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THE MORAL LEGITIMACY OF PREFERENTIAL TREATMENT

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Abstract
The moral legitimacy of preferential treatment has been a subject to a number of arguments amongst scholars of Philosophy. Some proponents of this theory argue that preferential treatment resolves the problem of inequality and creates the needed balance amongst members of the society. However, some opponents of preferential treatment argue that this theory rather deepens and encourages inequality it intends to stop by its lopsided "modus operandi," because even the mere mention of the nomenclature "preferential" connotes unfair and unbalanced treatment meant to appease some individuals and offend others. At what point can preferential treatment be considered good and justified by all? Can there truly be a universally acceptable preferential treatment? If so, what is the yardstick and veracity of such a claim? Unfortunately, while this argument lingers without some sort of a unanimous agreement, preferential treatment holds sway on regular basis in the offices, families, industries, corporate organizations and so on. In order to unravel the morally legitimate ground on which this age-long theory should stand especially in our contemporary times, we have hermeneutically examined its pros and cons. Further deductions, evaluations and conclusion were made based on the findings. The efforts of the proponents of preferential treatment in trying to justify their position is properly recognized but the work concludes that no matter how these proponents canonize this theory and its modus operandi, its greatest weakness lies evidently bare on the table of controversial lopsidedness towards the manner in which it handles human affairs.

Introduction

The world history as portrayed in divergent cultures, civilizations and ethnicities is decorated with various kinds of freedoms and restrictions, considerations and treatments that have variously affected the members of the society. Such freedoms, restrictions and considerations that either grade every human person as the same or as different have created situations that could be described as the good, the bad and the ugly (Todd, 2009). While 'the good' is celebrated and commended, 'the bad and the ugly' are usually rebuffed due to their considered immoral illegitimacy.

Preferential treatment is one of the issues that have continually recognized the existence of classes in the society and its moral legitimacy have as well remained a subject of continuous debate. The European Commission (2012) considers preferential treatment as a treatment given to a person or group of persons in a way that encourages greater benefits, rights and opportunities than other persons or group of persons. The implication of this is that if individual A gets a preferential treatment, it simply implies that he is treated better than individual B and other people. Individual A therefore has an advantage over individual B and others. This is a recurrent issue in human community. In fact, it is as old as man himself. But the moral and legitimate ground on which preferential treatment stands remain shaky, because it is often built on a faulty foundation. This is caused by many factors ranging from the motives and reasons behind such treatment. Preferential treatment cuts across all strata of the society including the elite, the religious, political class, businessmen, the artisans, and so on.

It is important to note that while some scholars justify preferential treatment and see nothing wrong with it, other scholars fault it. This article therefore, examines the pros and cons of this age long phenomenon with a view to unraveling the morally legitimate ground on which it should stand especially in our contemporary times. In order to sufficiently discuss this subject, we shall first explore the five major kinds of preferential treatment. These include: Preferential hiring (affirmative action), Preferentiality on the basis of quota, Preferential treatment as a form of compensation (reversing past injustice), Immigration preferentiality (investors, political refugees, specific interest countries such as US immigration act of 1990) and Preferential agreements and trade.

Preferential hiring (affirmative action): C.M. Swain (*2001)* holds that this includes a wide range of governmental and private initiatives offering preferential treatment to members of an ethnic minority or designated racial group. His emphasis is that affirmative action is usually meant to compensate those thought to be disadvantaged due to certain discriminatory actions meted against them in the past or present. the justification for preferential hiring or affirmative action therefore lies on compensatory grounds. People or group of people who were formerly disadvantaged are now favored with what may be termed a justifiable compensation regarded as their due, so that such people could easily move on in the society. Other working descriptions and characterizations of affirmative action however do not emphasize on this ameliorative and compensatory nature of affirmative action. Rather, it focuses on the current value of such action and its ability to enhance diversity both in the workforce and in the

educational institutions. Swain further affirms that there are diverse programs that fall under affirmative action which include some policies that affect public and private employment; government contracting, admissions into educational institutions, jury selection, disbursement of scholarships and grants, and so forth.

Kellough, J. Edward. (2006) holds that opponents of preferences have argued that such programs violate notions of nondiscrimination. It also suggests that former policies of racial or gender neutrality are more just. With some notes of advice to the US, Kellough then cautions that preferential affirmative action has not and should not move the country from behaviors grounded on neutrality to policies favoring minorities and women; so as not to derail it from its national diversity which reasonably reflects across all levels of the US institutions. Preferential affirmative action should not therefore be interpreted or presumed to mean that people should receive jobs or other opportunities for which they are not qualified. This is because such practices are not permitted under any legally constructed affirmative action program. It is the view of most proponents of affirmative action program that when properly implemented, it involves the establishment of goals or other strategies that favour the selection of qualified minorities or women for positions in which they are significantly underrepresented based on a reasonable estimation of what equitable representation looks like. By and large, the goals of affirmative action must be tied to fair estimates of the availability of minorities and women with requisite abilities, skills and knowledge for the positions they seek.

From the foregoing, it is clear that several affirmative action programs exist both in government and private organizations. Most universities and private corporations have equally developed their own voluntarily initiated affirmative action programs. However, their methods of implementing such programs and policies differ quite considerably especially in the past, ranging from softer methods of recruitment, outreach and enforcement of antidiscrimination norms to 'hard quotas. In whichever way it is tilted, is cautioned that such non preferentiality should be neutral and objective.

Preferentiality on the basis of quota: Janet L. Reed, (2015) holds that Quotas operate per se to evaluate individuals on the basis of prohibited classifications. It also results in reverse discrimination against majority persons, especially when it is applied in favor of minorities. Elbehri A.et al., (2000), makes an in-depth analysis into this subject matter with a supporting framework drawn from a model tariff reduction quotas(TRQs) regime on the partial liberalization

of sugar tariff reduction quotas, by the European Union and United States in order to illustrate the effects of country-specific TRQ liberalization. He argues that EU sugar quotas are mostly targeted at the African, Caribbean, and Pacific (ACP) countries as well as India. It is evident that because their imports exceed the quota, high over-quota tariffs are put in force. They gain quota rents because they export sugar duty-free to the EU. They equally receive the same support price as internally produced EU sugar.

On the other hand, the U.S. sugar TRQs are allocated to selected exporting countries due to their advantage in having average historical market share. The U.S. sugar imports and exporters therefore, benefit from quota rents arising from the differences between the domestic and world prices. Elbehri argues that in the case of sugar, all quota-holding exporters are assumed to capture the entirety of quota rents. He cites example with three sugar TRQ liberalization scenarios namely: over-quota tariff cuts (which is by one-third), followed by quota expansion (also by one-third) and finally, the combination of both. Since there are small quota tariffs in the United States and zero in the EU, they are not varied. When over-quota tariffs for EU sugar are reduced by one-third, it results in a net welfare gain for the EU and a net welfare loss for countries exporting sugar to the EU. Exporters within the Quota-holding cadre, experience a loss of quota rents as over-quota tariffs are cut, which in turn, reduces their per-unit quota rent. However, the importer which is EU, shows a net gain of tariff revenues because total imports would have expanded in response to lower tariffs. Elbehri then posits that under this scenario, the EU sugar imports are expanded by 5.1percent. Its sugar exports are reduced by 12.1 percent, while domestic sugar output is reduced by 4.1 percent. The increased exports result mainly from quota-holding sugar exporters from the Caribbean, Africa and Latin America, but export growth does not fully offset the effects of declining quota rents.

There are two major trade and welfare implications arising from this analysis of sugar TRQ liberalization. In the first place, in those country-specific TRQ cases where imports are observed to exceed quotas and where some exporters capture quota rents because of preferential access, it is clear that the welfare effects of liberalization depend on what happens to both over-quota tariffs and quota volumes. Secondly, developing countries that export to industrialized markets under preferential access, can suffer welfare losses under over-quota tariff reductions because of loss of quota rents. At the same time, exporters that do not benefit from allocated quotas are poised to benefit from a more liberalized trading

regime, because they will likely expand exports without an erosion of preferential margins or quota rents.

Preferential treatment as a form of compensation (reversing past injustice): An inquest into this type of preferential treatment was enunciated in 1975 in a law suit between Albemarle Paper Co. vs. Moody, 422, U.S. 450 (1975). The US Supreme Court had relied on its legislative history to discover that section 706(g) was intended to give courts the needed wide discretion to fashion out extensive equitable relief. The Act was then designed to restore victims to the positions they would have enjoyed in the absence of such unlawful discrimination. Therefore, in defense of reverse discrimination and injustice, the court suggests that any employer who is ordered to implement preferential treatment will incur liability resulting to reverse discrimination. It further held that the employer whose work-force does not mirror or clearly have the racial or sexual balance of the relevant labor market would face both an urgent and potentially costly dilemma. And if he enters into a voluntary or court-approved affirmative action program that includes preferential treatment, he may be forced to compensate majority of victims of his program. The employer must institute a formal affirmative action program, failure of which will leave him open to suits from any individual or class of discriminatees. He will equally face potential court-imposed quotas which may, in turn, lead to reverse discrimination litigations. Again, his failure to voluntarily comply with this Act, will also compel the courts to bear the entire burden of implementing it and so forth.

Spinner-Halev, Jeff (2012) argues that matters of past injustice border on what he termed “Enduring injustice” which is rooted in the past and lingers into the present. Jeff considers such kinds of injustice as enduring injustice as perplexing for the difficulty in the efforts for their repair or reversal. He lists some examples of cases of enduring injustice to include matters of exile, mistrust, sacred land, and acknowledgement of the past. These lie outside the bounds of liberal justice. None of them can be accounted for without making recourse to the past. This is why it is completely insufficient to solely rely on contemporary option for a solution. The issue of enduring injustice helps to clear doubts and find a solution to the question of why and which past injustices cry out for attention in our present day. The answer is not just because the history of some groups were unjust, but because their present situation is also unjust as well. The future will most likely, following from the past and present be unjust if nothing is done to prevent it. Part of what Jeff sets out to achieve with the idea of enduring injustice is not only to turn our gaze away from

beginning in the past and moving forward, but to also draw our attention to the way and manner in which we should begin with present injustices, trace them backward and then project them forward for a reversal.

D. Immigration preferentiality (investors, political refugees, specific interest countries e.g. US immigration act of 1990): Before the introduction and enactment of the United States' Immigration Act of 1990, as proposed by Ted Kennedy, there had been a discussion concerning the number of immigrants allowed entry into the US. As at 1988, the House had voted against a proposal to limit the number of family members of the immigrants eligible to enter the US. The Senate then debated about it in1989 before this immigration Act came into force and continued with family-based immigrant visas. This Act then increased number of immigrants allowed to come into the US. Millions of immigrants were also allowed entry over the ensuing decades including asylees. Signed into law by the administration of President George H.W Bush, this Act served as a national reform of the US Immigration and Nationality Act of 1965 and allowed 700,000 immigrants to come to the U.S. per year for the fiscal years 1992–94, and 675,000 per year subsequently. It then provided numerous packages for the immigrants and their visa procurement such as family-based immigration visa, five distinct employment-based visas, categorized by occupation, and a diversity visa program that created a lottery to admit immigrants from "low admittance" countries as well as countries whose citizenry were underrepresented in the U.S. In addition to these immigrant visas were also changes in non-immigrant visas like H-1B visa for highly skilled workers. The US Congress also created what was known as Temporary Visa Protected Status (TPS visa). The Attorney General was meant to provide TPS visa to immigrants who may be temporarily unable to return safely to their country due to an ongoing conflict, an environmental disaster, or other temporary and extraordinary condition. This specifically benefited citizens of El Salvador at the time.

This Bill contains numerous reformations beneficial to the US government and immigrants to the US. For example, it created new categories of nonimmigrant visas such as the O and P categories which were for extraordinarily skilled foreigners in the areas of entertainment, athletics, science, and so forth. Their admittance simply depended on certain level of consultation with the appropriate unions in US which are usually those asking them to come to the U.S. and their time depended on how long the activity/event they were participating would last. This Bill therefore, obviously reigns with a barrage of preferential treatments that are even quite controversial and undoubtedly beneficial to some group of people and unbeneficial to other groups. For example, from the expansion of green cards for foreign laborers

and new limits set for access to temporary visas like H-1B for visiting scholars and so forth, this Bill promotes high level of preferential treatment. Under H-1B visa program, some universities were left to do more paperwork to hire short-term visiting researchers and professors unlike others.

Wong, Tom K., et al (2015) equates immigration preferentiality controversy with poor global attention on human rights issues. Although, he acknowledges that human rights discourse has actually broadened over the past half-century, but it has not received the required global attention needed to permeate into and sanitize other relevant areas like immigration which is also a global concern. He alludes to the fact that human rights norms that are related to noncitizens, such as the basic rights during detention or deportation processes, have not been fully instantiated in the domestic legal frameworks guiding the machinery of immigration control. More to this is the fact that the reluctance of states to ratify international human rights treaties that relates to noncitizens have been a major setback.

Preferential agreements and trade: This deals with a trade agreement or pact between one or more countries. It usually aims at reducing tariffs and bridging other barriers for certain products amongst those countries that sign the agreement. While such tariffs may not be completely eliminated, they are often lower than what is given to countries that are not part of the agreement. Preferential trade agreement is also used in the World Trade Organization WTO for trade preferences, including lower or zero tariffs. This enables a member to offer such to a trade partner unilaterally. John D. Nash (2004) similarly holds that under such trade agreements, all forms of import restrictions are converted to tariffs which is otherwise called 'tariffication,' and this method must consider the status of different countries as it concerns developed and developing countries. He further explains that tariffication generally involves converting NTMs into tariffs by simply applying the price-gap method, which is the difference between domestic and world market prices. So, if the world price for a product is US$150 per ton, and the price inside a particular country is US$200 per ton, then, a tariff of US$50 per ton can be the result arising from tariffication. For example, having an established tariff equivalent of an import restriction, reductions are required for developed countries by an average of 36 percent and a minimum of 15 percent over six years; while developing countries have an average of 20 percent with a minimum of 10 percent over 10 years. These are simple averages which are not weighted for the volume of trade.

A more serious problem is the fact that the reduction commitments are based on "average cuts" rather than cuts in the average tariff. That is, assuming a tariff of one percent is cut by one-half percent, it counts as a 50 percent reduction. Hence, countries can achieve some target cuts by reducing already-low tariffs, while they are still making only the minimum reduction in sensitive products with high tariffs. After making necessary calculations for every different tariff lines, countries can draw up their schedules of commitments for agricultural products, which will then show bound rates and reduction commitments. Most Scholars agree that a tariff-only situation improves some level of transparency but it does not essentially result in better market access. It is in view of this that countries agree that in order to preserve the existing market access and also create greater access, current access opportunities should be maintained.

Some Implications of Preferential treatments

As stated at the beginning of this work, some unavoidable implications largely exist in all the types of preferential treatments discussed. All of them fall short of the expectations of the proponents of equity, fairness and justice as well as a participatory society. Although in most cases, affirmative action strives to prevent gender discrimination, racism, unfair treatment to minority groups and so forth, it tends to treat majority groups unfairly because of its policy which revolves around this class of people excluding majority groups. Proponents of this thought see affirmative action as a reverse form of discrimination and racism because it puts the majority group at an undeserving separate class because of gender and race.

Claire Andrew et al (1992) argue that the harm that results from preferential treatment are more than the intended good. For example, giving preferential treatment to women and the minorities often fails to benefit the individuals in this group who may have suffered the effects of discrimination, and who really deserve such compensations the most. This is because such individuals may even lack the basic skills and considerations for such benefits.

Conclusion

Going by its nomenclature and course of action, preferential treatment does not intend to achieve the "common good" of the entire members of the society. Johannes Messner (1965) insists that the common good remains metaphysically and ontologically a distinctive reality in the social whole which eventually makes it possible for all the members of

the society to have an integral existence. The simple implication of this is that the religious, moral, social, political and economic goods of the members of the society are fully embedded in the "common good." And through this, people realize their full potentials without any form of restriction, inhibition or constraint. Milton A. Gonsalves (1986) similarly affirms this when he holds that the "common good" consists of sharing and receiving of values, resources and powers amongst members of the society without any hindrance. It is a kind of a horizon of communion, unrestrained involvement and active participation of members of the society in order to attain an overall human enhancement. It is important to note that from time to time, certain people can make sacrifices for the attainment of the common good but such should not be an avenue to either devalue the human person or make him a mere object or means in the service of such a "common good" Johannes Messner (1965).

We must recognize the frantic efforts of some of the proponents of preferential treatment in trying to justify their position. But no matter how they canonize this theory and its modus operandi, its greatest weakness lies evidently bare on the table of controversial lopsidedness towards the manner in which it handles human affairs. This cannot be overemphasized, because it consciously violates the universal principles of equality and justice. So, despite the strides of these proponents and implementers of preferential treatment in America and other parts of the world over the years, it has rather encouraged inequality, unfairness and unjust treatment of people than eliminate them.

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