all students"[653]. Further, it has indicated that people have an increased ability to take the perspective of others and their involvement in political affairs.[654]

The second idea behind the diversity argument is that public institutions have a *civic obligation* to uplift the disadvantaged minorities to assume positions of leadership shall provide for a greater common good[655].

Further, the system of affirmative action can help diagnose and monitor any prejudice or bias against any group or community and rather than relying on delayed fissure, it can be remedied at that certain point of time. In other words, it can act as a preventive measure than a remedial one.

Harvard College, as an *amicus* to the court, in the case of *Regents of University of California v. Bakke*[656] submitted a brief defending the use of affirmative action for educations purposes. The following brief deserves to be reproduced below:

> *"The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans, but also blacks and Chicanos and other minority students. …*
>
> *In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin, or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the*

[652] Sandel, M. J. (Ed.). (2007). *Justice: A reader*. Oxford University Press, USA.
[653] Ibid.
[654] Ibid.
[655] Sandel, M. J. (Ed.). (2007). *Justice: A reader*. Oxford University Press, USA.
[656] 438 U.S 265 (1978)

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> *background and outlook that students bring with them."*[657]

Thus, when an institution (especially academic) is all inclusive as it can lead to "robust exchange of ideas"[658].

The critics point out two objections to the diversity argument. First, instead of achieving a pluralistic society, the use of racial system would damage self-esteem, as individuals would feel discouraged, and increase racial consciousness on all sides[659]. Further, it would "reinforce stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship with individual worth."[660] Thereby, having the ironic outcome than the one which was intended. Rather than fostering harmony and integration preferences have divided the society.

The second objection raised is that it runs contrary to equality. One person's right is being violated to put up another less meritorious candidate. Therefore, for achieving common good, people's personal right is being agonized. But this objection falls short because the institutions have a discretion to set an admission criterion for the intended social mission they are seeking to achieve. Thus, despite being more meritorious, the person must fulfil the criteria that the institutions define.[661]

Concluding the diversity argument, affirmative action can lead to enhancement of integration and can also lead to elimination of racial, sexual, or social prejudices.

*Compensatory Argument*:

This argument stipulates affirmative action seeks to achieve reparations for the evil wrongs which have been committed against the marginalized communities. The present generation should get a preference over others to make up for history of discrimination. This is seen as a remedial measure to compensate for the wrongdoings of the past.

However, critics have since pointed out that the ones usually reaping the benefits of this policy were not the actual suffers and those who usually pay the compensation are not the perpetrators. Therefore, why should the present generation have to bear the burdens of the wrongdoings of the past?

It would be incorrect to assume that the previous class who were victims of discrimination are now currently at a disadvantaged position in the society. It should be noted that persons reaping the benefit may already have the *means* for their own upliftment. As this policy comes at a cost of other person which may not be the perpetrators of the injustices, this policy must be targeted those the groups which are depraved than those which are the real sufferers of the past injustices. Thus, if this point is really to help the disadvantaged, affirmative action should be based on class, and not race[662]. The Indian Supreme Court had reasoned the same in *State of Kerala v. N.M. Thomas*[663], as per Krishna Iyer J:

> *"A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment but wish to wear the "weaker section" label as a*

[657] Ibid, pp. 323
[658] Ibid. pp 312
[659] Sandel, M. J. (Ed.). (2007). *Justice: A reader.* Oxford University Press, USA.
[660] *Regents of University of California v. Bakke* (Supra)
[661] Sandel, M. J. (Ed.). (2007). *Justice: A reader.* Oxford University Press, USA.
[662] Ibid.
[663] (1976) 2 SCC 310

> *means to score over their near-equals formally categorized as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made."*

Further, color blind[664] advocates, who base their ideas on abstract individualism and meritocracy state that individuals are the only members of the society and should be considered as single unit than a collective one[665]. Therefore, they ought not to be the bearer of others fault. As Daniel Bell[666] states,

> *"... the individual—and not the family, community, or the state—is the singular unit of society, and that the purpose of societal arrangements is to allow the individual the freedom to fulfill his own purposes—by his labor to gain property, by exchange to satisfy his wants, by upward mobility to achieve a place commensurate with his talents."*

Further, the Supreme Court of the United State in *Grutter v. Bollinger*[667] disclaimed that as *"14th amendment (Equality Clause) protects persons, not group"*, such governmental action would be subject to very detailed and careful judicial enquiry and scrutiny to ensure that personal right to equal protection of the laws has not been infringed[668].

The question which this compensatory argument raises is that do we, as members of society have a moral responsibility to redress the wrongs committed by a previous generation and do we incur such responsibility as individuals or as members of communities with historic identities?[669]

The author opines that only when the actions of the past have been redressed only then we can overcome and move forward to the future. However, drastic measures such as this policy should be taken as last choice and not as the first step for it can deepen the roots of discrimination. Therefore, other measures should be first deployed than preferring those which has the potential to backfire. The most effective safeguard against discrimination is the very device which affirmative action seeks to destroy[670].

### 1.3 Is Affirmative Action contrary to Equality?

The term 'Equality' is usually misunderstood as a generic term meaning it provides for a blanket parity, thereby providing the same treatment to everyone. This notion is incorrect as no two human beings are equal in all respects, the same treatment to them in every respect would result in unequal treatment[671]. For instance, a child cannot be compared with an adult, nor could a sick person be treated equally its healthy peers. That would only amount to unequal treatment or treatment which nobody will justify or support[672]. As stated by the

[664] This term was first proposed by Justice Harlan in *Plessy v. Ferguson*.
[665] Skrentny, J. D. (1996). *The ironies of affirmative action: Politics, culture, and justice in America*. University of Chicago Press.
[666] "Racial Preference and Racial Justice, edited by Russell Nieli, (Washington, DC: Ethics and Public Policy Center, 1991)"
[667] 539 U.S. 306 (2003).
[668] *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1.
[669] Sandel, M. J. (Ed.). (2007). *Justice: A reader*. Oxford University Press, USA.
[670] Wasson, Gabriel Patrick. "Affirmative Action: Equality or Reverse Discrimination?." (2004).
[671] Mahendra Pal Singh, Constitution of India. Eastern Book Company 2023
[672] Ibid.

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Supreme Court in *Kedar Nath Bajoria v. State of West Bengal*[673]:

> *"The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation."*

Equality means that equals should be treated equally while unequals must be treated unequally[674]. Thus, the exercise is to ascertain who are persons' situated in equal circumstances are being treated unfairly or not. If yes, then such action would contrary to equality. Discrimination is the very essence of equality.[675]

The term equality usually contains two facets: one, the equality before law and the *equal protection of laws*[676]. The former suggesting that rule of law and that nobody is above the law while the latter specifying the abovementioned idea that equals must be treated equally while unequals should be treated differently. However, that does not mean that the legislation should be arbitrary. Such legislation must, first, have some substantial distinction and, secondly, must have some legitimate purpose to be sought[677].

The question which arises is whether, the policy of affirmative action is violative of equal protection guaranteed by equality. To fully understand this proposition, let's take the instance of Indian Constitution.

Article 16(1) & (2) of the Indian Constitution provides:

> *16(1). There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*
>
> *16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.*[678]

On the contrary, Article 16(4) provides:

> *16(4). Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*[679]

Therefore, the equality provision of Article 16(1) and (2) provides that any person shall not be discriminated against in relation to matters of employment or appointment under the State (Equality Clause). While Article 16(4), on the other hand provides, notwithstanding anything contained in Article 16, the state shall not be hindered to provide for reservations of appointments in favour of any backward sections of citizens, which the state feels, is not adequately represented.

The question which was faced by the courts for several years was whether Article 16(4) is an exception to the equality clause provided under Article 16(1) & (2), implying that state has a discretion to provide for reservation or whether it an enabling provision, meaning thereby, that the state is duly obligated to provide for reservations. The former admitting that affirmative action policies run contrary to equality provision and acts as an exception to it while the latter stating that these policies are implicit in equality provision.

The majority judgement of *T. Devadasan v. Union of India*[680], the court opined that Article 16(4) is a *proviso* to Article 16(1), the Equality

[673] AIR 1953 SC 404
[674] Ibid.
[675] *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 Para. 24.
[676] This is the case, as far as author's knowledge, for American as well as Indian Constitution.
[677] For more, kindly see *State of West Bengal Vs. Anwar Ali Sarkar, [1952] 1 S.C.R. 284*
[678] The Constitution of India, Art. 16.
[679] Ibid.
[680] 1964 SCR (4) 680

Clause. The relevant paragraph has been reproduced below:

> *"…. this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) would in effect efface the guarantee contained in clause (1) or at best make it illusory."*

The minority, however, opined that 16(4) cannot be considered to contrary to the equality clause. The reasoning provided is that although people may begin from the same starting point, but they would not have the adequate skills and resources to compete with their counterparts. Therefore, Article 16(4) does not run contrary to 16(1) The equality provision already encompasses 16(4) with itself. As per *Subbha Rao J*:

> *"… Article 16 is an instance of the application of the general rule with special reference to opportunity of appointments under the State. It says that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. If it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only an utopian conception unless a practical content was given to it. Its strict enforcement brings about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. Two horses are set down to run a race —one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so, what would otherwise have been a farce of a competition would be made a real one. The same difficulty had confronted the makers of the Constitution at the time it was made. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well-nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced clause (4) in Article 16. The expression "nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article."*[681]

[681] Ibid. Para 26

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This view of *Subbha Rao J* has been echoed by the majority judgment in the case of *State of Kerela v. N.M Thomas*[682] and has been held to be the correct proposition of law by subsequent decisions[683].

The reasoning behind the same is that treating unequals as equals can lead to grave injustice for not everyone is born with the same circumstances, nor will have the same circumstances or resources by which they would be able to pursue their dreams and happiness.

Affirmative Action has been held to be a 'positive discrimination' giving preferential treatment to the downtrodden members of the society with the intent to uplift them and bring them to the upper strata of the society. A more diversified grouping justifies the means despite the Equal Protection Clause[684].

### 1.4 Substantial and Formal Equality

The concept of equality has now been sub-divided into two categories of Substantial (as known as Material) and Formal Equality. The former suggests that exclusion of material inequality and *what ought to be*[685]. Thus, substantive equality suggests that equality should not be about equal treatment but providing opportunities that helps individuals to realize the full value of personal liberty. It aims at providing eradication of individual, institutional and systemic discrimination[686]. There are two aspects of such equality- the equality of opportunity and equality of outcome. The equality of outcome, which requires resources to be allocated equitably, is seen as a radical step towards achieving substantive equality. The use of affirmative action is seen as furthering the ends of substantial equality.

The latter, formal equality, postulated that persons are to be protected individually in exercise of their civil liberties. Thus, concentrating on equal protection and opportunity with respect to *what it is,* side-lining equality of achievement[687]. This theory is the basis of color blindness that everyone is equal before the eyes of the law and such classification on any basis would go against the idea that individual is free and equal. India had, in its beginning, subscribed to the formal equality theory with a paradigm shift towards substantive equality.[688]

### 1.5 Conclusion

Although Affirmative Action was primarily used as a remedial device to eliminate the effect of centuries of racial, caste, or sexual discrimination and to cure the past. It has now diversified into helping those in the present. While some may be sceptics about this policy it must be kept in mind that for the advancement of the society, we must move together and it would be undesirable to leave anyone behind. Any without the use of affirmative actions, it may be more difficult for our society to continue to ignore its persistent racial and ethnic stratification. Thus, we must highlight our biases and tend to eliminate them. Affirmative Action is one such active measure to eliminate such prejudices in our society.

This policy is, however, viewed as replete with contradictions because it attempts to attain equality through inequality by practicing reverse discrimination on people of non-minority status. The practice of implementing a formative action policy might well become a cure worse than the disease[689]. Targeting historically advantage groups will further

[682] (1976) 2 SCC 310
[683] From 1963 onwards this view, that Article 16(4) is an enabling provision of 16(1), has been held to be correct. *Indra Sawhney v. Union of India*, AIR 1993 SC 477. *Dr. Gulshan Prakash v. State of Haryana*, (2010) 1 SCC 477 Para 16. *Ajit Singh v. State of Punjab*, (1999) 7 SCC 209. *M. Nagaraj v. Union of India* (2006) 8 SCC 212. *State of Punjab v. Davinder Singh*, (2025) 1 SCC 1. *Janhit Abhiyan v. Union of India* (EWS Reservation), (2023) 5 SCC 1
[684] ORAEGBUNAM, I. K. (2023). EXAMINING THE LEGALITY OF 'AFFIRMATIVE ACTION'IN NIGERIA TODAY: ECHOES FROM SOME OTHER JURISDICTIONS. *Preorc Journal Of Gender And Sexuality Studies*, *1*.
[685] Aishwarya, S. (2014). Equality before Law and Affirmative Action under the Constitution of India: Whether the Creamy Layer Concept Is Still Relevant? *CALJ*, *2*, 46.
[686] Parmanand Singh "Equal Opportunity and Compensatory Discrimination-Constitutional Policy and Judicial Control" 18 *Journal of Indian Law Institute* 300 (1976)
[687] Ibid. Note 55
[688] For more kindly read Neil Aurelio Nunes (OBC Reservation) v. Union of India, *(2022) 4 SCC 1* Para 24 onwards.
[689] Wasson, Gabriel Patrick. "Affirmative Action: Equality or Reverse Discrimination?." (2004).

intensify divisions and delay hope of more classless society[690].

These policies can also lead to the result of irreversible stereotypes, having diversity of colour does not automatically lead to diversity of viewpoint and assuming a linkage between diversity of colour or race with diversity of viewpoints tends to destroy the fabric of the society by erroneously assuming a linkage between culture and experience of minority group. Moreover, these policies also lead to the erroneous view of group rights at the expense and exclusion of individual rights.

These policies are, no doubt, consistent with a natural law demand for reparation in favour of any marginalised group. However, one must not ignore the legality of it in light of legal positivism especially where freedom from discrimination is guaranteed in almost all national constitutions. The constitution is, in essence, colour blind to all forms of bias and prejudices and abhors any such form of discrimination, especially, when it tends to have a negative effect on the society. After all, the Constitution is a living organic document which must cater to the needs of the society while guiding its citizens to the right path of justice and equality. This is a continual exercise which must be taken by both the lawmakers as well as the law interpreters (the courts) and especially in a democratic society, politicians should not weaponize affirmative action policies to promote for vote bank politics. This would only lead to degradation of the society where instead of removing the barriers of prejudice, they would be reinforced instead. Furthermore, the lawmakers should be aware of the other methods to tackle racial or caste based discrimination and affirmative action should be used as the last preference for such means.

Since minorities in many nations have outperformed their respective majority populations without having the means to discriminate against those majorities, and frequently in spite of those majorities' ongoing discrimination against them, the notion that one can automatically read the injustices of the past into the disparities of the present becomes absurd. If the present were to cleanly repeat the past, it would be very nice, but the facts have not cooperated.

[690] Ibid.