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DISCRIMINATION AND LAW

Can Reverse Discrimination be Justified?

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Introduction

Observers are increasingly convinced that no serious impact will be made on the problems of sex and race discrimination without some measure of reverse discrimination. However, the argument that all race-conscious or gender-conscious discrimination is bad has a powerful simplistic appeal. It is the dominant theory behind present British discrimination law (cf. Lambeth v. CRE "The Times" 24 April 1990 (CA)), and even in the United States, where reverse discrimination was previously allowed to some extent, there seems at present to be a backlash based on this kind of argument (cf. the Supreme Court decision in City of Richmond v. J.A. Croson Co. 109 S Ct 706 (1989)).

Before examining the strength of the arguments for and against reverse discrimination, it is necessary to draw a distinction between positive or affirmative action on the one hand and positive or reverse discrimination on the other. As I will use the terms, reverse discrimination or positive discrimination (which I treat as synonymous) involves the notion that a less well-qualified applicant may be preferred over another, better-qualified candidate on account of race or sex. Positive action or affirmative action (which I also treat as synonymous) are programmes designed to eliminate invisible as well as visible discrimination, and in doing so, to achieve a "proper" representation of all groups in the best positions in society. These programmes could include reverse discrimination as one strategy, but are not necessarily committed to preference of less qualified candidates. The distinction is important. Positive action which does not include reverse discrimination is not unlawful in the UK, and is encouraged by the EOC and CRE Codes of Practice. It does not attract the simple objection that all race-conscious and gender-conscious discrimination is equally bad, because it does not involve discrimination.

Another preliminary point to note is that it may not be possible to come up with a single answer for all situations. There are significant differences between race and sex discrimination which may mean that reverse discrimination is easier to justify in one case rather than the other, or that the justifications must be different. There may also be different arguments according to what kind of reverse discrimination is under consideration: is it access to training or further education in order to fit someone for a position, is it access to a particular post or is it a general policy such as the American set-aside programme, reserving certain proportions of public works to minority-controlled business enterprises? These distinctions will be borne in mind in the consideration of the arguments which follows.

Arguments based on Compensation

A popular justification for reverse discrimination is that it is intended to make up for past systematic discrimination against women or ethnic minorities. It should be noted that if someone who has been turned down in the past because of sex or race is given the next available position in preference to anyone else, then this is not an example of reverse discrimination but purely of ordinary compensation for a wrong suffered. It is submitted that this is true even if there were to be a stronger white or male candidate for the next position.

The attraction of compensatory justification is that it appeals to a non-controversial principle, that perpetrators should compensate their victims for the wrongs done to them. However, the expression of that principle immediately indicates some of the difficulties with this approach. First, the victims may be earlier generations, and so the wrong people are getting compensated. In the case of race discrimination, this may be answered by saying that present generations are still disadvantaged from the treatment of earlier generations, but this is not so obviously applicable to sex discrimination. A different, stronger way of putting the point is to say that the successors of the discriminators still enjoy their wrongful benefits. Secondly, discrimination against a group does not of itself prove that this particular member of the group has been the victim of discrimination: it would seem that further investigation is necessary. Thirdly, the compensation is being paid for not by those most responsible (the past discriminators or present employers) but by others who at the least may be seen to bear less responsibility - that is, the other candidates, who are likely to be younger and less powerful members of society.

Another point which has exercised the Supreme Court is whether the compensatory principle justifies general reverse discrimination, or only that carried out by those institutions proved to have discriminated in the past, and in a manner closely tailored to the rectification of that particular proved violation. The latter, narrower formulation seems presently to be the dominant theory (cf. Croson); however, insistence on proof of specific discrimination in the past will not only be difficult but also divisive.

Arguments based on Utility

If reverse discrimination will lead to a more just society overall, where everyone's talents are used to the full, where racial tension is eased and where all sections of society can expect a decent level of services, is it not a justified policy? Arguments based on an aggregate increase in social welfare were heavily relied on by the Davis medical school in California to justify its quota system for minority entrants in Bakke's case. Other benefits might be provision of positive role models for women and minorities, a breakdown of stereotyped assumptions that tend to relegate women and minorities to lowly positions and the positive benefits of a

genuinely mixed environment (this a stronger argument in relation to admission to higher education than in relation to employment).

To this it might be objected that reverse discrimination will decrease overall welfare in fact. Rather than produce benefits, the policy might reinforce a sense of inferiority in those receiving "special treatment"; it might increase racial tension by giving those from the dominant group a genuine sense of grievance, and that other strategies for producing a more equal society would be more effective; finally, that it would be inefficient not to choose the best-qualified person.

So far as the facts are concerned, there is not enough evidence at present as to whether the consequences would be good or bad. The question at least seems sufficiently open that it might be worth trying the policy out. However, more seriously for the utility argument, it should be noticed that it could have the result of disallowing reverse discrimination and even of permitting old-style race and sex discrimination depending on the factual assessment of welfare, and so might not be regarded as necessarily a sound principle.

A fundamental objection to the utilitarian approach in all circumstances, not just when reverse discrimination is being discussed, is that it allows the sacrifice of individual rights. Provided collective welfare is increased, the utilitarian is not concerned with the effect on individuals. Many of us may not wish to accept this. This brings me to the major argument against reverse discrimination, which is that it violates the rights of individuals, specifically those better-qualified individuals who would have been chosen but for the implementation of the policy.

Arguments based on Rights

Presumably we would accept that no one has a right to a particular job (although we might like to argue for a more nebulous "right to work"); equally it would seem reasonable to accept that no one has a right to admission to a particular course of higher education at a particular institution (though we would probably argue for a right to basic education, and perhaps in general to higher education for those who can benefit from it). (Incidentally, I use the term "rights" here to refer to those things which we believe ought to be recognized as rights, regardless of whether they are so recognized or enforced by law.) If we accept that the above rights are not to be argued for, then it would seem that the right infringed by reverse discrimination is a right to equality.

In the USA, where rights are specified in the Constitution, the argument that reverse discrimination is a violation of a right to equality has been particularly strong. But, as commentators point out, there is a great deal of confusion as to the nature of the right here being appealed to. Is it a right to equal treatment? Yet equal treatment could be unjust, as where equal grants are given to two

hospitals, but one is new and well-equipped and the other dilapidated and in urgent need of repairs. Is it a right to equal opportunity? But apparently equal opportunities in education or employment may in fact be unequal because of past discrimination preventing women or minorities acquiring the qualifications needed. More plausible is to argue for "treatment as an equal" (Dworkin) or for a right to equal consideration.

Dworkin argues, in relation to Bakke's case, that the use of race as a criterion in entry to medical school does not violate this right, despite its arbitrary nature, for all admissions procedures use arbitrary criteria and failure to meet the criteria is a misfortune, but not a violation of rights. But why is the use of race (or sex) as a criterion all right here, but not if used against women or ethnic minorities? Dworkin answers, because the purpose of reverse discrimination is to make society more equal and therefore more just: discrimination against these groups was based on prejudice and contempt. Or, to put it another way, the purpose of reverse discrimination is inclusive, designed to bring these groups into the community, whereas discrimination agaisnt them was exclusive.

Conclusions

Dworkin's argument justifies the use of race and sex for benign rather than malign discrimination, but only if it is used as a kind of qualification. In admission to higher education, where matters not directly related to predicted success in examinations is often taken into account (e.g. athletic prowess, interests in extra-curricular activities, contribution to the community), this may be fair enough. It might be said, however, that in employment it is much less likely that these could be regarded as qualifications. In the Lambeth case, it was argued that housing officers from the same ethnic background as a substantial proportion of the tenants would be more effective. It is clear that this kind of argument will not easily be accepted by British courts. In the same case, the Court of Appeal rejected the wider argument that the policy behind our discrimination legislation is to promote equality, and that the Council's action was aimed at that, thus implicitly rejecting the distinction between inclusive and exclusive policies referred to above. It appears that the Supreme Court is regressing to a similar position, and that more is needed to justify this distinction before there is much chance of reverse discrimination becoming an acceptable policy at large.

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