

AFFIRMATIVE ACTION IS *NOT* REVERSE DISCRIMINATION

Background

Affirmative action (AA) is one of the most profound public policies ever introduced by the American legislature in the twentieth century (Soni, 1999). In 1961, President John F. Kennedy signed Executive Order 10925, ruling that federal contractors should “take affirmative action to ensure that applicants are employed without regard to their race, creed, color or national origin” (Shaw and Barry, 2004). The policy was originally conceived as a way of ‘going the extra mile’ to attract and retain minority employees (Noe, Hollenbeck, Gerhart and Wright, 2003), who hitherto had been underrepresented in the workplace, relative to their proportion in the population. In the American experience, minorities (mainly people of African and Hispanic origin) and women were discriminated against by white employers.

Most African Americans are descended from slaves who had worked in the plantations of the South. Following their emancipation after the American Civil War, they were discriminated in the workplace, in schools and colleges. After affirmative action became law, many white males felt that they were being discriminated against, in favor of minorities and women. To them, affirmative action is ‘reverse discrimination,’ i.e. a discrimination against a majority race in favor of minority races and women.

Australia has its own version of affirmative action in the form of Equal Employment Opportunity for Women Act 1986, and the Racial Discrimination Act 1975 (Bush, 1998; Nankerrvis et al., 2002). Malaysia had her ‘affirmative action’ (Klitgaard and Katz, 1983), the New Economic Policy (Ayob, 2004), following the racial clashes of 1969, to give preferential treatment in corporate equity, and places in higher education to the indigenous peoples (*‘Bumiputra’*), who form the majority (Rasiah and Shari, 2001; Chitose, 2003; Cohen, 2004).

The purpose of this paper is to argue that affirmative action is *not* reverse discrimination, but simply a policy to contribute to diversity in the workforce as a matter of distributive justice to the diverse groups in society. ***Therefore, the position I am taking is that affirmative action is ethically and morally good.*** Before we go into the arguments for this position, let us review the philosophical theory underpinning the policy, its rationale, and criticisms of the theory by people who oppose affirmative action.

Philosophy of the Theory

The theory that is widely used to support affirmative action is *compensatory justice* (Fiss, 1996; Garret, 2004; Shaw and Barry, 2004; Sher, 2005; McElroy, 2005). This refers to the extent to

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which people are *fairly compensated* for their injuries by those responsible; just compensation being proportional to the loss inflicted (Velasquez et al., 2005). Compensatory justice requires that individual victims be compensated by the perpetrator(s) of the injustice. The application of the theory is quite straightforward in the case where the identities of the victim(s) and the perpetrator(s) of injustice are known, and both are alive. Take a simple example: Doe had been wronged by Smith through the latter's reckless driving which had caused grave damage to Doe's property. Doe went to court to make his claim for compensation. To achieve justice, Smith must pay a certain sum to Doe; and when Smith has settled the compensation, justice would have been served.

This theory is now being extended to affirmative action, where the victims of the injustice are not single individuals but a whole community (or gender), namely dead ancestors of minority races who had served as slaves. As for gender discrimination, the victims were women who were passed over in job recruitment or promotion in favor of white males.

How does compensatory justice fit in with ethical theories? Compensatory justice is concerned with the *fair treatment* of members of social groups, or the seeking of ways to compensate other groups for past injuries (Shaw and Barry, 2004). The word *fairness* is not easy to define objectively; it is equally thorny to ensure fairness. Ask any parent to define fairness in the way they treat their children, and one will hear a diversity of definitions. In the workplace, fairness means giving 'equal' treatment to each and every employee, in terms of pay raises, promotions, and opportunity for career development (training courses, sabbatical leave etc). Injustice is created when similar cases are treated differently, as for example when two employees of different ethnic backgrounds are treated differently on the basis of race, *ceteris paribus*.

According to American law, there are three necessary conditions, in compensatory justice's traditional formulation (Cooley, 2003). The *first* is that the action that inflicted the injury was wrong or negligent. In order to justify compensatory damages, the action must not only injure the claimant, but the injury must be the result of wrong or negligent behavior on the part of the defendant. The *second* condition for claiming compensatory justice is that the agent's action was the real cause of the injury. In other words, the agent must have actually caused the harm; an agent with no moral culpability can never owe compensation to an injured party. The *third* condition for compensatory justice is that the agent has to have inflicted the injury *voluntarily*. This condition is not met if the act was done due to pressure from a third party, and in this case, there is no moral responsibility for the agent to compensate the victim.

Rationale for the Policy

The phrase "affirmative action" was also used in President Lyndon Johnson's 1965 Executive Order 11246 which required federal *contractors* to take 'affirmative action' to ensure that

applicants are employed, and that *employees* are treated during employment, without regard to their race, creed, color, or national origin. The most compelling reason for affirmative action is that in the past women and minority races have been discriminated in jobs and higher education in favor of white males. Affirmative action was instituted to correct this past injustice by giving some preferential treatment to these disadvantaged groups so that the workplace and colleges would see a degree of diversity that reflects the diversity of the nation at large. This is the essence of the compensatory justice.

During the slavery period, whites had treated blacks like they were subhuman, to be bought and sold in the market place, pushed to the limit to serve their white 'owners' (Brown, 2004). Escaped slaves were doomed to die by hanging, for their 'crime'. Keeping them as slaves and abusing them were not crimes; after all, they were only 'Negroes'! David Hume, the Scottish philosopher, wrote in the 18th century that 'negroes' were an inferior race (Vasey, 1998), and might have to be treated differently.¹ In fact many Western philosophers' writings of the period sounded 'racists' by today's standards (cf. Morton, 2002).

As ethics and morality develop within a society, new demands are made upon governments to take a fresh look at entrenched values and mores. This was further buttressed by the civil rights movement spearheaded by Martin Luther King, Jr. who had to make the ultimate sacrifice for what he believed in. The main justification for affirmative action is atonement for past misdeeds, or an attempt at a public apology for the 'heinous crimes' of slavery, segregation, and also mistreatment and marginalization of women.

Criticisms of the Theory

Two of the criticisms for justifying affirmative action as a form of restitution and two other criticisms not related to the restitution issue will now be discussed.

First, it is unfair that the cost of the restitution be borne by young white males, when the perpetrators and beneficiaries of discrimination are older white males (Groarke, 1990), thus violating the principles of restitution. Since the present young white males did not inflict the discrimination (racial or gender), but their forefathers, they should not be penalized.

Second, the *victims* of discrimination are also of the older generation (and some may be dead by now!) but they do not receive any compensation; instead it is given to young minorities and women of the present generation. This new generation should therefore compete with all the rest of the job applicants; and let the best man or woman, regardless of color and creed, take the job advertised or the promotion offered. The critics are suggesting that compensation be given to older minorities and older women who were the *actual* victims of past discrimination.

¹ Hume (1711-1776) wrote: I am apt to suspect the Negroes and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences (cf. Morton, 2002).

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Third, affirmative action is no longer needed as society (referring to North America) has almost solved the problem of employment discrimination (Soni, 1999). These critics assume that racial discrimination in the workplace is almost eliminated; and if there is under-representation of any minority group or women, then this is due to lack of qualified candidates from those groups – not because of deliberate discrimination. In reality, discrimination is very much alive in America (see DeSario, 2003).

Fourth, affirmative action promotes inefficiencies in the workplace because minorities and women are hired and promoted to jobs for which they are not qualified (Soni, 1999). These critics assume that under affirmative action, women and minorities are being hired merely to meet targets of affirmative action, even though they are not qualified.

Critics' Objections

In this section I will try to synthesize the critics' *objections* to affirmative action and why they are saying that affirmative action is 'reverse discrimination,' and therefore, morally bad.

The most profound objection to affirmative action is that this policy deprives white men of their legitimate rights (Shaw and Barry, 2004) because they are now being *discriminated* against for no fault of their own. They become victims of circumstances, being caught in the middle of a social policy to correct a past injustice perpetrated by their forebears. As some of the successful court cases show, their point is well received by some judges – that affirmative action has turned out to be reverse discrimination. But some other judges do not concur with the verdict, thus sending out mixed messages on the legality of affirmative action. Himma (2002) argued "that there is no general right *not to be discriminated against* on the basis of race or sex; each person has, at most, a right not to be discriminated against on the *basis of stereotypes relating to race and sex*. Moreover... the most qualified applicant does not have a right to the position [because he] cannot acquire a property right in another person's property simply by having certain abilities and skills."

Secondly, affirmative action (AA) itself violates the principle of equal opportunity; thus the use of racial discrimination to fight racial discrimination seems to be illogical and beyond reason. Because AA is perceived to be reverse discrimination, it is clear that the solution is no better than the problem it is trying to overcome. The critics are saying that AA has the same elements of prejudice and stereotyping as racial discrimination, except that the majority, and 'superior' race or group, is now the victim.

Thirdly, these critics are claiming that 'color blind' and 'gender blind' policy will achieve social goals better than affirmative action. Presumably, these 'social goals' include *equitable distribution* of opportunities for all social groupings, and diversity in the workplace that reflects the population diversity outside. However, it is not certain whether they would consider *compensatory justice* as another social goal that is morally good in itself. If the latter is a

legitimate social goal, it is doubtful whether it can be achieved by having a *laissez-faire* policy scenario. It is for this very reason that society has taken upon itself to introduce deliberate interventions to try and maneuver society towards the goal.

Finally, and perhaps the most common objection is the fact that compensatory justice should not be paid by a *group*, but by the *actual individuals* who perpetrated it; and it should benefit the actual victims. It does not matter to these critics if both parties are no longer around! They might not mind if these jobs and promotions are given to better qualified minorities or women who have competed on a level playing field. The contention only starts when these jobs are given to less qualified people from whatever social group. The critics are suggesting that compensation be *funded* by the older white males.

Why Affirmative Action is Justifiable

Affirmative Action Is Noble. Affirmative action cannot be reverse discrimination. **First**, *discrimination*, as it is widely understood, is accompanied by *prejudice* and *stereotyping* of groups. *Discrimination* carries a negative connotation (Haslett, 2002). The perpetrators of discrimination are motivated by hatred and are driven by a feeling of superiority over minorities. It is synonymous with *being biased*, bigotry or racism. Conversely, affirmative action is a product of advanced human endeavor, ingenuity and soul-searching to find the most amicable solution to centuries of human injustice. The intent of affirmative action is *noble*, being based on genuine desire to correct serious wrongs of the past, not revenge.

In Islamic ethics, an act is judged by its *intent* – good intent implies high moral worth; but bad intent (e.g. giving charity to gain political mileage) has no moral worth, and attracts only God's wrath. This principle is similar with the Kantian ethical system, which posits that an act has moral worth if it is done only out of a feeling of duty to fellow human.

Greatest Good for the Greatest Number. True, affirmative action has produced some unintended side effects such as depriving a *few* people of their deserved rewards. This is unavoidable in any social policy – since in any process of change there are always *gainers* and *losers*. Overall, the gainers are expected to outnumber the losers. In the job allocation issue, if there are ten positions available, and three are reserved for minorities, there are still seven positions available for the majority. For the common good, surely, it is not too much to ask the eighth 'majority' candidate who failed to be given a job, to find another job elsewhere. Such a small sacrifice pales compared to the injuries suffered by the minority in years past. Affirmative action stands for the greatest good for the greatest number, as proposed by utilitarianism.

Affirmative Action Isn't Bigotry. The British are more 'creative' when they replace *affirmative action* with *positive discrimination* (Acton, 2000). Affirmative action has nothing to do with racism; nor bigotry. The eighth 'majority' candidate did not get selected *not* because there was *racial prejudice* against his skin color, contrary to what some people claim (cf. McElroy 2005). He is deselected not because he comes from an 'inferior' race, but because society thinks that the 'greatest good for the greatest number' principle should take precedence over any individual's private good. The public interest has to be given greater weight than the individual's interest – something not quite palatable in capitalistic Western societies, where individualism (Augoustinos et al., 2005) overrides collectivism. This sacrifice in the name of collective good is itself a highly moral act.

Making a Level Playing Field. I would advocate affirmative action as a *temporary* policy to give time to the underprivileged group(s) to catch up with the more fortunate group.² Where the 'playing field is not level,' it is necessary to consider the handicaps faced by underprivileged group(s). For instance, if rural students from very poor family background, with deprived school facilities, are made to compete for admission into state universities without special considerations, like what prevailed before 1971 in Malaysia, then the university will be 'monopolized' by students from urban areas. Historically, most Malays lived in rural areas and most Chinese lived (and still live) in urban areas; so, the university's student body would be dominated by ethnic Chinese. If this persisted over the years, there would be gross injustice to the indigenous peoples of Malaysia in their own homeland. It stands to reason that social intervention is necessary to correct the imbalance, so as to achieve a certain degree of diversity in university enrolment. In this case, 'affirmative action' is not aimed at achieving compensatory justice, but more at *distributive* justice. Affirmative action here is not racism in the sense that the group that has to make the sacrifice is perceived to be an inferior group, like the blacks used to be viewed in America by Caucasians.

Affirmative Action Is Pro-Meritocracy. These days, the buzzword is 'meritocracy'. Meritocracy is anything that we want it to be! DeSario (2003, pp. 509-510) suggests the use of "a quasi-meritocratic model that relies heavily on egalitarian ends [to define] merit [so that it] has a direct link to justice." In other words, meritocracy is not simply looking at one dimension of a quantifiable variable, such as a person's cumulative grade point average (CGPA), or score given by a supervisor, but it *ought* to be based on a composite measure that takes into account such

² In economics, the 'infant industry' argument is often used to argue the case for protection of a strategic industry for a nation; it is in this sense I am advocating the argument for affirmative action. Therefore, *all* promising poor rural students should be aided, regardless of race.

handicaps as alluded to earlier. Surely, coming from a disadvantaged situation should *merit* some *point*, in order to create a level playing field, and in the interest of an egalitarian society.

Affirmative Action Supports Diversity. Affirmative action is necessary to create diversity in the workplace and institutions of higher learning. The form it may take in the case of Malaysia may be different from that applied in America. Diversity is good for any organization for it enables the organization to harness the strengths of each cultural group and contain weaknesses that they bring to the workplace or college campus. While Malaysia is blessed with diversity in its population, the scenes at the workplace are far from satisfactory, from the diversity perspective. In government offices and public universities, one sees jobs being 'monopolized' by *bumiputras*; while in the non-Malay owned private sector organizations non-*bumiputras* fill almost all the slots, except as general workers, if any. There appears to be common reluctance on both sides to encourage greater diversity in their respective organizations. Perhaps, the private sector is waiting for the public sector to make the first move to dismantle its apparent 'apartheid' before it begins to embrace diversity in its own recruitment.

Is 'discrimination' widespread in this country? When a private sector organization, for strategic business reasons, stipulates in a job advertisement the requirement of special language skills such as Mandarin and/or other dialects, it effectively 'discriminates' against applicants who do not have a Chinese school leaving certificate. However, it is not racism, but strictly business! On the other hand, when the government fixes the starting salary too low, like in the police force, the military, and in the teaching profession, these agencies fail to attract non-*bumiputra* groups whose aspiration for high income is only equaled by their high scholastic achievement. To advance greater diversity in Malaysia, affirmative (implying 'positive') steps have to be taken immediately by the government. *Moral suasion* is perhaps the first step in this long and arduous road to diversity in the workplace.

On the gender issue, there is less concern in Malaysia about not having enough females in leadership or management positions. In less than ten years I believe the situation will be such that more females will head the agencies in government and the private sector. If one looks at the enrolment statistics in the universities, one will notice that the gender ratio now stands at 7:3 in favor of women. Where are the boys? Cynics point towards the drug rehabilitation centers throughout the country in response to the question. So, when women take over the helms of this country in the not-too-distant future, will there be 'affirmative action' in favor of the men?

Affirmative Action to Remove Stigma. As the need to compensate *individuals*, and not groups for past misdeeds, it must be remembered that groups were being segregated or discriminated; and groups were stigmatized for having a skin color different from 'mainstream' color! It is also

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more practical to compensate groups, because they are the 'inheritors' of those wronged. Administratively, AA is easier.

Conclusion

Affirmative action has noble aims, which are consistent with high moral values. It is not intended to discriminate against any group based on their skin color or their gender; any lessened opportunity faced by a group is an incidental upshot (a 'collateral damage'?) of addressing a grave issue. It is not intended to simply fill quotas without regard to minimum qualifications; it is merely an attempt to remedy past injustices or oversights, to ensure a better distributive justice. Being man-made, it is not a perfect remedy, for perfection is the monopoly of God the Almighty, for those who believe in His existence. 'Discrimination' will continue to exist as long as the sun continues to rise from the east, but we hope it is of the positive kind, like the need to 'separate the chaff from the wheat' in our everyday life. Affirmative action is man's small attempt at containing *blatant discrimination*, in order to make life more bearable for the majority of peace-loving souls.

REFERENCES

- Acton, James. (2000). Positive Discrimination/Affirmative Action. International Debate Education Association website. (<http://www.debatatabase.org/details.asp?topicID=40>) (Viewed on May 29, 2005).
- Allen, Robert. (1998). Rawlsian Affirmative Action: Compensatory Justice as Seen from the Original Position. Paper given at the Twentieth World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998. (<http://www.bu.edu/wcp/Papers/Soci/SociAlle.htm>) (Viewed on May 26, 2005). Email: RAllen8219@aol.com
- Augoustinos, M., Tuffin, K., *Every, D.* (2005). New racism, meritocracy and individualism: constraining affirmative action in education. *Discourse & Society*. London: May 2005. Vol.16 (3), pp. 315.
- Ayob, A. M. (2004). Malay Images in Economic Affairs: Viewing Through the Lenses of a Malay. Paper presented at the *Second International Conference on Malay Civilization* Organized by *Universiti Pendidikan Sultan Idris* Held at the Legend Hotel Kuala Lumpur, Malaysia, on 20-28 February 2004.
- Brown, Nikki. (2004). 'Send back the money!' Frederick Douglass's Anti-Slavery Speeches in Scotland and the Emergence of African American Internationalism. (http://www.star.ac.uk/Archive/Papers/Brown_Douglass.in.Scotland.pdf) (Viewed on May 29, 2005).
- Bush, Janine. (1998). Affirmative action in Australia: A consensus-based dialogic approach. Bloomington: *NWSA Journal*. Fall 1998. Vol.10 (3), pp. 115-135.
- Chitose, Yoshimi. (2003). Effects of Government Policy on Internal Migration in Peninsular Malaysia: A Comparison between Malays and Non-Malays. *The International Migration Review*. New York: Winter 2003. Vol. 37 (4), pp. 1191-1220.

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- Cohen, David. (2004). In Malaysia, the End of Quotas. *The Chronicle of Higher Education*. Washington: Feb 13, 2004. Vol. 50 (23), p. A.42.
- Cooley, D. R. (2003). Strict Joint and Several Liability and Justice. *Journal of Business Ethics*. Dordrecht: Oct 2003. Vol.47 (3), pp. 199.
- DeSario, Nicole J. (2003). Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law. *Harvard Civil Rights-Civil Liberties Law Review*. Vol. 38 (2), pp. 479-510. (http://www.law.harvard.edu/students/orgs/crcl/vol38_2/desario.php) (Viewed on May 29, 2005).
- Fiss, Owen M. (1996). Affirmative Action as a Strategy of Justice. Paper presented at "Affirmative Action Talk," a symposium sponsored by the Whitney Humanities Center and Yale Law School, October 17-18, 1996. (<http://www.puaf.umd.edu/IPPP/6QQ.HTM>) (Viewed on May 26, 2005).
- Garrett, Jan. (2004). Discrimination and Affirmative Action. (<http://www.wku.edu/~jan.garrett/ethics/discaffi.htm>) (Viewed on May 26, 2005).
- Groarke, L. (1990). Affirmative Action as a Form of Restitution. *Journal of Business Ethics*. March 1990. Vol. 9 (3), pp. 207-213.
- Haslett, D. W. (2002). Workplace Discrimination, Good Cause, and Color Blindness. *The Journal of Value Enquiry*. Vol. 36, pp. 73-88.
- Himma, K. E. (2002). It's the rationale that counts: A reply to Newton. *Journal of Business Ethics*. Dordrecht: June 2002. Vol. 37 (4), pp. 407-413.
- Klitgaard, R. and Katz, R. (1983). Overcoming Ethnic Inequalities: Lessons from Malaysia. *Journal of Policy Analysis and Management*. New York: Spring 1983. Vol. 2 (3), pp. 333-350.
- Madkins, J. B. (1989). Affirmative Action Is Necessary and Ethical. *Personnel Journal*. August 1989. Vol. 68 (8), pp. 29-30.
- McElroy, Wendy. (2005). What Does Affirmative Action Affirm? Excerpt from Wendy McElroy. (1996). *Sexual Correctness: The Gender-Feminist Attack on Women*. Jefferson, NC: McFarland & Company. (<http://www.zetetics.com/mac/affirm.htm>) (Viewed May 26, 2005).
- Morton, Eric (2002). Race and Racism in the Works of David Hume. *Journal on African Philosophy*. Vol. 1 (1). (<http://www.africanphilosophy.com/vol1.1/morton.html>) (Viewed on May 28, 2005).
- Nankerrvis, A., Compton, R. and Baird, M. (2002). *Strategic Human Resource Management*. (4th Ed.) Southbank, Victoria: Thomson.
- Noe, R. A., Hollenbeck, J.R., Gerhart, B. and Wright, P.M. (2003). *Human Resource Management: Gaining Competitive Advantage* (4th Ed.). NY: McGraw-Hill, Inc.
- Rasiah, R. and Shari, I. (2001). Market, government and Malaysia's new economic policy. *Cambridge Journal of Economics*. Vol. 25, pp. 57-78.
- Shaw, Bill. (1988). Affirmative Action: An Ethical Evaluation. *Journal of Business Ethics*. Oct. 1988: Vol. 7 (10), pp. 763-770.

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- Shaw, W.H. and Barry, V. (2004). *Moral Issues in Business*. (9th Ed.) Belmont: Wadworth.
- Sher, George. (2005). Transgenerational Compensation. *Philosophy and Public Affairs*. Princeton: Spring 2005. Vol. 33(2), pp. 181-201.
- Soni, Vidu. (1999). Morality vs. mandate: Affirmative action in employment. *Public Personnel Management*. Winter 1999. Vol. 28 (4), pp. 577-598.
- Vasey, Craig. (1998). Being and Race. Paper given at the Twentieth World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998. (<http://www.bu.edu/wcp/Papers/Soci/SociVase.htm>) (Viewed on May 26, 2005). Email: cvasey@mwc.edu.
- Velasquez, M., Andre, C., Shanks, T., and Meyer, M. J. Justice and Fairness. (2005). Markkula Center for Applied Ethics, Santa Clara University. (<http://www.scu.edu/ethics/practicing/decision/justice.html>) (Viewed on May 28, 2005)