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Global Issues in Compensatory Justice: Introduction

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The intersection of racial, ethnic or gender identity with social and economic disadvantage raises troubling questions and elusive resolution. Politicians and policy makers, committed to social justice in their particular countries, have for many decades attempted to redress persistent patterns of subordination and discrimination by recourse to, and within the accepted parameters of, their legal systems. A variety of legal scholars have contributed to the discourse of legal equality in the latter half of this century, including civil rights theorists (Greenberg, 1994), critical legal scholars (Kairys, 1978), critical race theorists (Delgado, 1995), and feminists (Bartlett and Kennedy, 1991). Much of the discussion has been critical of the law's inability to adequately address structural discrimination to which disproportionate numbers of women and minorities of colour are subjected.[1]

In the past few decades, particularly in the countries discussed in this volume, various 'gender sensitive' and 'race sensitive' approaches have been proffered. One such approach has been the adoption of a redistributive and compensatory mechanism popularly referred to as 'affirmative action' (also referred to as reverse discrimination, benign discrimination', and compensatory discrimination').

Affirmative action (in its various verbal configurations) raises awkward and complicated questions about group entitlements, compensation and rights. It challenges the legal system and political edifice to unbundle the multiple oppressions and multiple concomitant claims. In Western democracies it confronts the tidy formal arrangement of the individual rights regime by channelling remedies into group categories, thereby disrupting standard notions of individual equality.

Attempts at sustaining affirmative action have generally led to widespread controversy and some hostility, particularly from those sectors of the populace who believe themselves disadvantaged by the programs (Carter, 1991; Thornton, 1997). So these programs (and their underlying

policies) present a tremendous challenge to legislators and legal scholars who seek to reconcile the demands of legal strategies sensitive to race and gender with the seemingly contradictory demands of individual justice. In short, the very ideal of equality is subject to intense interrogation in its attempt to strike a balance between benign and invidious racial and gender classifications.

The purpose of this volume is to address and analyse the issue of discrimination, both adverse and compensatory. The central question underscoring this analysis is the possibility of translating legal rights into social and economic rights, a version of the formal versus substantive equality' debate in critical legal scholarship (Williams, 1982). The contributors examine the tension between collectivist aspirations which underpin the principles and policies of compensatory discrimination, and the consequences for liberal democratic theory.

Specifically the following questions are raised:

(1) What is the relationship of power and principle in the making of law with respect to equal opportunity or distributive justice?

(2) What purposes do affirmative action legislation and policies serve: compensation; redress; diversity; redistribution?

(3) How has the categorisation into disadvantaged minorities' improved the status of those minorities? Should economic status form part of the equation of disadvantage?

(4) How effective has state intervention (affirmative action legislation and policies) been? What are the mechanisms of evaluation and assessment, and are they helpful?

The contributors to this volume provide a conceptual framework within which to consider the vexed definition of disadvantage'. As we approach the new millennium, the contemporary constellation of global capital with its exciting possibilities and debilitating handicaps has challenged the epistemological boundaries of law, and the latter's capacity to accommodate demands for redress and justice, particularly that of a redistributive or compensatory type.

Global perspectives, as well as case studies from Australia, the United States, India and South Africa, highlight the contextuality and ambiguity of identity. Yet the law's concern, under a compensatory justice model, to classify individuals and groups as discrete identities deserving of advantage, and their encapsulation in formal constitutional

categories, makes this a particularly trying endeavour. Though distinguishable in their political and cultural contexts, these case studies incorporate the narratives of political backlash and stigmatisation which increasingly occupy a centre stage in the discourse.

It is difficult to negotiate the precise contours of affirmative action, either as principle or policy (Edley, 1996). Notions of compensatory justice are not confined to groups disadvantaged by historical and contemporary discrimination based on factors such race, ethnicity or gender. Many societies tolerate special treatment for certain designated groups, for example, veterans and the elderly. In the United States, in the educational setting – for example, and particularly at the elite universities and colleges, children of alumnae and donors often receive advantageous treatment in the admissions process. Despite this, the debate surrounding compensatory justice for racial and ethnic minorities and women is frequently accompanied by rancour. Everywhere the debate embodies at least some common elements. In all the case studies in this volume the notion of the allocation of resources based on group identity, premised on past discrimination, appears to subvert the ideal of equality so valorised in the jurisprudence of liberal democracies.

Whether an affirmative action policy or program is rooted in notions of redress or compensation (for past injustices), or diversity (to represent the multicultural reality of a particular society), or redistribution (a political arrangement benefiting vocal minorities), all the chapters in this volume refer to affirmative action as state imposition, through legislation, court judgments or other mechanisms, to depart from well established norms. In other words, they reflect intervention by the state to ensure access to employment, education, legislative seats and other appropriate societal goods, for targeted groups burdened by persistent disadvantage and under-representation.

In the first chapter, Chibundu analyses both the descriptive possibilities' and the breadth of its potentialities' in assessing affirmative action and international law. He points to the irony that despite the dearth of theory and practice of affirmative action in international law, proponents of affirmative action within nation states constantly evoke international law as the wellspring for their position on affirmative action. Chibundu deconstructs the veneer of sovereign equality of states and the contradictions it produces: the fallacy of equality in the face of economic inequality (between states and regions).

This contradiction became most apparent during the period of decolonisation, even though during the early years the newly independent states did attempt, through adroit political manoeuvring, a reconfiguration of the operating paradigms of international law.

The international jurisprudence of state sovereignty, and the concomitant sovereign equality of states, pose significant challenges for the possibilities of affirmative action. Chibundu explores the benefits and shortfalls of affirmative action by examining prior efforts towards this in the economic arena. In this regard he discusses the Generalised System of Preferences (GSP), adopted by the international community in 1971, which purported to advance arrangements between the wealthy and poor nations, whereby the latter would receive preferential treatment with respect to tariff treatment, aid and imports. Chibundu cites the political lobbying and other tactics utilised by the developing states as not dissimilar to the approach employed in domestic affirmative action programs. Eventually, however, as opportunism and corruption began to plague many governments in the developing countries, they soon lost their moral claims to equity.

Chibundu is not optimistic about affirmative action in light of global trends in the past two decades, particularly the reification of the market and its unchecked possibilities in regulating the global economy. He does see some optimistic signs, namely that in some Western countries the principle of affirmative action could be interpreted as a corollary to the right to non-discrimination. In other words, the existence (albeit contested) of affirmative action in many societies may give such an approach some cachet in international law. Furthermore, if affirmative action is based on notions of contemporary need, and not compensation for past wrongs, it may more easily acquire acceptability as a norm in international law. But Chibundu also recognises that there may be widespread resistance to the imposition of benefits based on group membership. In short, international law mechanisms of compensatory justice would probably face the same hostility about the appropriateness of deviating from the standard notion of equality, namely equal treatment, as it has in the domestic context.

Chibundu argues that the incorporation of affirmative action in international legal doctrine would be beneficial for two reasons: the institutional legitimation that would accompany its adoption, and its enabling effects on domestic legal practices. Despite this, he is not

sanguine about the possibility of affirmative action bridging the gap between the poor and wealthy countries, and altering the distribution of power and influence in the international community.

Mendelsohn considers the Indian experience, often referred to as the world's largest scheme of positive discrimination'. The preference in question is for the Scheduled Castes (the Untouchables), the Scheduled Tribes and Other Backward Classes. He focuses his discussion on the Untouchables since they make up the largest group, and compensatory discrimination for their benefit is the most significant and complex. Mendelsohn evaluates various concessions of compensatory discrimination, including the reservation of public jobs – the most significant benefit in the public mind. He argues that, despite the large number of beneficiaries, the proportion of Untouchables who benefit are small relative to the whole Untouchable population. And there have been numerous problems in implementation of the schemes, including bureaucratic inertia or hostility and a considerable backlash, often violent, to the programs. Mendelsohn notes that there is little research on the impact of Untouchable appointees on the culture or policy of the bureaucracy. Has the culture of the bureaucracy changed in favour of better treatment of the Untouchables? Mendelsohn concludes that other developments and public programs have had a far greater impact than programs of compensatory discrimination. Above all it is the growing consciousness and appetite for education of the Untouchables themselves that have seen them increasingly sending their children to school.

Mendelsohn is lukewarm about the benefits of reservation of legislative seats; he concludes that, at least now if not earlier, this is the least significant dimension of compensatory discrimination in India. But he recognises that the value of developing a pool of experienced legislators is more diffuse than the fruits of immediate instrumentalism, and that the presence of Untouchable legislators appropriately reflects the pluralism of Indian society.

Mendelsohn argues overall that despite extensive reservation of public sector jobs, special educational benefits and reservation of legislative seats, the schemes of compensatory discrimination have not succeeded in overcoming the poverty of a large proportion of the relevant communities. He contrasts the overall failure of state policy with the redistributive possibilities that were once inherent – the time is probably now past – in radical land reform in a country where large numbers of

people, including a great many Untouchables, are landless agricultural labourers. Of less radical impact but more significant than compensatory discrimination has been the effect of old-fashioned anti-discrimination action; this has made adverse discrimination of the grossest kind no longer so available a behaviour. The most intractable problem is no longer gross discrimination but poverty.

In the third chapter Andrews outlines the possibilities of affirmative action programs in South Africa since the advent of a democratic government there in 1994. She contextualises programs of affirmative action within the grand project of political transformation occurring there, and highlights both its possibilities and limitations. She distinguishes the South African experiment from others by emphasising its redistributive potential, and its popular acceptance by the majority of the population. Tracing the legacy of apartheid, and the political, economic and social distortion leading to massive inequalities between white and black South Africans, Andrews argues that affirmative action programs are imperative if democratisation is to be meaningful. She argues further that the specific race-conscious approach (but one which also includes women and the disabled) does not contradict the philosophy of non-racialism espoused by the African National Congress, the governing party.

She describes the major provisions in the *Employment Equity Act*, the first piece of affirmative action legislation promulgated in late 1998. According to Andrews, this Act represents a careful balancing of volunteerism and coercion, poised between corporate reticence and labour agitation. The Act, similar to some provisions in Australia's Affirmative Action Act, mandates concrete steps that employers have to take to implement their affirmative action programs. The Act provides for an advisory body which will bring together groups representing organised labour, organised business, government, blacks, women and the disabled. The Act utilises the existing industrial relations mechanisms to resolve disputes, and provides for the award of compensatory and punitive damages against recalcitrant employers, as well as forbidding against future discrimination.

Andrews outlines two significant problem areas for the implementation of affirmative action programs, areas not confined to South Africa but particularly poignant in the light of its recent history of racial subordination and exclusion. The first is the issue of racial cate-

gorisation required by affirmative action, which has the potential of reviving the more egregious aspects of rigid racial classification pertaining particularly to non-white (as opposed to black) South Africans. She highlights the race to the top of the most oppressed and its possible deleterious outcome for racial reconstruction. The second problem area is the perennial issue about standards or merit, and their intersection with affirmative action. Although Andrews does not seek to repudiate the idea of merit, its normative dimensions need to be interrogated to unearth their potentially discriminatory impact.

Andrews also focuses on the question of equality and the South African judiciary's evolving jurisprudence in this area. She outlines the constitutional provisions relating to equality and non-discrimination, and the Constitutional Court's expansive definition of this concept in a significant decision involving parental rights. She also analyses the first successful challenge to an affirmative action program, suggesting that its success had more to do with the program's technical deficiencies than judicial hostility to affirmative action.

Andrews concludes that despite its popular support and constitutional and legislative protection, affirmative action programs in South Africa cannot on their own substitute for wholesale government intervention to attack poverty and economic inequality.

In her contribution Banks provides a critique of legal and policy developments in the United States, focusing on the contested terrains of compensation (redress for past racial and gender injustice); diversity (the vision of the workplace and major institutions of the society reflecting its racial, ethnic and gender diversity); entitlement (the reality that the major beneficiaries of affirmative action have been white females); and equality (the widespread perception that affirmative action contradicts America's vision of itself as a land of equal opportunity). She assesses the manner in which the courts are accommodating these divergent strands in an increasingly complex debate.

Banks details the deep divisions within the American public which stem from competing visions of equality. Proponents of affirmative action interpret the use of race in allocating access to resources (in employment, education and government contracts) as indispensable to the goal of a racially just society. Opponents of affirmative action deplore the racialised nature of decision making, and its antithesis to the concept of equality.

Banks refers to the irony that the issue of affirmative action is largely race centred, that is, the perception that whites are losing out because blacks are favoured, when in fact white women have been the major beneficiaries of affirmative action. She questions the latter's silence in the face of concerted popular campaigns (through ballot initiatives and court challenges) to roll back affirmative action programs.

Banks chronicles the major judicial developments pertaining to affirmative action and traces the increasingly rigorous scrutiny afforded affirmative action by the United States Supreme Court. Concentrating mostly on affirmative action in employment, with the exception of the *Bakke* decision, she traces the court's reluctant acceptance of race as a legitimate criterion (to achieve diversity), to the current situation where, according to the *Croson* and *Adarand* decisions, racial classifications, even for benign purposes, must serve a compelling governmental interest, and must be narrowly tailored to further that interest'.

Taking her cue from critical legal theorists, particularly critical race theorists, she laments the erosion of the policies of affirmative action and growing hostility from the American public, and suggests that anti-discrimination measures have largely been superficial and palliative and not designed to achieve a racially just society. She cites the Philadelphia Plan created by the Nixon administration, much criticised by activists in the black community for its cosmetic and inadequate efforts at racial equity.

Banks argues that the legal requirement of racial intent has thwarted anti-discrimination initiatives by black victims of racial discrimination, whilst ironically proving very useful to white plaintiffs who allege racial intent in affirmative action programs they challenge. In fact, legal strategies adopted by victims of affirmative action programs have been based on the promise of equality and the imperatives of a colour blind society, arguments that the courts find increasingly persuasive.

Banks concludes that the best rationale for compensatory discrimination in the United States is 'positive diversity', which she describes as an affirmative celebration of difference in American society. Even though she recognises that this rationale may ultimately be only judicially palatable in the educational sector, she sees its necessity in sustaining affirmative action in the employment sector as well.

Gaze outlines the major features of Australia's Affirmative Action Act for Women which provides for affirmative action programs in the private sector. (There is no similar program in place for indigenous peoples or the disabled.) Gaze traverses the contested domain of law's neutrality and the persistence of structural discrimination. She grounds her arguments for the need for affirmative action in these conditions of systemic discrimination.

Gaze contextualises the nature and scope of affirmative action in the debates around gender and racial subordination and the absence of constitutional guarantees within which to centre rights to equality. Although anti-discrimination measures are incorporated (albeit unevenly) in most State and federal legislation, she laments the Australian legal system's insistence on claims to universality and neutrality. Consequently, the complaint-based mechanisms (with its burdensome requirement of intent) dominates, although there are some schemes of affirmative action for women, indigenous peoples, people from non-English speaking backgrounds and disabled people in public sector employment. These schemes largely flow from Australia's international treaty obligations.

These affirmative action programs have survived legal challenge because the special measures enacted have been interpreted as temporary and therefore exempt from anti-discrimination legislation. Gaze argues that the decisions in these cases are jurisprudentially unhelpful because the measures in the programs are still regarded as discrimination, although acceptable under the circumstances. The courts and tribunals have therefore reinforced unreconstructed concepts of affirmative action. She argues for a jurisprudence that sees affirmative action as integral to the notion of equality, not an exception to it.

Gaze catalogues some fundamental deficiencies with the Affirmative Action Act. She argues that because the purpose of affirmative action is to target structural sexism within the workplace, it does not adequately address the intersection of race and gender which affects women of colour. She also contends that despite the existence of affirmative action measures in both the public and private sector, traditional notions of merit have not been subjected to appropriate scrutiny. This is so despite their obvious disparate impact on women and members of disadvantaged groups in Australia.

Although Gaze sees the absolute necessity of affirmative action measures, and notes the radical potential of the Affirmative Action Act, she believes this potential has not been tapped because of inadequate enforcement mechanisms and a lack of direction. Consequently the Act has not changed women's lives dramatically. Australia's workforce remains overwhelmingly white and largely sex-segregated; jobs in which women traditionally have dominated continue to be undervalued. Moreover, Gaze expresses consternation at the current political environment in Australia, where claims to social justice, and particularly racial justice, are met with growing hostility. In this she sees a further erosion of the limited gains and possibilities of affirmative action.

The principle and policies of compensatory justice, either globally or locally, will continue to be contested. But the reasons for the existence of the schemes are all too plain: economic disparities continue to plague many societies, and the fault lines are along the divisions of race, ethnicity, gender and class. The contributions to this volume take these fault lines seriously, though they do not pretend to any easy solution to the tensions that particular programs have generated. The contributions are at least joined in the position that the existing distribution of resources is unfair, and that it is crucial that we address this unfairness.

Notes

1. I use American terminology to refer to ethnic and racial minorities burdened by racial and gender discrimination. Obviously huge numbers of poor people, who are not women or members of racial or ethnic minorities, are also burdened by the effects of economic inequality. This volume, however, concerns itself with the plight of women and racial and ethnic minorities.

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