
REASSESSING AFFIRMATIVE ACTION ACROSS JURISDICTIONS: NAVIGATING JUSTICE IN A GLOBALIZED WORLD

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ABSTRACT

We live in a world defined by a central paradox between in the era of Globalization and never-ending disparities. The concept of a borderless world grounded in meritocracy and universal human rights, yet entrenched inequalities based on race, caste, and ethnicity persist. Affirmative action, initially established to address historical discrimination, remains central to this contradiction. While designed to achieve substantive justice, the nation-state framework of affirmative action faces increasing challenges in the context of globalization. This paper contends that affirmative action remains necessary, but must be critically reassessed to address contemporary conditions. Three primary factors shape this debate: ideological tensions between neoliberal individualism and group-based justice, the influence of corporations through global diversity, equity, and inclusion (DEI) initiatives, and the emergence of transnational identities resulting from migration and global labour flows. Using a comparative analysis of the United States, India, and South Africa, this paper investigates recent legal and policy developments, such as the 2023 United States Supreme Court decisions on race-based admissions, the expansion of reservation criteria in India, and ongoing transformation initiatives in South Africa.

Keywords: Globalization, Affirmative Action, Inequality, Meritocracy, Neo-liberalism, Human Rights, Transnational, Reservation Policies.

CHAPTER I

INTRODUCTION:

We live in a world defined by a central paradox on one hand, globalization has characterized by the rapid movement of capital, & people across borders, promotes the notion of 'flat' world governed by the universal human rights & meritocracy; on the other hand, the world remains to continue with entrenched inequalities based on race, caste & ethnicity; Affirmative actions, aims to address the effects of discrimination by supporting disadvantage groups, occupies a central position within this ongoing conflict. The struggles of affirmative action began from the 20th century and is now being widely profound for a global reassessment; internationally, these are often referred to as temporary special measures;¹ The application of affirmative action differs from country to country, but the core rationale is remedial. This paper contends that affirmative action is still essential, although a tool for achieving substantive justice, globalization has rendered its traditional nation-state centric framework increasingly inadequate & more debated.

This tension appears in three core arguments:

1. Ideological contestation: Globalization spreads universal human rights norms that encourage group- based remedies, but it also promotes a dominant neoliberal that favours formal, colour-blind individualism instead of these approaches.
2. Corporate Co – option: Multinational corporations have become new spaces for diversity policies building their own 'diversity, equality, and inclusion'(DEI) systems. These can sometimes clash with or weaken government justice programs.
3. Transnational identities: Mass migration & expansion of global labour market created a complication in defining disadvantaged individuals or beneficiaries; this development challenges both fairness & practicality of policies built around historical industries;

This paper intends to show that reassessment of affirmative action. Constitution: an important response to evolving realities of law & justice in a globalized context through a comparative analysis of jurisprudence & policy trajectories in the United States, India, & South Africa. For example, in 2023, the United States supreme court in the case of *Students for Fair Admissions v. University of North Carolina*² and *Students of Fair Admissions v. Harvard*³ decided the race-based admissions are violating

¹ Colleen Sheppard, 'Mapping anti-discrimination law onto inequality at work' 151 Int'l Lab Rev 1, 10 <https://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2012.00132.x> accessed 12 October 2025.

² No 21-707 (US Supreme Court, decided 29 June 2023).

³ *Students for Fair Admissions v Harvard* [2023] 600 US 181

the equal protection clause, of the 14th amendment similarly, India has widened the scope of reservation to include economic criteria while South Africa continues to implement comprehensive race-based socio-economic transformation initiatives.

CHAPTER II

DOCTRINAL FOUNDATION:

Prior to analysing the impact of globalization, it is necessary to understand the legal provisions of affirmative action in three case study jurisdictions. These policies were developed for different objectives are justified by varying legal doctrines;

A. The United States: Individual Rights vs. Group Remedy

The term 'Affirmative Action' were rarely used by the US Courts during the 19th and 20th century to explain the remedial actions required of a defendant.⁴ In the year of 1964, the Civil Rights Act was implemented and it prohibits intentional discrimination on the basis of race, colour, and national origins. All government agencies, private sectors, educational institutions prompted by the civil law rights and executive orders started to adopt many plans. The constitutionality of affirmative action depends on the interpretation of the promise "equal protection of law"⁵ In 1978, the case of *Regents of the University of California V. Bakke*⁶, set the parameters of educational affirmative action. The court, in a fractured set of opinions, held that the university's special admissions program with its explicit racial quota was unconstitutional. However, the Court also held that race could be permissibly considered as one of several factors in a university's admissions process. Further, in the case of *Gratz v. Bollinger*⁷, The Court found that a university's policy of automatically awarding 20 points to applicants from underrepresented minority groups is unconstitutional and held that the university's automatic distribution of points based on race was unconstitutional.

In the case of *Grutter v. Bollinger*⁸, The University of Michigan Law School also considered race as a factor in its admissions process, but it did so without using a points system. The Supreme Court upheld the Law School's admissions policy, finding it to be a constitutionally permissible use of race because race was considered as one of the several factors among the attributes. Thus, from the cases of *Bakke*, *Gratz*, and *Grutter v. Bollinger*, it can be clearly found that the decisions from these cases were race-

⁴ See, eg, *City of Galena v Amy* 72 US (5 Wall) 705, 708 (1866)(the city's power had to "be exercised in favour of affirmative action to collect enough revenue to pay interest"); see also *Franks v Bowman Transportation Co*, 424 US 747, 777–781 (1976) (affirmative action as an equitable remedy).

⁵ US Constitution, Amendment XIV, s 1

⁶ *Regents of the University of California v Bakke* [1978]438 US 265.

⁷ *Gratz v Bollinger* [2003]539 US 244.

⁸ *Grutter v Bollinger* [2003] 539 US 306

conscious admissions in higher education. This scenario was changed from the cases of in the cases of *Students for Fair Admissions v. University of North Carolina*⁹ and *Students for Fair Admissions v. Harvard*¹⁰, The Court decided that race-based admissions are violating the equal protection clause under the 14th amendment. the governing law of US is still evolving and variously interpreted from the workplace to classrooms to gender discrimination.

B. India: A Constitutional Mandate for Representation

Affirmative Action refers to a system that seeks to increase the representation of women and minority groups in employment and education, particularly in contexts where these groups have experienced historical exclusion.¹¹ Affirmative action is widely used as 'Reservations'. This is based on the idea of distributive justice. In India, the concept of reserved quotas remains prevalent form and widely accepted predominant method. Reservations are implemented in many sectors. The Legal framework for Affirmative Action deals with the Right to Equality principle enshrines under Article 14 of Constitution of India and provision related to Affirmative Action through Article 15 & 16 of COI,1950. Article 15 provides the reservation for education sector, particularly, 15(4), 15(5), 15(6). The Supreme Court reaffirmed the reservation system in some cases which shaped the affirmative actions in the case of *Janhit Abhiyan v. Union of India*¹². In the case of *S. Vinod Kumar v. Union of India*¹³ in 1996, the Supreme Court held the validity of a government memorandum allowing relaxed evaluation criteria for SC/ ST candidates in promotions and thus the Court ruled it violated Article 335 of constitution. It is important to know that in the year of 2019, the 103rd Amendment aimed to introduce Economic Weaker Section in Higher education & Public Employment. Article 30 (1) exempted from the provision. This amendment marked a significant change in India's Affirmative policy. It aimed to create balance between addressing economic inequality and social representation.

C. South Africa: Transformation as a National Imperative

In South Africa, Section 7(2) of the Constitution deals with the provision on reservations or quotas, and it is implemented by the Employment Equity Act, 1998, and Broad-Based Black Economic Empowerment Act, 2003. The South African Constitution holds a significant position by establishing the Right to Equality & Equal Protection of Laws under Chapter II, Section 9. It prohibits unfair discrimination. Section 9 (2) explicitly deals with Affirmative Action by giving effect to equality and permits positive steps. Chapter III of the Employment Equity Act, 1998 deals with the provisions

⁹ *Students for Fair Admissions v University of North Carolina*

¹⁰ *Students for Fair Admissions v Harvard* [2023] 600 US 181

¹¹ Lopez S, 'Affirmative Action: Foundations and Key Concepts' (JSTOR Daily, 28 March 2019) <https://daily.jstor.org/affirmative-action-foundations-key-concepts/> accessed 15 October 2025

¹² (2002) SCC OnLine SC 1450

¹³ (1996) 6 SCC 580

related to Affirmative Action from Section 12 to Section 27. This Chapter places a responsibility on larger Employers. i.e., to implement Affirmative Action for over 50 employees, thereby maintaining the balance in the representation of all communities in the workplace. The early position of Affirmative Action is unfair and also violated the substantive Right of Equality. In the case of *Abbott v. Bargaining council for motor industry*¹⁴, it was decided that the Affirmative Action could only be used a defence by employers to establish protection against discriminations not as a tool to claim employment on the basis of policy. This scenario was changed in the case of *Minister of Finance & others v. Van Heerden*¹⁵, it decided that Affirmative Action means to achieve equality and not contrary to it. There is a threefold test to determine whether the measure falls under section 9(2) of the Constitution. Similarly, the Employment Equity Act does not establish an independent individual right to Affirmative Action.¹⁶ Recently, in the case of *Solidarity obo Erasmus v Eskom Holdings SOC Ltd*¹⁷, An employment practice to not shortlist any members of non - designated group amounts to absolute barrier to employment under Section 15(4) of EEA, 1998. Therefore, South Africa's Affirmative Action policy constitutes a legal framework designed to achieve substantive equality, rather than merely formal non-discrimination. The courts oversee its implementation to ensure that the policy addresses historical inequalities without creating insurmountable obstacles or resulting in unfair discrimination. This ongoing legal development demonstrates the balance between advancing equity and maintaining individual fairness.

CHAPTER III

GLOBALIZATION'S IDEOLOGICAL CROSS-CURRENTS

Globalization is more than just an economic process; In the context of affirmative action, it has generated a complex ideological landscape, compelling states to navigate competing pressures.

A. The Universal norm of non- discrimination:

Globalization has facilities the provision related to the understanding of human rights around the world. International treaties, most notably Convention of Elimination of all form of Racial Discrimination provides clear set of standards that explicitly substantiate affirmative action.

Article 1(4) state that '*Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals.....shall not be deemed racial discrimination.*'¹⁸

¹⁴[1999] 20 ILJ 330 LC

¹⁵ [2004] 11 BCLR 1125 CC

¹⁶ *Dudley v city of Cape Town* [2004] 25 ILJ 305 LC

¹⁷ (C1001/18) [2024] ZALCCT 18 (24 May 2024)

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, UNGA Res 2106 (XX) (entered into force 4 January 1969) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> accessed 17 October 2025.

Article 2(2) States ‘*Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them.....they were taken have been achieved.*’¹⁹

These provisions safeguarding the legal framework of domestic affirmative action program by not framing as “Reverse Discrimination” but act as a tool for fulfilling the obligations of international human rights. It also connects the policies of Indian and south Africa to a global idea of justice.

B. The Neoliberal counter – narrative of “merit”

Globalization in economics has promoted a significant counter ideology This prioritizes market logic, deregulation & individualism and influenced legal & social norms; within this framework, an ideal society is a “meritocracy” where individuals compete under equal conditions & success is attributed to individual talent rather than group identity. Neoliberal ideology serves as the legal foundation for opposition to affirmative action by reinforcements group- based remedies as follows;

- 1) Economically inefficient: policies reduced as distorting market outcomes by failing to select the most qualified candidates.
- 2) Unfair: these measures are characterized as penalizing members of majority groups such as white or Asian – American students in the US; “forward caste” individuals In India.
- 3) Illegitimate: reverse discrimination and violate the principle of colour-blind equality.
- 4) The judgement of *SFFA V Harvard*²⁰ decision implies the peak way of thinking in US chief justice Roberts opined that “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race”, this ideology provides pressures to the countries follow group – based system.

CHAPTER IV

GLOBALIZATIONS PRACTICAL IMPACTS: CORPORATIONS & MIGRATION

Beyond the diffusion of ideas, the transnational movement of capital and individuals increasingly complicates the practical implication of affirmative action policies.

¹⁹ ICERD (n 18).

²⁰ [2023] 600 US 181

A. The Multinational Corporation: A New Arena for Justice?

The rise of MNCs as a dominant global actor has created its own system of affirmative action called Diversity, Equity and Inclusion system. The policies mostly drafted in the headquarters of MNC'S.

- In the United States, after the Supreme Court's Students for Fair Admissions (SFFA) ruling, which addressed university admissions, corporations have become the principal context for affirmative action and diversity, equity, and inclusion (DEI) initiatives. These corporate DEI programs are currently subject to significant legal challenges from activists who apply the *Colour-Blind* rationale established by the SFFA decision.
- In India, a multinational technology company headquartered in Bangalore illustrates a significant dynamic case²¹. The firm's internal diversity, equity, and inclusion (DEI) policy, directed by its United States headquarters, typically emphasizes gender and LGBTQ+ inclusion, reflecting priorities common in the global North. However, this approach often neglects caste-based discrimination, which is a primary focus of Indian reservation policy. As a result, global corporate DEI frameworks can unintentionally marginalize or obscure the most urgent local forms of inequality.
- In South Africa the situation is even worse. A global MNC cannot simply imports its DEI programs because of the rigorous & perspective BBBEE Score Cards. These scenarios create a *glocal* tension. The DEI action of corporate MNC is often not aligned with state mandated Affirmative actions.

B. Transnational Migration and 'Beneficiary' Dilemma.

Globalization challenges the basic categories that affirmative action relies on these policies were drafted long time ago when national identities were clearer & Histories were mostly shared within the counties. Now, with more people moving across borders for work safety, these old categories no longer fit as neatly.

The beneficiary's dilemma in all three jurisdictions;

1. **In the United States**, the "Black" category in university admissions, originally intended to address the legacy of American slavery, now encompasses first- and second-generation immigrants from countries such as Nigeria, Jamaica, and Ethiopia. Although these students are classified as "Black," they do not share the specific historical disadvantages associated with

²¹ California Department of Fair Employment and Housing v Cisco Systems Inc et al, No 5:20-cv-04374 (ND Cal)

slavery and Jim Crow laws. Analyses indicate that these recent immigrants are disproportionately represented among Black students at elite universities.²² This development complicates the justification for remediation. Similarly, the "Asian-American" category, which served as the plaintiff group in *Students for Fair Admissions (SFFA)*, aggregates diverse populations, including seventh-generation Japanese-Americans, recent Hmong refugees, and affluent immigrants from South Korea.

2. **In India**, the reservation system is linked to 'socially and educationally backward' status *within the country*. The eligibility of Non-Resident Indians (NRIs) presents a challenge. For example, the child of a wealthy OBC or Scheduled Caste (SC) family raised abroad may seek a reserved university spot upon returning to India. The 'creamy layer' test was established to address domestic class mobility, not transnational wealth.
3. **In South Africa, this tension is particularly pronounced. Broad-Based Black Economic Empowerment (B-BBEE)** policies are intended for "Black" South Africans, defined as individuals disadvantaged by Apartheid. This policy framework generates significant social and political friction with recent immigrants from other African countries such as Zimbabwe and Nigeria. Although these immigrants are racially "Black," their status as non-citizens who did not experience Apartheid excludes them from B-BBEE benefits. This situation directly connects the reassessment of affirmative action to ongoing national debates about xenophobia, citizenship, and the definition of South African identity.²³

In each of these cases globalization has made it harder to define who has faced historical disadvantages & the categories used in affirmative action seem increasingly unfair, arbitrary & clumsy.

CHAPTER V

DIVERGENT FUTURES: THE TRAJECTORIES OF REASSESSMENT

The global pressures have not led to the single global trends instead, the reassessment shape through traditional legal cultures leading to three distinct & divergent future paths.

1) The US trajectory:

The US has adopted judicial interpretations to abolish state-sponsored / race-based policies

²² Mary C Waters, *Black Identities: West Indian Immigrant Dreams and American Realities* (Harvard University Press 2001).

²³ Jonathan Crush and Godfrey Tawodzera, 'Exclusion and Inequality: The Case of Foreign-born Workers in the South African Labour Market' Southern African Migration Programme Policy Brief 39 (2017).

influenced by the ascendency of new – labelled ideologies, the legal framework emphasizing the principles of equalities, After the decision of SFFAV Havard, the universities & Corporations seeking alternative measures to promote diversity, these efforts attempt to achieve the objectives of affirmative action.

2) The Indian Trajectory:

India is taking a different path instead of ending reservation, it elevated in another scope; the 103rd amendment introduced the concept of 10% EWS quota of the population which made paradigm shift based on economic criteria by delinking the group – based system (Caste). This policy appears to address the economic concerns arising from globalization which has resulted in a new demographic of economically disadvantaged individuals from forward caste who perceive themselves as marginalized.

3) South Africa Trajectory:

South Africa is strengthening its approach with ongoing & severe racial inequality; the government still views B-BBEE and EE as essential for national stability & transformation. The reassessment here is not whether to have “affirmative action, but how to make it better, concentration of benefits among black elite & users of corruption. The government views its group- based, transformation-oriented model as a core part of its identify since the end of *Apartheid*.

CHAPTER VI

CONCLUSION

The global reassessment of affirmative action highlights the significant smugle of applying 20th centuries legal framework to the realities of 21th century. The US, India, South Africa, each has its own distinct histories grounds for the evolution of justice. The concept of globalization, initially anticipated to promote greater connectivity & equity, has instead accelerated debates surrounding affirmative actions. It has promoted individualism, challenging group-based remedies, simultaneously reinforcing human rights transnational. Additionally, Globalization paved way for the development of DEI Policies by MNC's which may / may not align with national initiatives; As migration increases, it becomes harder to distinguish between those who benefit from certain policies and those who do not. This makes it more difficult to justify policies that rely on a country's history of harm.

No straightforward solution has emerged. The United States' adoption of *Colour-Blind* formalism risks perpetuating the inequalities it intends to eliminate. India's shift toward economic criteria may

undermine the foundational objectives of caste-based reparation. South Africa's government-led changes may clash with global markets and increase inequality within the country. Because of these issues, traditional models do not work well enough. To achieve justice in today's globalized world, we need new ideas that support real equality. These solutions should consider complex global identities, address ongoing economic gaps, and recognize that many people still do not have equal opportunities.