

“Leslie Pickering Francis’ Arguments of Affirmative Action: Revisited”

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Abstract—Affirmative action, in contemporary political philosophy, has been the most debatable issue. Some Philosophers say that there should not be any policy which is far from the equality before law and the law that shows deviation from the same, should not be praised at all. Affirmative Action is a policy of preferential treatment which is done to uplift the deprived and underrepresented class on the cost of others’ possession that is against the equality before law. While, some Philosophers say that there should be Affirmative Action for assuring a level playing field. It’s because there is disparity in social-economical scenario dispersed in the society. The deprived class is far from the favorable socio-economical scenario as the groups of main stream are entertaining. In this paper, I will try to criticize the arguments of Leslie Pickering Francis given in the favor of Affirmative Action. Along with this task, I will try to inquire Affirmative Action from the Philosophical point of view. The paper will conclude by advancing my own position regarding this issue.

Introduction

The term "Affirmative Action" was first used in ‘National Labor Relations Act, 1935’ which came in existence in 1935. The act was a cluster of orders banning the discriminatory behavior of employer against union members or union organizers. But the first use of the Phrase “Affirmative Action” is usually attributed to ‘Executive Order of 10925’, which was issued by American President John F. Kennedy in the year 1961. The Act became the ‘Civil Rights Act, 1964’. This act was based on the composite idea carried by the American President ‘John Kennedy’ and the Leading Liberals of that time. The central theme of the act was to create a level playing field where equal opportunity for all can be assured through fair procedures. The order contained the provisions that all the government agencies have to insure that criteria and considerations of the applicant for employment should be regardless to their race, color and national origin. As the order was implemented on the ground two years passed, the sub-clause of sex is also added in the order. Sixteen days after the act was passed, riots erupted in the major regions of United States of America. (Cohen and Sterba 191-198)

During these riots, America got its new President i.e. Lyndon Johnson. Lyndon Johnson in order to implement the Act

effectively issued an order i.e. ‘Executive Order 11246’. The Order contained directions that all executive departments and agencies of Federal Government should establish and maintain positive program to insure the equal opportunity of all employees. In response to the Act, the US Department of Labor has created a special committee, named as “Office of Federal Compliance Program”. The committee replaced the already existing committee “Equal Employment Opportunity Commission” which was established by the former “Executive Order 11925”. The committee was aiming to respond the individual complaints regarding discriminations. The ‘Office of Federal Compliance Program’ proved more effective in improving the situation of minorities than the ‘Equal Employment Opportunity Commission’. (Cohen and Sterba 12-20)

The above discussion was related to mentioning legislative initiatives taken by the different authority of Legislature in order to establish an easy way to implement the policy of Affirmative Action against the Discrimination. Now, I am going to discuss the earlier cases related to the discrimination that compelled the government to make policy like preferential treatment. In this line of thinking, the first case in US Supreme Court related to Affirmative Action, was ‘Griggs v. Duke Power Company’ which was filed in 1971. The Petitioner argued that the Duke Power Company has adopted the criteria for hiring the job candidates which was discriminatory against the minority groups. So, the Duke Power Company is in the violation of uniform law i.e. ‘Title VII’ of the ‘Civil Rights Act, 1964’. In Education sector, the first case was ‘Regents of University of California V. Bakke’. The case filled in 1978. In this case, Bakke’s admission got rejection at Davis Medical School, University of California. Despite, he has scored more marks than the cutoff of an average socially and economically disadvantaged class i.e. minority groups. It’s interesting to discuss here that ‘University of California’ usually reserved 16 percent seats of total available seats for the students from the socially and economically disadvantaged class. Bakke had an idea in his mind that if the quota might have not allotted to the targeted

classes, he must have got admission in the University. That’s why; he challenged the roster of University of California in US Supreme Court. The decision was in his favor. (Cohen and Sterba 46-71)

Supreme Court found that the use of Quotas in the affirmative action program to remedying or compensating the effects of societal discriminations is nothing but rather in the violation of ‘Civil Rights Act’ and ‘Equal Protection Clause of the Fourteen Amendment’. Its noticeable here that in later case such as ‘Grutter V. Bollinger’. The essence of the case was the same. Here, ‘Barbara Grutter’ was White female applicant. She was refused to take admission in ‘University of Michigan Law School’ on the basis of race which was pure violation of ‘Fourteenth amendment’ and ‘Title VI’ of the ‘Civil Rights Act, 1964’. The University argued that there was a compelling interest of the state to ensure a critical mass of students from minority class and Supreme Court that affirmative action program in education permitted if it is related to the tailoring to meet a compelling government interest. And the case is related to insuring the government’s interest. Hence, it’s desirable and should be applied on higher level in the society to assure the well-being of everyone. Thus, Supreme Court has accepted the decision of ‘University of Michigan’. (Cohen and Sterba 33-45)As the efforts are made to strengthen the policy the profit became known to all. So, each country had tried to adopt the policy of affirmative action.

It’s difficult to bind up the policy of Affirmative Action because of it has different forms and viewed differently with respect to respective socio-economic background of respective countries but some attempts are done to describe it which are as follows:

According to Taylor, an affirmative action program is a spectrum consisting of at least five categories (Taylor, 476-506):

1. Category. Formal equality of opportunity: In this approach an affirmative action program aims to implement a neutral policy to ensure that opportunities are open to everyone regardless of race, gender, religion, or any demographic attribute.
2. Category. Aggressive formal equality of opportunity: Instead of neutrality and non-intervention, supporters of Category 2 would aggressively use sensitivity training, external monitoring, and outreach efforts to achieve a fair outcome in admission and employment.
3. Category. Compensating support: In this approach special training programs, financial support, mentoring, or tutoring are provided to minorities to compensate for their disadvantages.
4. Category. Soft quotas: In this method “bonus points” are added to the selection indices of minorities in admission and employment while no explicit quota is set.

5. Category. Hard quotas: As the name implies the approach aims to achieve a proportional representation of the population by gender and racial composition in the student body and the work force.

James P. Sterba has defined Affirmative Action as “a policy of favoring qualified women and minorities candidates over qualified men or nonminority candidates, with the immediate goals of outreach, remedying discrimination, or achieving diversity, and the ultimate goals of attaining a colorblind(racially just) and gender-fee(sexually just)society” (Cohen and Sterba 199-200)

To sum up, it can be said that Affirmative action is public policy of preferential hiring designed to compensate the victims of injustice; in which some positive steps are to be taken that can be in the form of policies, laws, or change in perspectives that is geared towards the upliftment of, development of an increase of representation of deprived class regardless to their race, gender.

Affirmative Action involves the philosophical discussion regarding the theoretical and practical content related to it. It’s well known fact that the subject Philosophy comprises three things at a time, Metaphysics, Epistemology and Axiology or Science of value. So, here, immediate need is to inquire the philosophical content in Affirmative Action.

Affirmative Action: A Metaphysical Exposition

The metaphysics is related to the origin and etymology of the respective words. The metaphysical exposition is entirely unique, it doesn’t dependent on this phenomenon world. That’s why it’s called as a Meta i.e. beyond, Physical i.e. Material. Many a philosopher accepts that there are two categories of the world. The first category is, of world of things which deals with the material or phenomenon world which always keeps changing. That’s why the beings of this world are kept in the category of Contingent being. The second category is, of the world of ideas, where all the ideas exist freely. They are complete, independent, and stable and always keep unchanged. That’s why the category of the things is kept in the category of Necessary Being. Metaphysical exposition deals with the world of ideas. The word Affirmative Action has its real meaning in the world of ideas. The meaning affects the metaphysical content of the personality, in every individual the consciousness level, belongs the world of ideas, which understand everything and prepare the individual to act in accordance to the postulates provided or emerged by this world of ideas. So, the word affirmative action and its etymology is metaphysical exposition of affirmative action can be, there should be level playing field for all, prior to the preparedness of the individual and policy of Affirmative Action is doing this business, it should be followed. Thus, the metaphysical exposition is justified.

Affirmative Action: An Epistemological Exposition

Epistemological is a sub-branch of philosophy which deals with study all the aspects related to the knowledge as the nature, scope, validity, types sources and the theory of knowledge. Metaphysical exposition is related to the Affective aspect of the personality which is related to the level of free-will. The question is, the how truth of individual, got from the Metaphysical deduction, is verified? The individual is always in the search of methods and the principles which can distinguish and validate his "attained meaning". Understanding this thing applying on the concept of Affirmative Action, the personality got the meaning that to include the deprived class into the main stream of the society is the aim of affirmative action. Having this thing in mind the individual, is now, prepare to think upon the application part of affirmative action. For instance, what is ethical value, scientific value of Affirmative Action? Is it assuring the total welfare of the society and institutions where it has to be applied? Is it insuring the better quality of life of each individual? Thus, here, personality involves the knowing content of all the existing concepts and ideas. So, a detailed description of the word explained, an idea developed in the mind and what would be the challenges in the implication of affirmative action on the ground? All these queries are in the preview of epistemology. Hence, the Epistemological Exposition is justified.

Affirmative Action: An Axiological Exposition

This sub-branch of philosophy is a science of value. In this area of philosophy all the logical study is done with the help of some logical methods and principles, that proves and distinguish the good or correct arguments and reasoning from bad good incorrect arguments and reasoning. For instance, Affirmative action in Metaphysical exposition has revealed its meaning, and Epistemological Exposition revealed its efficiency in application. Moreover, one and important treatment is left i.e. logical consistency. There are two broad categories of arguments which are given in favor, and disfavor of Affirmative Action. The first category is, of Forward Looking Argument and the second category is, of Backward Looking Argument. All the arguments are Tested with some logical tools, and the validity of the arguments are checked. The bad arguments and incorrect arguments criticized and removed. Thus, by going through these criteria, the concept Affirmative action becomes logically strong, and all the logical fallacies are removed. Hence, the Axiological Exposition is justified as well.

Leslie Pickering Francis' Arguments of Affirmative Action

In Social philosophy, each and every process of philosophizing demands a logicity which leads to argumentation. The process of argumentation is solely based on arguments. Argument is a set of propositions which are set logically in order, and the order of the propositions lead to a fair, just and logical conclusion.

In social philosophy, it is difficult to argue some ideas on the original basis of argument forms; it's because when we strive to delve within the subject matter of social philosophy the concepts are closely interrelated to each other. So, a well-formed argumentative structure is quite difficult. Arguments of Affirmative Action which are given to defend the Affirmative Action are as Forward Looking Argument, Backward Looking Argument, Compensatory Argument, Corrective Argument, Diversity Argument, Argument against Meritocracy, Role model Argument, Open Access Argument, Argument from Equality, and Argument from Favoring the Same.

Leslie Pickering Francis in his article "In Defense of Affirmative Action" has discussed his views of Affirmative Action.

There are two kinds of affirmative Action. The First kind of Affirmative Action is 'Weak Affirmative Action', and the second kind of Affirmative Action is 'Strong Affirmative Action'. (Cahn, 144-146)

1. Weak Affirmative Action

This kind of Affirmative action is based on the principle of liberty principle of liberalism which says that there should be fair and just procedures to ensure the universal access to all the individuals regardless to their race, gender, religion, culture and ethnicity. Thus this form of affirmative action is based on the idea of possessive individualism. (Cahn, 144-146)

2. Strong affirmative action

This kind of affirmative action is based on the difference principle of John Rawls. The difference principle asserts that the inequalities are fair when they are related to the benefitting of the least advantaged people of the society. Thus the aim of this kind of affirmative action is to go beyond the rule of procedural justice to the rule of substantive justice, in order to fill the all the social scarcities, which they might have owned, if the discrimination might have not occurred. (Cahn, 144-146)

Leslie Pickering Francis asserts in his article that there are three kinds of arguments which can be given in the support of Strong Affirmative Action:

1. Compensatory Arguments
2. Corrective Arguments
3. Redistributive Arguments

1. Compensatory Arguments

Idea of compensation is based on the repayment of the "primary goods"-that is, those things any rational being would desire, such as opportunities, liberties, rights, and wealth which were payable to them regardless to their creed, color and gender. But unjustly, the primary goods some other

groups were acquired by some other groups. That led to the unjust acquisition of rights and wealth which is immoral in all cases. That’s why the arbitrary actions are not admirable on any philosophical grounds. That’s why these kinds of immoral practices should not be praise in any manner. This is what the underlying theme of the compensatory argument of proposing affirmative action. According to Francis, the classes of main stream of the society have acquired more than sufficient places in all the prevailing and pertinent social and economical institutions of the society. (Cahn, 9–47) That led to propagate ideas of favoritism. As a result, the individuals of targeted class are not getting ample places in any societal and economical institutions. Moreover, the targeted class won’t acquire their ample representation in each and every institution. They can’t be able compete to the classes of main streams of the society. Morality asserts that ‘victims of injustice should be compensated’.

Leslie Pickering Francis asserts that there is not a single feasible way to find out the victims of injustice. It’s quite arbitrary that some groups of the society are assumed as the victims of injustice without any justification. Leslie Pickering Francis says that it’s quite difficult the groups of injustice and if a person has done discrimination to blacks, on what grounds, one can support to consider the whole group as the doers of injustice. In his own words:

“A decision whether to modify redress in light of the burdens imposed on others, to take one example, requires discussion of what it is now just to do in light of all the circumstances. Here again, the compensatory argument runs up against corrective and redistributive issues. Compensation is not the only and perhaps not even the central issue when we move beyond allegations of biased treatment of identified individuals to larger-scale issues about the composition of university faculties. Thus compensation is not the primary argument for affirmative action programs in employment in higher education.” (Cahn, 9–47)

Thus, Leslie Pickering Francis does not support compensatory argument in the favor of affirmative action.

2. Corrective Arguments

The argument is based on wrong doings of main classes towards the individuals of deprived or targeted classes. The wrong doings have led to the society in the severe gap of socio-economic distribution among the existing classes. To fill the gap, it’s necessary to correct the lethal effects the past injustice. That is what affirmative action does. For instance, Whites owe reparations to contemporary blacks, not because they are themselves guilty of causing the disadvantages of Blacks but because they are in possession of advantages that fell to them as a result of the gross injustices of their ancestors. (Cahn, 9–47) The idea is quite natural to deny these opportunities that provided to the targeted class. But when it has to be thought morally that one would surely feel that the present favorable conditions that he has got, all these are the

part of opportunities that might have been equally in the deprived classes, if they have not been discriminated. Thus, it’s moral responsibility of advantaged class to correct the past injustice. If they would continue to think the discriminatory thoughts, they would increase the inequality, injustice in the society that will create a group living in heaven and the other group is living in the hell. That is the deviation from the whole development of the society. (Mill, 01-22)

Minority and women have been deprived of their basic socio-economic status since time immemorial. For all round development of their life, it is the vital necessity of upbringing them on the level playing stage. (Cahn, 9–47) The very essence of justice lies in justice as fairness. The nourishment of individual capability requires a well ordered basis such as family, society, state etc. it’s because the lower qualifications, the minorities are not wholly responsible, it was the extra occupying social, economic and education opportunities on the cost of Minorities. If some communities have unfortunate in getting these benefits, it’s the humble responsibility of the institution to include such factors as: societal deprivation, diversity, multiplicity, different cultural and linguistic criterions etc. for the inclusion of the students of these communities. Thus, Affirmative Action would not only increase the representation of lower qualified people, but also it will decrease the future inequality of the society in broader sense.

Objection

Opponents of this argument assert that the policy of preferring less qualified persons over the well qualified persons in the institutions in order to remove the causes of injustice, and to compensate the victims of injustice. But rather it is creating the same causes of injustice in alter form by discriminating one group over other groups by suspending the fair procedures of justice. The same aftermaths are also revealed by John Kekes. To quote:

“But we must not forget about the consequences of preferential treatment for those who have been injured by it. These people will feel Unjustly harmed, and they would be right in so feeling. They have not been responsible for the past injustice, or, at the very least, no more so than other people in their society, and yet the effect of the policy is to force them to bear an unfair share of the burden of it.” (Cahn, 144-146)

3. Redistributive Arguments

To increase the representation of all classes of the society in any socio-political institution; it’s necessary to hire the policy of preferential treatment, that would maintain the rich diversity in the institutions. The very essence of justice lies in justice as fairness. The nourishment of individual capability requires a well ordered basis such as family, society, state etc. If some communities have unfortunate in getting these benefits, it’s the humble responsibility of the institution to include such factors as: societal deprivation, diversity,

multiplicity, different cultural and linguistic criteria etc. for the inclusion of the students of these communities.

There are two kinds of Justice. The first one is Procedural Justice, and the second one is Substantive Justice. Procedural Justice demands that if the procedures are fair, the outcomes are bound to be fair. The presence of fair rules and laws are enough to begin a race of life. A person is entitled to attain anything in accordance to his ability through fair means. Substantive Justice means, distributing social goods according to the need of the people. Merely existence of equal rule and regulations can't make the just society. It is not sufficient only to treat like cases alike and unlike cases unlike. The Procedural Justice needs to be supplemented with a substantive principle of justice. A substantive principle tells us which cases to count as like and which as unlike. For instance, a race competition is organized in a school. (Cahn, 9-47) For instance, there is difference between a professional racer and a village boy participating in a race, an able racer and a disabled person. Hence, following the fair procedures, they are being kept in the same category, they are already losing. It's because they don't have the same physical competency.

Thus, if there some group in disadvantage, they must be treated differently, and the advantaged class should be treated differently. It's because they are not in the same level playing field. I think if the society is in balanced state, there should be no affirmative action, but if the society is imbalanced; there is inequality, in justice, slavery, deprivation etc. in the society. There is need of taking positive steps to elevate the disadvantaged class. Thus, Procedural and Substantive Justice is relevant and desirable in their respective state of the society. That is why Affirmative action should adopt as a policy to develop a composite culture of the institution.

Objection

The opponents of this kind of arguments say that there is not a single feasible way to find out the victims of injustice. It's quite arbitrary that some groups of the society are assumed as the victims of injustice without any justification. Moreover, the recognitions of the groups whose members are supposed to be victims of injustice are and complicated and vague. It's because there is no account taken of social and economic status that can be considered as the scientific method which brings the result that the women of upper or middle class women and blacks are to be favored over the able sons of able white migratory workers. Nor, there has not been made any methods aimed to distinguish between the members of the unfairly treated groups whose lower qualifications are due to injustice caused by upper and middle classes. Hence, the quota system is going to minimize the ability, capability and quality of that particular institution and we are not in extreme need of a good institution. And a good institution is made up of good and qualitative people not by hiring the individuals of lower qualities in the name of discriminations. There are so many different ways of compensating the past injustice as we can run

so many training and enabling program to enable them which is also a kind of affirmative action. (Cahn, 144-146)

Conclusion

After discussing the arguments of Leslie Pickering Francis, it can be said that he accepts all the three arguments of favoring Affirmative Action as compensatory argument, corrective argument and redistributive argument or arguments from diversity. But he favors more corrective and redistributive argument than compensatory argument. The essence which came out by the objections raised against arguments of affirmative action by Francis can be summed up as; the society should make the environment where all the individuals can entertain their rights. That will help them to elevate their status. If it is not so, the diversion from the concept of equality, rule of law and common civil code, would lead to emerge the society with classes. Some class would entertain higher rights than the others classes. If the policy of preferential treatment adopted as the policy in the society, it will create a wide gap between the targeted class and untargeted class which will increase day by day. This is what happening with the today's society and conflicts are taking place. Some substantial and inclusive initiative has to be taken to balance the society aiming to look at the classes with an eye, not different classes viewed differently as we can provide the backward classes some special training program to elevate their mental and physical status, not by giving them some direct reservation in different institutions which will increase the incompetency. Hence, the quota system is going to minimize the ability, capability and quality of that particular institution and we are not in extreme need of a good institution. And a good institution is made up of good and qualitative people not by hiring the individuals of lower qualities in the name of discriminations. There are so many different ways of compensating the past injustice as we can run so many training and enabling program to enable them which is also a kind of affirmative action.

References

- [1] Acharya, Ashok and Bhargava, Rajeev. "Political Theory: An Introduction." Pearson Publication, Delhi, 2011, pp. 296-305.
- [2] Cahn Steven M. *Affirmative Action and the University: A Philosophical Inquiry*, Temple University Press, 1993, pp.48-92.
- [3] Cohen, Carl and P. Sterba James. *Affirmative Action and Racial Preference*, Oxford University Press, USA.2003, pp. 7-107.
- [4] Mill, Stuart. John. *Utilitarianism*, Dover Publications, Inc. Mineola, New York.2015, pp. 1-22.
- [5] Sandel, J. Michael. *Justice: What's Right Thing TO Do?* Penguin Group, USA Inc.2010, pp.167-183.
- [6] Taylor, R. S. 2009. Rawlsian affirmative action, *Ethics*, 119(3), PP. 476-506.