



POSITION PAPER

What, if anything, is wrong with affirmative action?

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ANALYSIS

I. Introduction

Affirmative action can be defined as the process of giving some form of favouritism to previously or currently disadvantaged groups of society with the aim of bridging inequalities, especially in employment and education admissions.

Liberal political philosophy has often defended affirmative action, especially under the broader framework of distributive justice, equality of opportunity and moral desert. And this defence has been particularly strong within *deontological liberalism* –although not exclusively (*e.g.*, Sher, 1975:159-170). Deontological liberalism, also referred to as Rawlsian liberalism or simply political liberalism, is an account of liberal philosophy that asserts the priority of the right over the good, as opposed to *teleological liberalism*, which upholds the priority of the good over the right.

One of the most distinctive features of deontological liberalism is the claim that the state ought to be neutral with respect to any given conception of the good life held by individuals. And this neutrality, among many other implications, leads to one important consideration for this topic –*i.e.*, affirmative action. Namely, that there is no judgement

with regard to reasonable conceptions of the good that individuals may hold so that the state does not intervene to favour any particular conception.

In this short essay, I seek to critique deontological liberalism's alleged neutrality by addressing this point. I direct my critique to one of many arguments used by proponents of affirmative action. That is, *diversity*. By promoting diversity in public institutions, I argue, the allegedly-neutral liberal state presents a *telos*, which in turn compromises its own definition as deontological or anti-teleological. Finally, there will be some words in favour of a libertarian position, arguing for a minimal state in light of the threat of state coercion in order to pursue –or enforce– such *telos*.

II. Justifying *forward-looking affirmative action*. The *diversity argument*.

Affirmative action is justified by a myriad of different arguments. According to Sandel (2009:167-183), there are three main arguments in favour of affirmative action: a *corrective argument* for differences in educational or socio-economic backgrounds; a *compensatory argument* for past wrongs; and a *diversity argument*. These arguments could also be classified into Dworkin's (2000:79-88) backward-looking and forward-looking dichotomy. According to him, *backward-looking justifications* of racial affirmative action –which I will make extensive to ethnicity, religion and gender, considering affirmative action in its broadest sense– includes both the compensatory and the corrective argument, and the *forward-looking justification* is primarily aligned with the diversity argument.

My interest pertains to the latter and, thus, my focus is on the *forward-looking justification for affirmative action* and, in particular, with respect to the argument in favour of *promoting diversity*. In other words, I address the *justification* that deontological liberalism gives us for the implementation of affirmative action policies. This justification, with respect to education admissions, consists of the fact that (a) it is important to have diversity in the classroom for the benefit of us all, as it encompasses integration among different groups, it better represents the composition of society, etc., and that, similarly, (b) the professionals any institution educates will then fully enter society –*i.e.*, the labour force–, which is already diverse. Hence, the promotion of diversity advances the common good and benefits the

overall society. And the same two arguments also serve as the rationale for affirmative action in that later stage of employment.

I find, however, this response to be unsatisfactory. For (a) and (b) seem to depart from a previous analysis. As I see it, the justification of affirmative action for the promotion of diversity should start with an explanation of why we find diversity to be desirable, for this is far to be self-evident. From a utilitarian perspective, for example, one could argue that mechanisms different from diversity could lead to better results both in social integration and civility for diverse societies. Nonetheless, in order to reach the claim of neutrality and properly address it, let us agree that, indeed, *diversity* is of value in both the classroom and the workplace, especially within already diverse societies.

This concession, however, does not respond to all concerns, for Rawlsian liberalism has to justify not only diversity but race or gender-conscious admissions or hiring. In other words, there are multiple sorts of diversity but only some of them have a place in our societies. For instance, race and gender diversity are upheld as the basis for affirmative action, but religious-based diversity is not. At this point, let us remember that race and gender-based affirmative action cannot be defended using the corrective or compensatory arguments –which could explain why affirmative action chooses race and gender and does not advance any other arbitrary characteristics. On the contrary, what is being discussed here is the *forward-looking argument of diversity*.

One could make the argument that, if the aim is to promote diversity, increasingly multicultural and pluralist societies would surely be better reflected in the classroom or in the workplace by a system of quotas or some other affirmative action device that would accurately represent overall society. Not only with respect to race and gender or sexual orientation but also regarding religious belief, physical condition, etc. However, for example, we do not see Catholic quotas of the sort mentioned by Weber in *The Protestant Ethic and the “Spirit” of Capitalism* in early twentieth-century Germany.

As we can see, deontological liberalism's justification of affirmative action in its forward-looking sense is not just to promote diversity, but *one kind of diversity*. This begs the question of why the liberal state chooses that sort of diversity over the remaining types. I believe that, whatever the reason the liberal state provides to justify affirmative action on the grounds of pursuing that specific kind of diversity, it implies that such diversity is seen as worth pursuing. If that is the case, however, it also implies that such diversity is valuable or, at least, more valuable or more worth-pursuing than other types of diversity. To put it differently, society B—being the result of the implementation of affirmative action—is more desirable than society A—*i.e.*, the status quo.

There are many possible reasons for this justification since worthiness or value of society B over society A can respond both to *instrumental* or *normative* motives. However, either way, it encompasses some judgement. In the case of the former, as Delgado argues, “affirmative action is viewed as an instrumental device for moving society from state A to state B” (1991:1223) and, therefore, acts as a process of social engineering. As for the latter, the normative judgement of society B over society A encompasses an evaluation process that elevates, for its *intrinsic worth*, one over the other.

If this is the case, both the instrumental argument and the normative argument are *teleological* arguments, rather than *deontological*. The instrumental argument holds that “the system thus bases inclusion of people of colour [and, we could add, gender-diversity] on principles of social utility, not reparations or rights” (Delgado, 1991:1224). As for the normative argument, this is all the more compromising for Rawlsian liberalism, as it points out that the evaluation process departs from one conception of the good, favouring it over the rest.

Deontological liberals, in light of the instrumental teleological claim, could respond to Delgado's argument by asserting that the beneficiaries of affirmative action have *a right* to be hired or admitted on the basis of their arbitrary characteristic—race or gender—so long as the institution has defined its mission and set its criteria beforehand. The instrumental critique could argue that this, in turn, would also imply that there is unequal treatment of

institutions with those who, *ceteris paribus*, are not hired or admitted precisely because they lack such arbitrary characteristics. In other words, individual rights would be sacrificed for the sake of one specific kind of diversity or for the common good, which is contrary to the very core of Rawlsian liberalism –according to which the common good should not be pursued if individual rights are violated in the course of its promotion. I, however, do not think this is the case. I do not think that any individual right is being suppressed if the institution has previously defined its mission and detailed its admission or hiring criteria accordingly. For nobody has a right to be accepted into a given university and nobody has a right to be hired by some company. This view is shared by both proponents of affirmative action and also by some detractors –see, for example, Dworkin (2000:79-88) and Sandel (2009:167-183). A different issue is, however, if the institution defines its mission and sets the admission or hiring criteria accordingly. Under these circumstances, people do have a right to be hired or accepted if they meet the criteria, in which case the rights of applicants would be harmed were they not hired. But besides this scenario, no rights are sacrificed and, thus, the priority of the right consecrated by deontological liberalism is preserved... or so it seems. For the question remains on what grounds does the institution define its mission and sets its criteria, if not social utility? The justification of Rawlsian liberalism for diversity's sake-affirmative action is still unanswered. As we have seen, no individual rights are violated by affirmative action policies whose aim is to promote diversity. However, some arbitrary characteristics are included in the hiring or admission's criteria, and we must find the reason why. In other words, the *justification*. Having rejected above the *instrumental* argument, we must turn to the *normative* realm to address this issue. And it is here where the *neutrality claim* comes into play.

Race and gender are the arbitrary characteristics that affirmative action seeks to advance so that the classroom and the workplace are more race-diverse and gender-diverse. If that is the case, as stated above, there is some value attributed to these characteristics in a way that gender and race are morally relevant since they are “admitted to be meritorious in and of itself, and thus relevant to the distribution of a society's opportunities” (Eastland, 1992:46).

Liberal neutralists argue that the consideration of race and gender as morally relevant for the creation of rights does not emanate from a conception of the good life. On the contrary, the specific kind of diversity that affirmative action promotes is defended precisely on neutrality grounds with respect to any given conception of the good. Of course, most neutralists do not defend absolute neutrality for, as Meckled-Garcia asserts, “the idea of an absolute neutrality is arguably incoherent” (2001:295). He refers to the fact that neutrality is indeed neutral with respect to a number of possibilities that define a range, all of which being comprehensive conceptions of the good. But neutrality is also not absolute with respect to its own conception since, as Rawls notes, despite its accurate definition as neutral, “it is important to emphasize that [political liberalism] may still affirm the superiority of certain forms of moral character and encourage certain moral virtues” (1988:263). As a result, Rawlsian neutrality is not entirely morally free-standing, even though it is not built upon any comprehensive conception of the good. Therefore, what is pertinent at this point is to determine whether or not the desirability for the specific kind of diversity sought by deontological liberalism is based on a comprehensive conception of the good. As Rawls himself notes, “[t]he crucial point here is that admitting [liberal] virtues into a political conception does not lead to the perfectionist state of a comprehensive doctrine” (1988:263).

If Rawlsian liberalism, in the issue of forward-looking affirmative action, defends diversity –of that specific kind– on the basis of its *intrinsic* desirability, it is embarking on its own defined *telos*. Namely, creating society B which is characterized, among other things, by the diversity that is being advanced by affirmative action. We could argue that such *telos* is a comprehensive one, upholding a liberal conception of the good life and, thus, contrary to deontological liberalism’s alleged neutrality. By contrast, according to Rawls:

“[I]f a constitutional regime takes steps to strengthen the virtues of toleration (...) it does not thereby become a perfectionist state. (...) Rather, it is taking reasonable measures to strengthen the forms of thought and feeling that sustain fair social cooperation between its citizens regarded as free and equal. This is very different from the state’s

advancing a particular comprehensive doctrine in its own name.
(1988:263-264).

Let us briefly consider which is the ‘virtue’ that is being advanced in this case. As mentioned above, in the particular case of promoting diversity, affirmative action considers gender and race as morally relevant. This is most troubling since Rawlsian liberalism seeks to detach distributive justice –and, in this case, the justification of affirmative action– from moral desert. As Rawls notes, “no one deserves his greater natural capacity nor merits a more favourable starting place in society” (1999:87). Mainstream deontological liberalism holds that the reason behind this dissociation is an egalitarian one, so that justice is not a matter of honouring virtue or moral desert, whereas others believe it is a teleological one –*e.g.*, Sandel, 2009. Nonetheless, as we can see, the aforementioned dissociation does not stand in this particular issue. And this makes deontological liberalism seem to hold a more comprehensive conception of the good –namely, the liberal one– than it admits. Nevertheless, as Sher (1997) notes, the understanding of a ‘conception of the good’ is highly controversial, either because “some normative claims are often treated as conceptions of the good (...) [or] because many views about what makes people better off are not (...) conceptions of the good at all” (1997:37-38). My concern, however, is that Rawlsian liberalism does not need to be perfectionist or comprehensive to be teleological. Pursuing a telos requires, however, to hold a substantive liberal conception. Therefore, regardless of whether affirmative action presents here a comprehensive or a non-comprehensive conception of the good, what seems clear is that there is a telos that compromises deontological liberalism’s anti-teleological position.

Neutrality, according to deontological liberalism’s own definition, seems to be preserved under the non-comprehensive conception of political liberalism, for let us remember that Rawlsian liberalism’s neutrality pertains only to conceptions of the good. By contrast, neutrality is greatly compromised if there is a comprehensive –and liberal– conception of the good as the basis for pursuing that specific kind of diversity. And it is compromised regardless of whether there is a perfectionist or non-perfectionist telos –what Quong (2011) calls liberal perfectionism and comprehensive antiperfectionism. Either way,

much is lost in any case for deontological liberalism. If neutrality is not compromised because of liberalism's neutral stance with respect to conceptions of the good, it is still very substantive with respect to values and ideas which it tries to promote, shaping what we may call a *weak telos*. On the other hand, if neutrality is compromised, there is indeed a *strong telos* in place. In the first case, there simply is a conceptual misunderstanding since, after all, deontological liberalism seems to have its own teleology. In the second case, however, Rawlsian liberalism fails to subscribe to its own thesis because it attributes moral desert to the individuals whose characteristics are to be advanced under the diversity argument. As a result, distributive justice is not truly dissociated from moral desert as the deontological discourse claims. On the contrary, distributive justice holds a consideration of how society should be –or, at least, how it would be better than the current one– which is characterized by the sort of diversity it advances.

This last point is all the more troubling because of the fact that this moral attribution is not only directed to arbitrary characteristics over which we have no control, but its design is also entirely arbitrary –nowadays it is directed toward race and gender, but it could be different, showing a great degree of moral arbitrariness. A backward-looking argument for affirmative action would at least be clearer on the individuals that, because of past wrongs or socioeconomic disadvantage, are to be compensated or protected. On the contrary, a forward-looking argument for diversity says nothing objective about the individuals whose characteristics are to be worth advancing in order to shape society into that sort of diversity. Gender, sexual orientation and race are all arbitrary factors over which people have no control, and so is religious belief or political orientation. As a result, the advancement of some of these arbitrary factors over the rest shows a great degree of arbitrariness.

III. Conclusion

This analysis suggests that we should avoid diversity as a forward-looking argument for affirmative action since, as we have seen, there are two main things wrong with it. Firstly, deontological liberalism turns out to be dishonest in this respect, since it presents itself with a clear telos –regardless of being based on values or a comprehensive conception of the good. In this sense, liberal perfectionism has no problem of ambiguity, as it holds that “it is

no less legitimate for government than for private individuals to try to promote the good” (Sher, 1997:4). Secondly, affirmative action requires permanent assessment for social engineering policies, which may lead to uncertainty and instability due to the need to constantly revise the social engineering process. Furthermore, the hiring decisions and admission standards may be directed to perverse ends. Finally, as Sandel argues, “the idea that merit arises only once social institutions define their mission is subject to a complication (...) [since] they are not free to define their mission just any way they please” (2009: 179) As a result, even if a foreseen telos is desirable, institutions may be prevented from pursuing it.

Therefore, I would argue against this sort of behaviour from the state –affirmative action in its forward-looking sense. For it seems that a minimal state would be less capable of advocating for –or enforcing– a different or an allegedly-‘better’ society.

IV. References

- Delgado, R. (1991). ‘Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?’, *Michigan Law Review* 89 (5), pp. 1222-1231.
- Dworkin, R. (2000). ‘Affirmative Action: Is It Fair?’, *The Journal of Blacks in Higher Education* 28, pp. 79-88.
- Eastland, T. (1992). ‘The Case Against Affirmative Action’, 34 (33), *William & Mary Law Review*, pp. 33-61.
- Meckled-Garcia, S. (2001). Toleration and neutrality: Incompatible Ideals?, *Res Publica* 7 (3), pp. 293-313.
- Quong, J. (2011). *Liberalism Without Perfection* (New York: Oxford University Press).
- Rawls, J. (1988). ‘The Priority of Right and Ideas of the Good’, *Philosophy & Public Affairs* 17 (4), pp. 251-276.
- Rawls, J. (1999). *A Theory of Justice: Revised Edition* (Cambridge, MA: Belknap Press).
- Sandel, M.J. (2009). ‘Arguing Affirmative Action’, in *Justice: What’s the Right Thing to Do?* (New York: Farrar, Straus and Giroux), pp. 167-183.
- Sher, G. (1975). ‘Justifying Reverse Discrimination in Employment’, *Philosophy & Public Affairs* 4, pp. 159-170.

- Sher, G. (1997). *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press).
- Weber, M., Baehr, P., & Wells, G.C. (2002). *The Protestant Ethic and the "Spirit" of Capitalism and Other Writings* (New York: Penguin Books).