

AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION

1 Affirmative Actions as Compensatory Justice

In the past various kinds of atrocities were perpetrated on certain sections of the society, namely the blacks in the United States of America and Scheduled Caste and Scheduled Tribe Communities in India. "Whites were thought to be defiled by social or residential proximity to blacks, intermarriage was taboo, blacks were denied the same level of public goods—education and legal protection—as whites, were restricted to the most menial occupations, and were barred from any positions of authority over whites. The visceral feelings of black inferiority and untouchability that this system expressed were deeply ingrained in the members of both races, and they continue, not surprisingly, to have their effect. Blacks still form, to a considerable extent, a hereditary social and economic community characterized by widespread poverty, unemployment, and social alienation".¹ Therefore there is need to repair the injury caused to them by preferring them none to those who are not victims of past injustice for placement in jobs and academic and professional programmes. Such an Affirmative Action Programme is primarily justice that is compensatory in character. This is brought out clearly by President Lyndon B. Johnson by the image of a shackled runner :

"Imagine a hundred yard dash in which one of the two runners has his legs shackled. He has progressed 10 yards, while the unshackled runner has gone 50 yards. At that point the judges decide that the race is unfair. How do they rectify the situation?"

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Do they merely remove the shackles and allow the race to proceed? Then they could say that "equal opportunity" now prevailed. But one of the runners would still be 40 yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the forty yard gap; or to start the race all over again? That would be affirmative action towards equality".²

Affirmative Action prefers those victimised groups to others for placement in jobs and academic programmes corresponding to their percentage in the population.

II. *Objections Against Affirmative Action*

It is urged that the blacks and the scheduled castes and the scheduled tribes must submit themselves to open competition with others on the basis of equality. This argument is unfair. For, it is the same society which, by its past victimisation, has incapacitated these sections of the society to further their own welfare and has made them incapable of competing with others on equal terms.

Secondly, the advocacy of Affirmative Action is said to be blatantly inconsistent. When discrimination is practised against the blacks, it is urged that race is irrelevant. Such practices are arbitrary, capricious and injure them without even a semblance of justification. But when the blacks are preferred to other groups for the placement in jobs and academic programmes, it is claimed that race is relevant.

To this an advocate of Affirmative Action may say that race was used to illtreat the blacks in the past whereas at present, race is not really the basis for preferential treatment of the blacks. Still race is considered to be irrelevant. If so, then, what is the basis of these programmes? The injuries caused to the

blacks, and the consequent disadvantageous position they were driven to, necessitate Affirmative Action as a form of compensatory justice—this, and not race which is relevant. However, the determination of those who are to be compensated is relative to the determination of the victims of past injustice. As race becomes a mark or indicator of the injured only because of its consistent use against the blacks in the past, it becomes inevitable to take race into account for distributing the social goods to the past victims of injustice.

Thirdly, it is pointed out that only the non-victims of past injustice are benefitted by Affirmative Action. The critics argue that, as the inability of the blacks to compete with others on equal terms is attributed to their past ill-treatment, we can conclude that the relatively better qualified individuals among the blacks should have altogether escaped from past injustice. Is this sound? It seems that one can draw the loss of potentialities and the consequent inability to compete with others, from past ill-treatment, whereas it is not valid to infer that the beneficiaries of Affirmative Action are those who have altogether escaped from past injury. For, a few injured people are still able to develop their capacities because of their robust and extraordinary personality traits, either inherited or acquired; this becomes truer because of the possibility of the injuries being not grievous enough to crush them. Perhaps Affirmative Action has not benefitted the most injured; yet it is not valid to draw the conclusion from the said premise that compensatory justice is not awarded to the victims of past injustice. This envisages the need to devise programmes to compensate the most injured and supplement them to Affirmative Action and not the giving up of preferential treatment.

Obviously the present day situation for blacks is far better than what it was fifty years ago. Therefore, the young blacks

who now apply for placement in educational institutions or jobs are not those who were wronged. Hence, there is no need to compensate them. But, are there changes to such an extent as to set aside compensation.² It is a moot point. In addition, even those who were not ill-treated in the past have felt the impact of the victimisation of other blacks. As their negative traits such as the lack of self-confidence, self-respect, etc., are the indirect consequences of the victimisation of the other members of their group, it behoves on the whites to compensate them.

Fourthly, Affirmative Action damages the self-esteem of the blacks. The whites think that the blacks constitute an inferior race and they never give credence to their merit. Even when a black secures a job or a seat in a college entirely by his merit others aver that preferential treatment, and not merit, has played a part in his selection.

III. *The Group Approach to the Problem.*

Various arguments are urged against the group approach to the problem.

1. The realization of the truth that the individual and not the race is an ethical unit is a great achievement. The moral default committed by a member of a race is one for which he and not the entire race is responsible. That "collective guilt" and "collective responsibility" are unjustifiable on moral grounds. Prof. James Seth rightly asserts that moral progress consists in the gradual discovery of the individual. "The fundamental law of moral progress, whether in the race or in the individual may be stated in essentially the same form. The progress is, in sum and substance, the gradual discovery of the individual. It is difficult for us to realise that the idea of individual moral independence and responsibility is the product of long centuries of moral

development. The ethical unit of earlier times is the tribe or the family; later it becomes the state; later still, perhaps the caste or class; and last of all, the individual."³

The truth that the individual is the ethical unit is not lost sight of even in the race-based Affirmative Action. As ill-treatment of the blacks in the past was based on race, it becomes necessary to take note of it in order to identify easily the persons whom compensation is owed. That the individuals alone count is paramount and race is only an inevitable means used to trace the injured. But care should be taken to find out whether there is a high degree of correlation between past injustice and the groups selected for Affirmative Actions. Otherwise it cannot be fair.

The problem of identifying the victims of discrimination can never be exaggerated. Suppose it is held that the employment of the members of a group, say 'A', in the medical field, is less than their ratio in the population. This is not a sufficient ground to show that they are discriminated against. Perhaps they are disinclined to take up jobs in this field. Therefore, the discriminatory practices against the members of group 'A' can be cited as a cause for their inadequate representation in employment but not *vice versa*. In addition, some of the backward groups are not those who were subjected to ill-treatment in the past. Therefore, the determination of the facts regarding past victimisation *vis-a-vis* groups is difficult, but indispensable.

2. What is the meaning of group compensation? What is of importance in any collective compensation is the criterion in the light of which the compensation paid to the group is distributed to the members of the group. Compensating arbitrarily only a few members does not mean that the group is compensated. The most injured among the discriminated who, now, are incapable

of applying for jobs or seats in colleges are not benefitted by Affirmative Action. In the absence of a fair distribution of compensatory justice to all the injured, the so-called compensation is, in truth, empty and misleading.

In considering this view, it is necessary to reiterate that Affirmative Action aims at compensating only the individuals and that the groups constitute only marks for identifying the injured. Hence, "group compensation" is logically inexact. Affirmative Action certainly serves the purpose aimed at, though some may fail to come up to a level in order to derive the benefits under this scheme of dispensation. This fact brings to the fore that Affirmative Action must be supplemented by other programmes for rendering justice to all deserving of compensation.

IV. *Reverse Discrimination*

Attempts are made to justify the laying of the burden of rectification on the shoulders of the whites. The whites who neither participated nor, in any way, abetted others in the commission of injustice against the blacks in the past, lose the opportunities for study and employment as a consequence of the introduction of Affirmative Action. These whites owe no debts to them. Therefore, why should it be incumbent on them to bear the burden of Affirmative Action? It is better for the entire society to share the burden; it is more so primarily because of the inability to place the burden on the shoulders of those who perpetrated injustice against the blacks in the past.

It is said that the world is of such a nature that actions, intended to promote the welfare of the greatest number, at times bring a little suffering for a few. For instance, the execution of large scale projects like dams or industrial houses, though improves the economic conditions of the many, does injure some, especially because of the acquisition of their immovable proper-

ties situated in the areas in which the projects are to be executed. But the suffering of the few as a consequence of the measures taken in the larger interests of the people is a lesser evil and therefore justified. Affirmative Action is one of such measures.

This is unsatisfactory. What is surprising is that those who urge this argument are oblivious of the right on the part of the victims of these welfare schemes for compensation and if their rights are not to be given just consideration, then, by applying the same logic, one may legitimately argue that there need be no compensatory justice for blacks as well.

Many whites, in truth, are the beneficiaries of the discriminatory practices of the past against the blacks, though, they are not at all responsible for such practices. Had the Blacks been given equal educational opportunities in the past, the corresponding number of whites would have been excluded from educational institutions. Thus, the education of many whites is owing to the denial of opportunities for the Blacks. Therefore, it is not unfair that these Whites should pay the price of rectification.

This is also untenable. It is obvious that no one, after all these years, can link the loss of a particular Black with the gain of a specific White. In other words, the view is too hypothetical and too general to carry conviction for stipulating debts from any individual White, though, at least, a more benevolent and sympathetic attitude can be expected of the enlightened Whites as a result of this argument.

The original objection in the form of 'Reverse Discrimination' carries much weight. While considering it, however, one should take into account the following.

The best method of compensating past injury and thereby alleviating the lot of the Blacks is to provide them with educational

and employment opportunities. That means the denial of these opportunities to some Whites. Therefore, the burden is such that it can be laid only on the shoulders of these Whites and not on the entire society.

The past discrimination of the Blacks is not on the same footing with the alleged Reverse Discrimination of the Whites. In fact, the Blacks were ill-treated in the past merely because of their race and that they were thus deprived of their right to treatment as an equal. In other words, the fact that the Blacks were not treated with the same respect or concern shown to the Whites is rightly viewed to be paramount; but in Affirmative Action the Whites are unfavoured not because of any prejudice or bias, but because of a rational calculation of the best and just distribution of the limited resources of the society. The Whites enjoy the right to treatment as an equal, though they do not share equally the common good. What each individual has a right to is not an equal share of the common good but a consideration equal to the consideration given to others. ⁴

V. Utilitarian Arguments

The advocates of Affirmative Action claim that it produces the best consequences for society and that this is an overriding factor than the objections urged against it.

It is asserted that "strong affirmative action involving significant preference should be undertaken only if it will substantially further a social goal of the first importance. While this condition is not met by all programmes of Affirmative Action now in effect, it is met by those which address the most deep-seated, stubborn, and radically unhealthy divisions in the society, divisions whose removal is a condition of basic justice and social cohesion."

Is this claim justifiable? Does Affirmative Action promise the eradication of "the stubborn residues of racial caste" and usher in a more integral society in the future? It seems that it may not promote such a highly desirable form of social change. Affirmative Action is looked upon by the critics as nothing short of Reverse Discrimination in which there is only a rearrangement of the groups for discriminatory purposes. The Whites who now fall outside the Affirmative Action category can and will claim compensatory justice for themselves at a later date. Thus discrimination will be a vicious circle. Moreover, even now, the selection of groups for Affirmative Action is considerably vitiated by the claims and counter claims by various groups for preference instead of justice. The goal of social harmony as a utilitarian value of highest importance can never be realised by means of the race-based Affirmative Action. The indispensable prerequisite for realizing the goal of social harmony is the giving up of the habit of thinking and acting in terms of race.

Again, suppose injustice is caused to one without a reference to the group to which he belongs; can it, therefore, cease to be an evil? Therefore, what is of paramount importance is the realisation that injustice, in any form, irrespective of its race or caste basis, is an evil which must be rooted out at any cost. In addition, this is reinforced by the consideration that mere utility, not ennobled by justice, is not acceptable. If preferential hiring of Blacks is justified on mere utilitarian grounds, then, by applying the same logic, one may claim that discriminatory practices against Blacks, if and when they increase utility for society, is right and reasonable. Therefore, what is basic is justice, not mere utility, from which no one can swerve without committing immorality.

The critics bring to the fore that Affirmative Action shuts out enormous talent from education and employment and thereby leads to a lowering of standards. People have to be contended with the poor performance of doctors, engineers, administrators, lawyers, judges etc., who sadly lack excellence. Worst of it all is the preferential hiring of teachers; this hinders the growth of not only the Whites, but also the very persons for whose development Affirmative Action is designed. Therefore Affirmative Action either keeps the society at a dead level or, perhaps, lowers it. In short, there can be highest utilitarian value for society if and only if the most qualified candidates are selected on the basis of fair and open competition.

To this, one may counter : Was ' merit ' an impartial and real criterion of selection in the past? The fact remains that donations, corruption, and influence played a vital role in any admission procedure. What is surprising is that those who were not concerned with the selection of less qualified Whites in preference to better qualified Whites till date raise a hue and cry over preferential treatment of blacks on the basis of the alleged lowering of standards.

True, that many are not unfamiliar with the lowering of standards due to turning a blind eye to merit in certain cases; however, these constitute not the rule, and therefore, attempts should be made to put an end to them rather than exaggerating, escalating, legalising and granting official sanction to them. In short, it is better late than never to set things right in order to recognise the value of merit on utilitarian and social considerations.

VI. *Conclusion*

It is obvious that the incompatibility between rendering compensatory justice to the Blacks and the principle of non-

discrimination of the Whites is unfortunate, and seems to be insoluble. Much can be said in favour of both the principles involved. Hence, the choice before us is not between a right and a wrong. The best that can be done in search of a solution is to attenuate the evil arising out of both the courses.

First of all, the government should scale down the level of "reservation" in colleges and employment. As a step towards it, caste should be taken to weed out the non-victims who constantly attempt to join, by any means, the Affirmative Action category. This is a very difficult task, especially because of the demands of almost every group for preference instead of justice. This difficulty is increased all the more by the emergence of spurious castes and communities in order to gain preferential treatment and the assurance given by politicians to certain "forward castes" on the eve of elections that they will extend preferential treatment to them if they vote for them. As a matter of fact, many groups benefitting from Affirmative Action in the name of "Backward classes" in India are not those who were subjected to injustice in the past. Persons who were unwilling to avail themselves of the opportunities for study should be distinguished from those to whom those opportunities were denied, for the latter can claim for compensatory justice whereas the former cannot.

Secondly the number of places reserved for the favoured groups should not exceed their percentage in the general population of the country. This is stipulated in order to reduce the incidence of Reverse Discrimination as far as possible. As Affirmative Action is practised today in India, reservations are not only as high as 70 per cent but also without any correlation between groups and past injustice. This trend has to be changed. Even in those cases where the correlations between groups and past injury is exact, protective discrimination should be only for the

poor. Assessing economic backwardness even among the Blacks and scheduled castes and scheduled tribes is essential because the privileged section of the under privileged society should not be permitted to monopolise the preferential benefits. An economic criterion in the form of family income can be stipulated in order not to be "overinclusive". Moreover, periodical reviews ought to be made primarily to delist the relatively better off individuals among the favoured groups who had attained some progress as a result of the preferential treatment. But total opposition to Affirmative Action cannot be viewed as legitimate, because the atrocious and high degree of discrimination practised against the Blacks in the United States of America and the Harijans of India justifies Affirmative Action, though this may involve Reverse Discrimination of a much lesser degree in comparison with the past discriminatory practices. Without Affirmative Action these Blacks and Harijans will never have equality or human life.

Thirdly, even in filling up the stipulated number of vacancies reserved for the favoured groups, the employers should make special efforts to appoint the Blacks, not only because they are Blacks, but also because they are as qualified as any other applicant. Under no circumstances unqualified Blacks should be hired or promoted. When this criterion is adopted to fill almost every job and not just the 'quota' determined on the basis of their presence in the population, then, it becomes grossly discriminatory and unfair, especially in those thickly populated areas of the world where unemployment is acute.

In this context, it is necessary to interpret the word 'qualifications'. Suppose there are vacancies for the post of clerks in banks. In filling up these vacancies the Blacks are rejected on the ground that they are 'unqualified' or "less qualified" compared to the Whites. But it is pertinent to point out that the Blacks said to be "unqualified or less qualified" are those who

possess the qualifications on the basis of which the whites themselves were appointed as clerks in banks ten or fifteen years ago. The point is that these Blacks satisfy the criterion laid down for these posts a few years ago, and that these qualifications are really adequate to perform efficiently the clerical job. Therefore, the expressions "unqualified" or "less qualified" are relative to the growing stiff competition for employment and they do not in any way undermine the efficiency of the Blacks, if they are appointed in spite of these labels. Notwithstanding this, if these Blacks are classified as unqualified, then, it entails the truth that the Whites selected for the same or similar posts in the past are unqualified.

The word "qualification" need not necessarily mean merely the grades secured in the university examinations. Suppose the Blacks, if they are admitted in a medical college, will later on serve the people in remote villages or serve the poor or those sections of the society where the Whites are not interested, where the services of the Whites are not forthcoming in spite of the best efforts of the government. In such cases, the Blacks are better qualified than their rivals, because of their willingness to satisfy an important social need. Hence, the interpretation of "qualifications" should be stretched so as to include the institutional, professional and social needs. However, there can be no relaxation of the basic criterion, namely, they should be able to learn the subjects taught.

As stated already, preferential hiring of less qualified is not justified on two counts. 1) This is unfair to the better qualified whites. 2) It is not wise to entrust public health, defence, law, public works, administration, justice, teaching, etc., to the incompetent. To offset these evils, it can be prescribed that Affirmative Action should aim at improving the capacities of the favoured groups. The government and private agencies ought to conduct

special coaching classes for them and thereby improve their potentialities in order to compete with others either to secure seats in educational institutions or placement in jobs. They should be trained to compete. Past injustice should be the basis of selection of candidates for these training programmes; but competence should be the basis for placement. Though this is still discriminatory against the Whites, because of their exclusion from such programmes, the incidence of Reverse Discrimination is, nevertheless, reduced; furthermore, this takes the wind off the rails of the advocates of meritocracy against Affirmative Action.

Affirmative Action, though inevitable, is an inadequate instrument for compensatory purposes. Other programmes such as the allotment of houses, supply of subsidised food, fuel for cooking, dress materials, health care programmes, governmental allowances etc. should be devised to uplift the most injured and also to spread the burden of compensation fairly on the public at large.

Lastly, but not least in importance, is that Affirmative Action programmes should be only a temporary measure. The preferences should be on the principle of "thus far and no further"; for the aim is to put an end to the need for preference. It should not continue a moment longer than necessary.

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NOTES

1. Thomas Nagel, "A Defence of Affirmative Action" in *Ethical Theory and Business*, edited by Tom L. Beauchamp and Norman E. Bowie, Prentice Hall, Inc., Englewood Cliffs, New Jersey, p. 485.
2. Johnson's Executive Order 11246 is cited in Fagothey's "Right and Reason" in *Ethics in Theory and Practice*, The C. V. Mosley Company, St. Louis, Toronto, London, 1981, pp. 421-422.
3. James Seth, *A Study of Ethical Principles*, William Blackwood and Sons, London, p. 325.
4. Rashdall's view is cited by William Lillie in *An Introduction to Ethics*, Methuen & Co. Ltd., London, 1955, p. 317.
5. Thomas Nagel, "A Defence of Affirmative Action" in *Ethical Theory and Business*, p. 485.

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