

From Inequality to Equality:
Evaluating Normative Justifications
for Affirmative Action as Racial
Redress

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Inequality in South Africa

- SAIRR: In 2011, aggregate earnings were R2 380 for blacks, R3 030 for coloureds, R6 800 for Indians and for whites R10 000
- Van der Berg: Unemployment rates in 2009 were 28.8% for blacks, 21.6% for coloureds, 12.7% for Indians, and 4.6% for whites (2011: 127)

Inequality in South Africa

- While progress has been made, interracial inequality remains
- Inequality at least partially the result of past injustice
 - Personal discrimination
 - Legally entrenched discrimination
- Demands redress?

The Employment Equity Act

- “...as a result of apartheid and other discriminatory practices, there are disparities in employment, occupation and income, within the national labour market”
- These disparities “cannot be redressed simply by repealing discriminatory laws”
- The Act seeks to “ensure the implementation of employment equity to redress the effects of discrimination”

State interference in employment practices justified?

- TRC: Most businesses benefited from discriminatory policies, and some industries actively participated in the design of apartheid policies
- Conclusions too broad?
- Nonetheless, business has both moral and instrumental reasons for reducing inequality

Normative grounds for affirmative action as racial redress?

- Two theories of distributive justice:
 - Nozick: Entitlement theory of justice
 - Rawls: Justice as fairness
- Our focus: race-based AA

An entitlement theory of justice: Robert Nozick

Anarchy, State and Utopia

- State intervention beyond the protective services of the minimal state is unjustified – “any state more extensive violates people’s rights”
- Rejects patterned principles of justice: what matters is individual entitlement

An entitlement theory of justice

- Each individual is entitled to what they have if:
 1. A holding arises from a just original acquisition
 2. A holding arises from a just transfer
 3. Nobody is entitled to any holding that does not arise in accordance with (1) or (2)

Principle of rectification

- Not all holdings are generated in accordance with principles (1) and (2)
- In these situations, rectification is called for
- This seems to be the case in South Africa
- Is AA an appropriate method of rectification?

Principle of rectification

- Identify who would have had what in absence of injustice and bring this situation about
- AA may be justified under the principle of rectification if it can achieve this

Problem

- Focus: individual property rights – individual restitution
- AA targets groups

Rectification in practice

- Difficulty for principle of rectification in South African situation: how do we work out who would have had what in absence of injustice?
- Innumerable injustices over a long period of time, affecting the majority of the population
- Historical information insufficient to yield a description of holdings

Nozick's solution: back to patterns

- “[A]ssuming that (1) victims of injustice generally do worse than they otherwise would and (2) that those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation...then a *rough* rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximise the position of whatever group ends up least well-off in the society” (1974: 231).

Nozick's solution: back to patterns

- This might provide a justification for group-based AA...
- But only if AA can be justified by Rawlsian (or some other patterned) principles of distribution

Nozick's solution: back to patterns

- Conclusion

- The entitlement theory of justice is of little use in the South African situation until rectification has been achieved
- This theory cannot tell us *how* rectification ought to be achieved without sacrificing its commitment to the minimal state and individual property rights

The Rawlsian view of Justice as Fairness

Rawls: Justice as fairness

- *A Theory of Justice* (1971/1999)
 - Fairness is understood in terms of ‘the original position of equality’ (1999: 11)
 - The original position is a hypothetical position characterised by the ‘veil of ignorance’ (1999:11)
 - Since we are all similarly situated behind the ‘veil of ignorance’, it is ‘the appropriate original status quo’ (1999:11) and therefore fair

The principles of justice

- How do we choose the principles of justice?
 - We will act rationally, conservatively, and in self-interest
 - This translates into a concern for the worst-off in society
- What principles will we choose?
 1. Equal liberty for all
 - ✓ The Equal Liberty Principle (EL)
 2. Socio-economic inequalities are justified only if:
 - 2(a) They are to everyone's advantage
 - ✓ The Difference Principle (DP)
 - 2(b) They are attached to positions and office open to all
 - ✓ The Fair Equality of Opportunity Principle (FEO)

Ideal and non-ideal theory

- Rawls defines his theory of justice in terms of ideal theory
 - i.e. he examines the conditions of justice in circumstances where:
 - On-going justice is absent
 - Present distributions are not the outcome of historical contingencies
- Nagel: Ideal theory is a good yardstick for justice, but does not tell us *how* to correct injustices
- This may be the reason for why Rawls never explicitly comments on the justness of AA programmes (except in one general remark)

‘The serious problems arising from existing discrimination and distinctions based on gender and race are not on its agenda... This is indeed an omission in Theory; but an omission is not as such a fault... Whether fault there be depends on how well that conception articulates the political values necessary to deal with these questions. Justice as fairness, and other liberal conceptions like it, would certainly be seriously defective should they lack the resources to articulate the political values essential to justify the legal and social institutions needed to secure the equality of women and minorities’ (Rawls, 2001: 66).

Categories of AA

- Taylor / Nagel's typology:
 - Category 1: **Formal Equality of Opportunity**: ... requiring inter alia the elimination of legal barriers to persons of color, women, and so forth as well as the punishment of private discrimination against them.
 - Category 2: **Aggressive Formal Equality of Opportunity**: self-conscious impartiality achieved through sensitivity training, external monitoring and enforcement, outreach efforts, and so forth as a possible supplement to category 1.
 - Category 3: **Compensating Support**: special [measures] all designed to compensate for color- or gender-based disadvantage in preparation, social support, and so forth [in order] to help recipients compete more effectively.
 - Category 4: **Soft Quotas**: 'compensatory discrimination in the selection process,' such as adding 'bonus points' to the selection of indices of persons of color or women in... hiring processes, but without the use of explicit quotas.
 - Category 5: **Hard Quotas**: 'admission [or hiring] quotas,' perhaps 'proportional to the representation of a given [historically oppressed] group in the population.'

AA in SA

- The Employment Equity Act :
 - Category 1: ‘The purpose of this act is to achieve equity in the workplace by **promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination**’; and, ‘Affirmative action measures implemented by a designated employer must include **measures to identify and eliminate employment barriers**, including unfair discrimination, which adversely affect people from designated groups.’
 - Category 2: ‘Affirmative action measures implemented by a designated employer must include **measures in the workplace based on equal dignity and respect for all people.**’
 - Category 3: ‘Affirmative action measures implemented by a designated employer must include **making reasonable accommodation for people from designated groups** in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.’
 - Category 4 and 5: ‘Affirmative action measures implemented by a designated employer **must include measures (i.e. preferential treatment [category 4] and numerical goals [category 5])** to ensure the equitable representation of suitably qualified people from designated groups... and to retain and develop people from designated groups...’

Ideal theory: justifying AA

- Ideal theory
 - Category 1 interventions (i.e. formal equality of opportunity) will always be justified due to FEO
 - FEO requires formal equality of opportunity (i.e. no barriers)
 - FEO requires substantive equality of opportunity (i.e. equal talent should translate into equal opportunity)
 - Category 2 interventions (i.e. aggressive formal equality of opportunity) will sometimes be justified
 - To prevent a backsliding into non-ideal past conditions
 - To prevent certain current developments from leading to future non-ideal conditions
 - Category 3-5 interventions (i.e. compensating support and quotas) threaten FEO and undermines EL

Non-ideal theory

- Non-ideal theory is contingent on
 - Partial present compliance
 - A historical legacy that impacts on present conditions
- These undesirable conditions may require
 - More stringent AA interventions
 - That we temporarily reverse the lexical priority of EL over FEO

Non-ideal theory

- The goal of non-ideal theory is to bring about ideal conditions
- BUT, to prevent non-ideal theory from functioning in a purely utilitarian manner, non-ideal theories must be consistent with the spirit of ideal theory
 - i.e. any means undertaken to secure ideal conditions must appeal to liberal-democratic principles, which means that procedural justice must be observed
 - This is the only way in which we can guarantee fair outcomes

Non-ideal theory: justifying AA

- Category 3 interventions (i.e. compensating support) is consistent with the spirit of ideal theory
 - Analogy: removing the weights from the legs of participants in a race rather than rigging the rules (Johnson)
- Category 4 and 5 interventions (i.e. soft and hard quotas) violate the spirit of ideal theory
 - Why? Procedural justice is suspended in the name of fair outcomes
 - BUT fair outcomes are only guaranteed by fair procedures
- Conclusion: A Rawlsian justification for category 4 and 5 interventions suffers from the same problem as Nozick's principle of rectification i.e. *we simply do not know what the (fair) distributional situation would be in the absence of historical injustice* (in other words, had a fair procedure been followed)

- '[r]ejigging competitive results on justice grounds is inevitably arbitrary and inconsistent with the spirit of FEO, at least if one accepts the interpretation of FEO as an application of pure procedural justice to the distributive domain of offices and positions, as Rawls very clearly does' (Taylor, 2009: 494).

Summary

- Nozick's principle of rectification does not allow us to determine what the distributional situation would have been in the absence of historical injustices
- In these circumstances, Nozick suggests that we adopt Rawlsian principles
- Rawls' ideal theory can be used to normatively ground category 1 and 2 interventions, and his understanding of non-ideal theory can additionally ground category 3 interventions
- Category 4 and 5 interventions transgress the spirit of ideal theory in suspending procedural justice, cannot guarantee just outcomes, and should therefore be rejected by Rawlsian scholars

Conclusion

- This argument leaves us with two options
 1. We reject Rawls's conclusion because his theory is insufficient in that it cannot ground the type of interventions (i.e. quotas) deemed necessary to secure race-based equality in SA
 2. We accept Rawls's conclusion and reject the quota system for the reason that we cannot find a sound moral justification for endorsing such a system
- Option 1 necessitates that we determine different criteria for grounding affirmative action
 - E.g. Diversity
- Option 2 necessitates that we explore alternative means for the rectification of race-based inequality
 - E.g. Education

Our recommendations

- We prima facie reject option 1 in favour of option 2
- Our conclusion is that – in order to secure equality and equal opportunity – business:
 - Has a moral duty, as well as an instrumental reason, for investing in, and supporting, the educational sector more strongly
 - Has a moral duty to implement AA, in order to eliminate employment barriers (category 1), to promote and enforce impartiality and an attitude of non-discrimination in the workplace (category 2), and to remove extraneous constraints that hamper fair competition of previously disadvantaged groups (category 3)