

POLITICS OF PREFERENCE: LESSONS FROM INDIA, THE UNITED STATES AND SOUTH AFRICA

Krishna K. Tummala

Kansas State University, Manhattan, KS, USA

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Summary

This article deals with the policy of preference to minorities in public service with special reference to India, United States and South Africa. In India, the policy has become a tool of competitive populism. In the United States it has been subjected to the ideological positioning of the Supreme Court and the White House. In South Africa it is turned on its head with the majority of the population enjoying preference resulting in the fight of the minority “white tribe.” The following questions are raised: Has this sanguine public policy turned out to be a political soccer game? Has it been a victim of ideological fights and even opportunism among competing groups? Given all the tribulations, can altruism be rescued from politics?

1. Introduction

All modern nations have tried to reach out for minorities in an effort to offset past discrimination and make their public service more representative. Such efforts are known by several names, the most commonly used being affirmative action (AA). Three nations are chosen for comparison: India, the largest working democracy; the United States of America, an immigrant nation and the most stable democracy; and South Africa, which, after a long rule by a microscopic minority, has come into the comity of modern democratic nations only recently with the transfer of power to the majority blacks in 1994. While the experience of India and the United States in this context is formidable and long, more so the former, the South African experience is nascent but important.

2. The Case for and against AA

It is useful here to briefly recall the rationale behind preferential treatment and its criticism. Supporters of AA argue mainly on five criteria: *First*, the concept of compensatory justice implies that having historically discriminated against some groups either by custom/tradition or through deliberate public policy, it is about time to undo the damage and extend due compensation. *Second*, distributive justice demands that social goods and wealth be distributed justly by providing equal opportunity and access to all. *Third*, social utility theory commends that everyone in the society has something to contribute and shall be given the occasion to participate. This is an argument for inclusion rather than exclusion; diversity is a core democratic value. *Fourth*, is the theory of “representative” bureaucracy, which suggests that by making the public service diverse and representative of all segments of the community, the service itself would become more responsive to the needs of all. *Fifth*, there is an emerging definition of “merit”, not as solely measured by the scores obtained in a test, which might or might not be “valid”, but as “deserving” in other ways.

The arguments against AA are many. The *first* and foremost is that of reverse discrimination, i.e. an effort now to prefer a minority, to undo previous discrimination, is to perpetuate discrimination, except it is now being practiced on a different group. *Second* is the “make whole” argument, which posits that preference may at best be given to only those that were discriminated against, and not to a whole class of people, some of whom may actually be quite well off. *Third* is that any preference is against the individualist political philosophy which demands less government and least interference in one’s entrepreneurial spirit. *Fourth*, any preference now tends to obtain the character of an “entitlement,” perpetual in its application, and not a time-bound remedy as it was meant to be. *Fifth*, the very effort at better representation might result in poor service to the clients, in that inefficient and incompetent people may possibly be appointed because of preference. *Finally*, there is a miscellany of psychological and social arguments that preference would lead to self-denigration, defensive behavior, and so on. Preference can be used as a crutch to lean on or as a club to brow-beat administrators, thus making personnel disciplinary decisions almost impossible to make.

Perhaps the most worrisome of all this discussion is that it largely tends to become quite emotional, obscuring logic and undermining rationality. Often times, non-discrimination is either confused with preference or used as a defense against preference. Non-discrimination is passive, and color and sex neutral, whereas preference is active and both color and sex conscious. While the former is negative in its connotation, the latter is positive and pro-active. AA as a preferential policy thus ironically treats some more equally in an effort to enhance equality, and by doing so in a way negates the very principle of equality that it is seeking. Notwithstanding the contentious nature, there has been a moral, philosophical and policy commitment among the many nations (including the three here) extending preference to minorities which is now being re-visited and challenged.

3. Policy Initiatives

To offset the essentially unequal and hierarchical character of its society, India launched

numerous social engineering programs. The most important of all perhaps is "reservations," denoting a set quota of public service positions for recognized minorities.

Post-independence policies of the Indian government regarding minorities, however, were not the products of any agitation, representation or demands by the minorities themselves. In fact there were some leaders who opposed any preference, partly due to their commitment to democracy and its equality principle, and partly due to some trepidation in that caste and religious divisions would worsen the already existing great social divide. Yet a significant majority of the members of the Constituent Assembly believed in the obligation of the state to provide for the deprived. Vallabhai Patel, a conservative himself, stated the philosophical position during the debates while writing the new Constitution thus:

"We wish to make it clear...that our general approach to the whole problem of minorities is that the State should be so run that they should stop feeling oppressed by the mere fact that they are minorities and that, on the contrary, they should feel that they have as honourable a part to play in the national life as any other section of the community. In particular, we think it is a fundamental duty of the State to take special steps to bring up those minorities which are backward to the level of the general community."

Additionally, political realities dictated such an approach, as was cogently expressed by B.R. Ambedkar, who thought that "minorities are an explosive force" with the potential to "blow up the whole fabric of State." Moreover, as they accepted majority rule, minorities deserved some safeguards. Thus these policies stem from a large dose of a socialist commitment of the well-meaning and principled constitution makers, and their efforts to improve the condition of minorities. No contradiction thus was perceived in a staunch commitment to democratic equality and special treatment of minorities. Accordingly, three groups in the majority Hindu society were targeted for preferential treatment. These are called the Scheduled Castes (SCs) constituting around 15% of the population, and the Scheduled Tribes (STs), never fully integrated into the Indian society but living on the social fringes mostly in the hilly regions, who comprise 7.5% of the population. And then there are the Socially and Educationally Backward Classes (SEBCs), popularly known as Other Backward Classes (OBCs), of indefinite number (variously estimated to be around 50% of the population), whose definition is left open.

Accordingly, for the Centre (as the federal government in India is commonly known) a quota of 15% for SCs and 7.5% for STs is set for direct recruitment on an open competitive examination on an all-India basis. (State governments have their own reserved positions.) No reservation was originally envisaged for OBCs at the Centre, but each State government was left free to make such reservations as it saw fit. It should be noted that the private sector is not covered under this policy of reservations.

However, in the name of efficiency, as enjoined in Article 335 of the Constitution, and believing that any "unreasonable, excessive and extravagant" reservation would restrict general competition, the Supreme Court in 1963 said that total reservations (including the SC, ST and OBC categories) shall be less than 50% of positions. The Court further

affirmed that preferential provisions are not meant to subvert the principle of equality guaranteed by the Constitution under Fundamental Rights, but are provided only as exceptions. In 1992, the Court in fact thought that: "Equality...is secured not only when equals are treated equally but also when unequals are treated unequally....To bring about equality between unequals...it is necessary to adopt positive measures to abolish inequality."

The constitutional dilemma between equality and preference came to the fore in 1951 when in *State of Madras v. Champakam Dorairajan*—a case not unlike *Bakke* in the United States—a special admissions provision into a professional school was successfully challenged as violative of the equality clauses. Consequently, the very first Amendment to the Indian Constitution was enacted adding Section 4 to Article 15, empowering the state to make "any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Article 16 (4) in the original Constitution itself dealt with public employment by stating that the state can make "reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." Thus was the constitutional tussle resolved. And what with a centralized staffing system, each administrator is no more in a quandary as to what needs to be done individually.

Contrarily, the experience of the United States is muddled. The army, as a pioneer, did historically integrate the services and provided preference for veterans. The idea of preference in the civilian sector, however, is of recent origin. The term "affirmative action" first appeared in President John Kennedy's Executive Order 10925 of 1961, and four years later President Lyndon Johnson in his Executive Order 11246 required AA in providing genuine equal opportunity. The civil rights and women's liberation movements in themselves lent support and exerted pressures which led finally to an operational policy statement, albeit reluctant, by the US Civil Service Commission on May 11, 1971 which in part read thus:

"Employment goals and timetables should be established in problem areas where progress is recognized as necessary and where...minority employment is not what should reasonably be expected."

But AA has to be reconciled with the 5th and 14th Amendments' emphasis on equality. The courts continuously wrestled with this naughty problem, particularly in the absence of a clear legislative mandate from Congress. Moreover, the 1964 Civil Rights Act was not meant to accord any preferential treatment. Its Title VII Section 703 (i) in fact admonishes that no racial balance is required, and in (j) prescribes that no preferential treatment shall be given to any one to correct any existing racial imbalance. But its Section 706 (g) reads that "...the court may enjoin the respondent from engaging in...unlawful employment practice, and order such affirmative action as may be appropriate." Consequently, the courts have come to play an important, yet often times reluctant and certainly not a consistent, role in this public policy. However, the 1978 Civil Service Reform Act talked of a civil service that is representative of the nation's diversity instead of being a preserve of one group or the other.

Until about late 1980s, the U.S. Supreme Court took an affirmative position on AA, albeit under strict scrutiny and largely by a 5-4 majority. By taking a cursory look at several of its decisions one can glean some principles in this context. (a) To start with, the Supreme Court was even reluctant to enter into this discussion, and when it did, it looked into the narrow civil rights issue rather than the fundamental tension between equality and preference. (b) Any preferential treatment should serve a “compelling state purpose,” and would be subject to a strict constitutional scrutiny..(c) Race, color and sex conscious personnel practices are acceptable so long as they are bona fide occupational qualifications—BFOQs. (d) Private and voluntary preferential policies were preferred. Consent decrees may not provide relief for future clients who are not necessarily parties to the agreement. (e) A Congressional set-aside of a preferential quota is acceptable. (f) A personnel practice is not unconstitutional, even if it were to result in a harsh impact on minorities, so long as it does not intentionally discriminate. (g) No preference ought to result in invidious discrimination and demean any group. Yet, while dealing with “quasi-sovereign” entities, special considerations are not unconstitutional. (h) Membership in a disadvantaged group alone is not sufficient to warrant preferential treatment. (i) Relief accorded must be narrow, and not intrusive. It should also not be disproportionate to the harm done to others, or trammel the rights of those that might be adversely affected. When less intrusive means (such as hiring goals) are available, there is no reason to follow drastic measures (such as layoffs). (j) While past societal discrimination in itself is not enough ground to provide preferential treatment, the “make whole” theory is ignored as relief need not be restricted to victims alone. Relief could be extended to a whole class of people to dismantle past, and to prevent any future, discrimination. In cases of egregious discrimination, the court can order proportional representation of minorities, and that a class of people, and not necessarily the victim alone, is entitled for relief. (k) While quotas themselves are shunned, Court-ordered quotas are permissible as a temporary measure, although it is not necessary to indicate a date on which such a quota prescription would end. The 14th Amendment principle of equality was not violated when a one-for-one promotion for blacks for a period of time was court-ordered. (l) Race conscious practices were acceptable to break down old patterns, and race is *one* but not *the* criterion for preferential treatment. Similarly, sex is but one of the several considerations.

South Africa provides a much starker example. For long, the majority of the nation, comprising of 76% blacks and 8.5% coloreds and 2.6% of Asians, were governed by a repressive and small 13% of minority white Afrikaners. The dreaded apartheid laws, introduced after the National Party came to power in 1948, included the Group Areas Act of 1950, Separate Amenities Act and the Bantu Education Act of 1953, among others; they kept all the minorities (who paradoxically included the majority blacks) not only separate but also very deprived. It was only in 1992 that President de Klerk’s referendum confirmed the need for reforms with 68.7% voting in favor. In 1994 new elections were held and the African National Congress under the leadership of Nelson Mandela came to power. A new constitution was written and adopted in May 1996 (amended in October). And it was a new beginning.

The new Constitution recognizes the injustices of the past, and believes that the country belongs to all who live in it, united in their diversity. Past divisions will be healed, and a new society established. Chapter 2:9 (3) of the new Constitution reads: “The state may

not *unfairly discriminate* directly or indirectly against any one on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (emphasis supplied). Thus, while the criteria listed in terms of non-discrimination are far more inclusive than in many of the modern nations, in principle discrimination on fair grounds is permissible. Thus is AA sanctioned. To that end, the "Employment Equity Act," was passed in October 1998, but without defining the term "equity." The Act has two "Purposes": one, to promote "equal opportunity and fair treatment in employment through the elimination of unfair discrimination", and two, implement "affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce." "Designated groups" are defined as black people (who include Africans, Coloureds and Indians), women, and people with disabilities.

While "unfair discrimination" is not allowed (measures taken in pursuit of affirmative action do not constitute "unfair discrimination"), the onus of responsibility to establish that an employment practice is fair is placed squarely on the shoulders of the employer. Each designated employer, in consultation with the employees— both designated and un-designated—must conduct analyses of the employment barriers and other policies that stand in the way of designated groups, prepare an employment equity plan, and report annually to the Director-General of the Department of Labour on the progress made in the implementation of such a plan. The Director-General has powers to make compliance demands on the designated employers under threat of monetary penalties. Each plan ought not to be for a period of less than one year, and not longer than five years. (At the expiration of one plan, another may follow.) While preferential treatment is meant for only suitably qualified people, such "suitability" may be a product of formal qualifications, prior learning, relevant experience, or "capacity to acquire, within a reasonable time, the ability to do the job."

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Biographical Sketch

Krishna K. Tummala is Professor and Director, Graduate Program in Public Administration, Kansas State University, Manhattan, KS, 66506-4030, USA. He specializes in Comparative Administration, Public Budgeting and Public Personnel Management. His books during the last few years include: *Public Administration/Policy*, ed. (forthcoming); *Comparative Bureaucratic Systems*, ed., (2003); *Public Administration India* (1996). He also edited two symposia on behalf of SICA (Section on International and Comparative Administration, American Society for Public Administration (ASPA) in 1998 and 1999). Over forty-five articles of his appeared in journals such as: *Asian Journal of Political Science*; *Public Administration Review*; *Asian Profile*; *International Journal of Political Science*; *International Issues*; *Indian Political Science Journal*; *Public Budgeting & Financial Management*; *Asian Survey*; *International Journal of Public Administration*; *Administrative Change*; *Public Personnel Management*; *Public Budgeting & Finance*; *Indian Journal of Public Administration*; *Southern Review of Public Administration*; *Congressional Record- Senate*; *Politics, Administration and Change*.

Apart from his several publications, he was Chair, Section on International and Comparative Administration (SICA) of the American Society for Public Administration (ASPA), Chair of the Kansas Chapter of ASPA, Senior Fulbright Fellow, and a Senior Research Fellow of the Indian Council of Social Science Research. He served on the Editorial Board of *PAR*. He won the first prize in an international essay contest on "Reservations in the Indian Public Service," held by the Indian Institute of Public Administration, Government of India, and received the "Public Administrator of the year, 2001" award from the Kansas chapter of ASPA. He served as a member of the National Council of ASPA, and the Executive Council of the National Association of Schools of Public Affairs and Administration (NASPAA). He is Vice President (President-elect) of the Public Administration national honor society, Pi Alpha Alpha.