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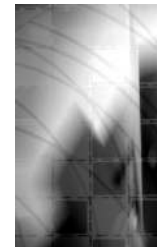

The shackled runner: time to rethink positive discrimination?

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ABSTRACT

This article argues a case for reconsidering positive discrimination as a viable and necessary policy intervention to speed up the progression to equality in the workplace. It provides counter-arguments to the four main objections to positive discrimination: the failure to select the 'best' candidate, the undermining of meritocracy, the negative impact on the beneficiaries and the injustice of reverse discrimination. It concludes that positive discrimination provides the necessary structural conditions in order for radical, transformative change towards equality to take place.

KEY WORDS

diversity / equality / equal opportunity / meritocracy / positive discrimination / social justice

The shackled runner: time to rethink positive discrimination?

An evocative image of a shackled runner was conjured up by US President Lyndon Johnson as he introduced affirmative action legislation in 1965 aimed at redressing racial discrimination. He said the following:

> Imagine a hundred yard dash in which one of the two runners has his legs shackled together. He has progressed 10 yards, while the unshackled runner has gone 50 yards. At that point the judges decide that the race is unfair. How do they rectify the situation? Do they merely remove the shackles and allow the race to proceed? Then they could say that equal opportunity now prevailed. But one of the runners would still be forty yards ahead of the other. Would it not be the better part of justice to allow the previously shackled runner to make up the forty yard gap; or to start the race all over again? (Quoted in Bell, 1973: 429)

This quote presents the central dilemma of policy making in relation to equality of opportunity. It is the question of whether the structural disadvantage suffered by some groups needs to be accounted for (and compensated for). The predominant solution within Europe has been to reject the need for structural intervention and adopt a liberal (and neo-liberal), relatively light-touch approach of regulation to control blatant discrimination and provide legal routes to redress unfairness arising from indirect forms of discrimination (Jewson and Mason, 1986b; 1994; Webb, 1997). The structural issues remain and the current, increasingly mainstream assumption that market forces provide the best route to equality is questionable on a number of grounds. Not least is the evidence that the rate of change is very slow; for instance, in the UK it has been estimated that at the current rate of change, it will take over 70 years to achieve an equal number of female directors of FTSE 100 companies (Equality and Human Rights Commission, 2008).

This article argues that it is time to recognise that the neo-liberal market model cannot be relied upon to make the changes quickly enough. It is time to reconsider structural intervention to remove the shackles and make up the forty-yard gap. The concept of positive discrimination is the key intervention needed to speed up change; in countries as diverse as Norway and India it has already become a central component in achieving equality of opportunity, and it has recently surfaced in the UK's 2010 Equality Act, to the indignation of the media.

To make the case for reconsidering positive discrimination as a viable policy intervention, this article counters the main objections to positive discrimination from its critics. It suggests that each of the objections can be overturned and it concludes that positive discrimination provides the necessary conditions for radical, transformative change favoured by proponents of equality mainstreaming. Before looking at the criticism in detail, some conceptual clarification is needed.

Clarification of terms

A common source of confusion is often the conflation of positive action and positive discrimination. Positive *action* is a generic term for policies aimed at encouraging and supporting under-represented groups within a workplace, such as a recruitment campaign to increase the proportion of ethnic minority applicants, or a mentoring scheme for women in management roles to improve promotion prospects. In positive action schemes, under-represented groups may benefit from measures that seek to redress their existing disadvantage but they do not have the right to have these disadvantages specifically taken into account when decisions are made by managers about selection, promotion, pay and so forth. In terms of Johnson's analogy, it is akin to removing the shackles of the runner. Positive *discrimination* is the specific recognition of certain characteristics (typically sex, race/ethnicity, disability, religion, sexual orientation and age)

considered to have disadvantaged a group of people through no direct fault of their own. It brings consideration of the disadvantage into the formal decision-making process by making these characteristics legitimate criteria for evaluating candidates. In Johnson's terms, it is removing the shackles and bringing the runner level with his competitor.

The failure to recognise the distinction between the two concepts means that some people will react negatively to the idea of positive action when in fact their main objection is to positive discrimination. This conflation is well illustrated by the type of cross-purpose discussion that occurs in forums such as chat rooms, YouTube and responses to online newspaper articles. It is important to extract objections to the concept of positive discrimination from more general criticism of positive action, or indeed any equality initiative. Of course the two are not mutually exclusive, but the concern in this article is with the critics of positive discrimination who are generally supportive of positive action, rather than with those who reject all equality interventions.

Criticisms of positive discrimination coalesce around four main objections: the failure to select the 'best' candidate, the undermining of meritocracy, the negative impact on the beneficiaries and the injustice of reverse discrimination. The remainder of the article takes each of these criticisms in turn and produces a counter argument.

Criticism 1: *positive discrimination might mean that the best candidate is overlooked in favour of the candidate that meets other requirements (sex, ethnicity, disability etc.)*

This criticism is based on two assumptions that can be challenged: the assumption of a single form of positive discrimination and the assumption that there is an objective measure of the 'best candidate'.

Critics tend to assume that positive discrimination is simply about enforcing quotas, with the resultant effect being that an unqualified (or less qualified) person from an under-represented social group will be given preferential treatment over a more qualified person from a dominant social group. For example, in Norway public limited companies and state-owned enterprises are required by law to have at least 40 percent of their boards of directors comprised of women, so critics have argued that this has led to the promotion of some women who are less qualified than their male counterparts. Certainly quota-based systems can be problematic because they make social group characteristics (sex, race/ethnicity, disability, religion, etc.) the most important criteria for choosing between people, which might in some circumstances lead to the 'best candidate' not being appointed. For instance, the reservation system in India aimed at providing a fixed quota of civil service posts for scheduled castes and tribes is often criticised for resulting in the employment of under-qualified staff. However, quota systems like this are the most extreme version of the positive discrimination principle and, as some commentators point out (for example,

Plous, 2003) it is possible to identify more moderate forms for which the criticism above does not necessarily hold. Two versions in particular stand out in contrast to the 'quota' system; these can be labelled the 'tie-break' system and the 'threshold' system.

The tie-break system of positive discrimination means that when there are two or more equally qualified candidates it is permissible to base selection on a characteristic such as sex, race/ethnicity or disability. The person selected is not deficient in terms of qualifications for the job, but has been given an advantage because they can help to redress a shortfall in the organisation regarding the social composition of the workforce. It is a reversal of unspoken principles that often occur when selection decisions are made in organisations: that when faced with an equally qualified man and woman, other factors that are not job-specific are brought into consideration such as the likelihood of the woman becoming pregnant, the ability to fit in or the 'hunch' about someone. These are far less systematic and less transparent than the principle of using an existing, known social imbalance to decide in a tie-break situation. Returning to the example of India, the huge Tata group of companies recently made a corporate decision to adopt a policy of positive discrimination along the tie-break lines. The Indian private sector is not obliged to operate the reservation system, but the Tata directors want managers to select in favour of scheduled castes and tribes where candidates are equal in merit.

This type of tie-break system is included in the UK Equality Act 2010 (see section 159) and allows managers in any organisation to take into account under-representation when choosing between equally qualified candidates. The government stresses that the measures are voluntary and constitute only an extension of positive action – probably to make the initiative more politically palatable. Unconvinced, the UK media have focused on this element of the legislation more than the other aspects, arguing that it introduces preferential treatment for women and minorities but down-playing the fact that it is permissive (rather than mandatory) and restricted to situations where candidates are equally matched.

The UK's tie-break initiative establishes a legal principle of lawful selection based on 'protected characteristics' (sex, race, etc.), although it is likely to present some implementation problems for legal reasons (see Rubenstein, 2009: 31). This develops an earlier legal precedent in the UK of requiring managers in organisations to recognise difference in relation to disability, codified by the 'reasonable adjustment' clause of the Disability Discrimination Act 1995. The precedent also provides a salutary warning because 'reasonable adjustment' has met with compliance problems even though it is not voluntary (unlike the proposed tie-break initiative), and has suffered from local level resistance and managerial backlash (Foster, 2007).

An alternative to the quota and tie-break systems can be labelled the 'threshold system' of positive discrimination. This method requires candidates to achieve minimum qualification standards, but then allows managers to make choices in favour of candidates from disadvantaged groups. The principle

assumes that the pre-existing structures disadvantage certain groups and that this will be replicated in processes of skills and knowledge accreditation, opportunities for gaining work experience and ability to demonstrate higher level competency through previous job responsibilities. To require a 'tie-break' before taking into account social group characteristics would mean that candidates from the disadvantaged social groups have already proved themselves to be more able; they have jumped a higher hurdle to get to the tie-break position. In contrast, the threshold system means taking into account social group characteristics from the point where a candidate has attained the minimum standards required to do the job. The approach candidate from a disadvantaged group does not need to be compared with the highest achiever (a moveable target as it depends on the other candidates) but with the required standard to undertake the job (a fixed target or benchmark). This also has the advantage of encouraging the organisation's managers to consider what really constitutes the job requirements – so it fits with the meritocratic principle (discussed below) that candidates need to be assessed on their suitability for the job (based on their skills and abilities to perform well in the role), rather than on acceptability (based on dubious assessments of whether they fit with the social norms or workplace 'culture', for example – see Jewson and Mason, 1986a; Webb, 1997).

Commentators might argue that even if candidates are assessed to see whether they meet the job suitability threshold before positive discrimination takes effect, it will not necessarily result in more opportunities for disadvantaged groups. Webb and Liff (1988) point out that in specifying job requirements managers make value judgments about the skills needed and how to organise the work which often arise from a priori assumptions about the suitability of the work for a woman or a man. The resultant sex-typing of jobs means that, for some candidates, suitability is about their gender even before they reach the minimum standards threshold. In such instances, positive discrimination may largely be irrelevant since it is doing nothing to prevent the sex-typing of the job in the first place.

The second false assumption made by critics is that there is an objective measure of the 'best candidate' for the job. A pseudo-scientific rationalism permeates selection processes, so where candidates are assessed through 'objective' means, such as aptitude tests or work samples, there is likely to be more trust in the measures produced by the assessment method – although the tests themselves may be flawed or lack high predictive validity for the particular job in question. For example, quasi-experimental research from the USA revealed that 75 percent of white respondents were willing to accept the decision to hire a black candidate over a white candidate for diversity reasons (to meet social responsibility goals of the organisation) when the assessment scores of the candidates are the same (a tie-break situation) but that this proportion fell to 25 percent if the white candidate scored slightly higher than the black candidate, even though both candidates were sufficiently qualified to undertake the job (Berry and Bonilla-Silva, 2008). Thus, although white respondents accepted the importance of the context (the organisation's need for a diverse workforce)

as a good rationale for hiring the black candidate, this was abandoned as soon as score differences were seen. The authors conclude this demonstrates that white support for race inequity is often superficial and fades away when alternative rationales are available, such as 'best candidate' arguments.

Few organisations systematically evaluate the effectiveness of their chosen selection methods for predicting future job performance; for instance, less than half the respondents to the most recent recruitment survey by the UK's Chartered Institute of Personnel and Development (CIPD) stated that they check that the tests they use are valid, reliable and culture-free (CIPD, 2009). Most assessment processes have subjective elements (typified by selection interviews) so arguments about the 'best candidate' are dubious. Often subjective elements are manipulated in favour of or against particular candidates in order to influence the decision towards each selector's preferred candidate.

Finally, although the principle of 'the best candidate for the job' would seem to be in the interests of fairness, it is problematic because it requires a comparative judgment. The 'best' candidate is not necessarily the only appointable candidate, so the decision-making transforms into a process of choosing the criteria that might legitimately be used once the appointable standard has been attained by more than one candidate (a common occurrence in many organisations). If there are no criteria other than those on the person specification list, then the decision-making tends to focus on evaluating which of the candidates has exceeded the minimum standards by the greatest margin. For many organisations this is normal procedure (and defensible) but not necessarily in the interests of equal opportunity because the process will favour experience and overlook structural disadvantages. An equally rational approach would be to introduce other criteria that focus on the organisational context and needs, once the appointable standard has been attained. If 'diversity' is a stated strategic objective of the organisation then it ought to be perfectly acceptable to bring this into the decision process. The 'best candidate' would still be appointed, but under these conditions, fresh criteria are being used to determine what constitutes 'best' beyond the appointable standard. This is the basis of the 'threshold system' described above.

Criticism 2: *positive discrimination is not based on meritocratic principles*

The issue of meritocracy raised by the critics is frequently an appeal to principles of economic individualism. Typically it finds an expression among those who argue for non-interventionary approaches to securing equality. For example, the head of diversity at PricewaterhouseCoopers stated, 'It makes commercial sense to create an environment where meritocracy prevails. Anything other than this is de-motivating for everyone and productivity will inevitably drop.' (Hilpern, 2007: 13)

There are at least four challenges that can be made to the veracity of statements such as this.

1) It might not be in the interests of managers to ensure meritocracy due to internal politics, and might not be possible due to well known processes that influence the selection of candidates (for example, stereotyping, halo/horns effects, cronyism, 'old boys' network' etc.).
2) If it is a superior business model that produces greater advantages of productivity and commitment, then why are not all companies following it?
3) It is difficult to prove quantitatively the commercial advantages.
4) There is a contingent nature to these advantages: in some instances there will be a business case for meritocracy, while in other instances it might be to a business's advantage to discriminate unfairly (Dickens, 1994; Noon, 2007).

An additional problem is that the concept of merit is not as value neutral as it might first appear. How is merit to be measured? Should it be focused on talent and ability, or should it also reflect effort and achievement? If elements of the latter category were included then merit would recognise personal achievements against the odds; for example, someone from an underprivileged background, state schooling and a low ranking university might be more meritorious than a middle-class person from a private school and a top university, even if the latter had better qualifications.

Objections based on the principle of merit can of course be used to disguise prejudicial views about certain groups being unable or unsuitable to perform certain work. The view promulgated is that some social groups fail due to inability (typically a biological essentialist perspective) or personal choice (typically a preference theory perspective), but such arguments surface even in the absence of positive discrimination initiatives; in other words, positive discrimination does not cause those views to be held, rather it provides the excuse for them to be expressed. Commentators have argued that this is particularly the case for contemporary racism where its expression is not overt but is framed in terms of merit and personal effort (see Sears and Henry, 2003).

An observation made by Reyna et al. (2005) is that both opponents and supporters of US affirmative action programmes claim the principle of merit to be their main concern in taking their stance. Opponents argue that it infringes merit by giving preferential treatment based on social group characteristics (sex, race, etc.) while supporters argue that only by taking these characteristics into consideration can a truly meritocratic process be ensured. Overturning the notion of meritocracy produces an uncomfortable alternative proposition for the advantaged group: that meritocracy is not the prevalent norm and so, logically, some people in the advantaged group do not deserve to be in their jobs. Intuitively people may know this proposition to be plausible – most people are able to point to instances of favouritism, cronyism, nepotism and the like – but the issue is how widespread this is believed to be. People are unlikely to argue that their own position was gained through a non-meritocratic process, even though they might claim this is the case for their superordinates or their co-workers.

Criticism 3: *under positive discrimination even if the minority candidate is the best one for the job, it might raise suspicion in the minds of other employees and managers that they were only appointed or promoted because they are from a particular social group*

Although this issue is undoubtedly a drawback, it is not so much a product of the particular system of positive discrimination as of positive action initiatives in general. It stems from the view that any group requiring special help must in some way be deficient. While there are policies in place that are designed to help (and may have the effect of helping) a particular social group, the achievement of any individual identified with that social group is brought into question, irrespective of whether or not the individual has been assisted in any way. The suspicion or accusation by others of having had preferential treatment would be doubly frustrating for an employee in an organisation where equal opportunity policies are ineffective (so offer no real assistance), yet who has achieved in spite of the prejudice towards their age, disability, ethnicity, gender, religion or sexuality. This is not restricted to situations where positive discrimination is in place: assumed preferential treatment can occur irrespective of whether equality initiatives are present or not, and even when nothing is known about the selection policy (for example, Heilman and Blader, 2001).

Given the criticism above, it is not surprising that among those who oppose positive discrimination are its intended beneficiaries. If the people it is aimed at helping do not wish to be assisted in that particular way, it seems to undermine positive discrimination's whole purpose. The objections stem from feelings of being stigmatised, undervalued, under-rated and not promotable. It can leave those who have been selected with the feeling that they have not been chosen for the right reasons, that they will never get on and that they are a token rather than a valued employee. However, there needs to be some caution in assuming that beneficiaries will reject positive discrimination. First, there is no quantifiable evidence to suggest this is a widespread view (so generalisation is not possible) and second, research suggests a complex set of reactions among beneficiaries depending on a range of contextual variables (for example, McMillan-Capehart et al., 2009).

There is also a bitter irony here: the choice for the beneficiary is between two lose scenarios. The structural conditions of disadvantage mean that any policy designed to redress the imbalance will be opposed in general by the privileged group and be articulated as preferential treatment (for the reasons raised in criticisms 1 and 2 above). To be freed of disadvantage it is essential to accept action that has been socially constructed as a special privilege (a lose scenario), while to refuse the action means that existing disadvantage will prevail (also a lose scenario).

Finally there is a type of false consciousness defence of this position: that the beneficiaries are duped into accepting the rationale of the privileged class and rejecting a means of overturning their disadvantage. Of course, the usual criticisms of passivity and agency would apply.

Criticism 4: *the problem of dealing with unfair discrimination cannot be legitimately solved by reversing the discrimination (against the dominant majority)*

This has been the viewpoint of the UK's Chartered Institute of Personnel and Development. Their policy is to condemn 'reverse discrimination' for being as unfair as the discrimination it is supposedly attempting to redress. This 'two wrongs' argument undoubtedly has some force in terms of the moral legitimacy of an action from a deontological stance, although the justification seems more often based on a teleological weighing up of consequences.

Aside from HR professionals, other managers display indignation at the idea of positive discrimination. Typically this is expressed in a call to be gender-blind and race-blind: that one should not be worried about a person's sex or race but their ability to do the job (an appeal to meritocracy and job-suitability) and the social justice of selecting according to these principles. Although laudable, white, able-bodied, heterosexual men have historically benefited from a system that privileges them. It is of little surprise that they react negatively towards changes that seek to remove those privileges. The enlisting of the social justice argument – that discrimination is morally wrong – rings hollow when issues of fairness have not been a primary concern for those accepting the privileges of their dominance. There is hypocrisy in claiming a concern for social justice only when one becomes a potential victim of injustice.

As commentators such as Young (1990) point out, the 'problem' arises because of a belief in the primacy of the principle of non-discrimination. If it is acknowledged that injustice occurs through other means, such as oppression, the moral primacy of non-discrimination disappears. Not discriminating is therefore less important than not taking action that oppresses, subordinates or marginalises a social group. The point being made is that drawing distinctions between people based on social group characteristics and treating them differently (discriminating between people) is not wrong in itself, but if it is done to reduce opportunities or exploit groups then it becomes an oppressive act and is morally questionable. Conversely, drawing such distinctions in order to provide preferential treatment and therefore to redress an existing disadvantage can be construed as morally laudable. At issue is not the treatment, but the purpose and impact of the treatment. This long-standing tension between same (equal) treatment and different treatment (Liff and Wajcman, 1996) is a central antagonism in policy making yet remains a false dichotomy obscuring the core purpose of equality policy if the latter is aimed at providing social justice.

Conclusion: positive discrimination is necessary for transformative change

The often unspoken concern behind the criticisms is that positive discrimination is a radical, interventionist step ill-suited to liberal democracies. However, the

notion that positive discrimination is at all radical is contested by commentators such as Cockburn (1989) and Webb and Liff (1988), who argue that it does not change attitudes, cultures and ways of working, and does not challenge power structures within organisations; it is not radical enough because it is not 'transformative'. If this line of argument is accepted then positive discrimination (particularly as a tie-break system) is seen merely as a further step towards redressing some forms of structural disadvantages that have developed historically due to the power of dominant groups – particularly white men. It might therefore be dismissed as incremental adaptation where improvements for some of the disadvantaged groups also provide space for the advantaged groups to adapt and accommodate without serious loss of status, power or influence.

While there is some force in this critique of positive discrimination as a type of liberal incrementalism, it is difficult to see how radical change might occur without greater state intervention. It can be suggested that positive discrimination creates the favourable conditions for transformative change to permeate organisations more rapidly and extensively. Under these conditions, alternative models of work organisation and work processes can emerge, and different values, norms, workplace cultures and practices can thrive. Indeed, this leads to the proposition that positive discrimination is a necessary precondition of transformative change, not simply an additional strategy in a multi-dimensional approach to mainstreaming, such as suggested by Booth and Bennett (2002).

If objections to positive discrimination are overturned and its role in the process of transformative change is accepted, then this has important conceptual significance. The reclamation of the concept from the critics and its resurrection from the policy graveyard is long overdue. President Johnson's image of the runner's 'shackles' and 'lost ground' continues to be a powerfully relevant analogy. Even if in countries like the UK the gap is gradually closing, the pace of change towards true equality is too slow. There is a strong justification for implementing positive discrimination and a good reason to challenge the mainstream opinion that disadvantaged groups should continue to remain patient for decades to come while they wait for the free market to sort out the injustices they suffer.

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