

Can Affirmative Action Be Justified?

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Abstract

This paper deals with affirmative action linked to theories of equality. The aim is to answer the question: **Can affirmative action be justified?** Three different perspectives, or faces that I have chosen to call them, are the core of the analysis; formal equality meaning equal rights, actual equality which deals with equal opportunity and absolute equality which is understood as equal results.

After a short introduction and background the essay looks at the affirmative action debate in order for the reader to get an overview of the most important arguments for and against affirmative action. Then follows the analysis with the three faces of equality in relation to affirmative action from where the conclusion then can be drawn that affirmative action can be justified only if we look at absolute equality. The paper however also concludes that if we consider actual equality affirmative action might be justified as a short-term measure for long-term goals. A case-study, taken from a current case between 44 women and SLU, is used to show the problems and value conflicts involved with affirmative action.

Key words: affirmative action, equality, discrimination, SLU, justify

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1 Introduction

1.1 Problem and Aim

Affirmative action is a pressing issue that is strongly debated and it awakes a lot of different feelings in people. Affirmative action refers to policies that, through active processes try to enhance equality; may it be at a university, a workplace or a business. It is a response to the inequality and discrimination towards historically excluded groups – primarily women and minorities.

Although the intentions of affirmative action is to attain positive results, to make equal previous inequalities and stop discrimination towards women and minorities, the opinions go apart and these policy are strongly controversial. For one, it deals with race, ethnicity and gender; all of which are controversial and “loaded” concepts. Secondly, it is often associated with values such as justice, equality, freedom, (equal) opportunity and discrimination; words that are hard to define and difficult to implement (with the exception of discrimination that we want to eliminate!) To illustrate: Badersten, for example, mentions three ways of looking at equality, as: *formellt lika möjligheter*, *faktiska möjligheter* and *absolut jämlikhet*.¹

The aim of this essay is to answer the question: can affirmative action be justified? To help me answer I will look at the three different faces, as I will call them, of equality; formal, actual and absolute equality. Depending on what we mean when we say equality we will have different starting-points thus we, most likely, will also get dissimilar answers.

Affirmative action is an interesting subject as it remains a constantly relevant topic. It is relevant not only in Sweden but everywhere in the world although the focus, form and the extent of the debate differs greatly from country to country. While the debate in Sweden for example has been more emphasized on gender – to make the ‘working world’ more accessible to women, equal pay for equal work etc. – the issue in the US on the other hand has been more focused on minorities and their right to equal treatment and representation in society. It can be looked at from a variety of perspectives and values and as just mentioned the opinions go apart about more or less everything; from what exactly it is or what it should be to who is being affected and who should be affected. Nonetheless the underlying idea is more or less the same – everybody in a society, country, or even broader –

¹ Badersten, Björn. (2006). *Normativ Metod: att studera det önskvärda*. Lund: Studentlitteratur. p.36

in the world – should in one way or another be treated ‘with equality in mind’. Personally I have conflicting opinions about this. On the one side I do of course support the idea of an equal society where everyone: women and men, black as white, old or young, no matter where you are from, what you believe in (or don’t believe in) and so on, has the same opportunities for creating a good life for themselves. At the same time, I understand the frustration, anger and disappointment of the people who gets personally affected. It is a problem of “not in my back yard”.

I should mention that I in this essay will not discuss our rights of equality according to the law – that is strictly judicial – unless it is relevant for the text, as in the chapter with the case-study. It is more of an ethical and normative discussion I am trying to hold. It should also be mentioned that I in this essay will solely focus on affirmative action per se – affecting both men and women. Hence I will *not* take a stand in the equality debate men versus women.

1.2 Background

Affirmative action first came about in the USA to compensate the black population for the discrimination they had been faced with. The blacks were to be given equal opportunities as individuals in the American society. During the Nixon presidency it stood clear that these actions or policies had not given good enough results and ”den gamla principen om lika möjligheter för individer fick ge plats åt en mera långtgående maxim om *lika resultat för grupper* [cursive in original].” Consequently there was a shift from individualism to a more collectivistic view of equality. This is still the area where the majority of the affirmative action policies are seen in the US, to support ethical minorities. In Sweden however the debate has been more focused on gender – to increase the equality between the sexes.²

What do we mean with affirmative action? This is not an easy question to answer as there are many different opinions on what should and should not be included in the definition of affirmative action. According to Carol Bacchi, the dominant view is that “affirmative action means ‘preferential’ treatment to assist ‘disadvantaged’ people to move into better jobs.”³ What is preferential or not is obviously very subjective and the question arising is “just how much ‘preference’ is ‘compatible’ with equal opportunity.”⁴ What also can be stated, which most people seem to agree upon, is that it involves *active measures*, either voluntarily

² Åsard, Erik., Runblom, Harald., Lindahl, Folke. Särbehandlingspolitikens utveckling, utfall och utmaningar i Sverige och USA. in Åsard, Erik., Runblom, Harald. (red.) (2000): *Positiv särbehandling i Sverige och USA*. Stockholm: Carlsson. p.307ff

³ Bacchi, Carol Lee. (1996): *The politics of affirmative action: ‘women’, equality and category politics*. London: Sage Publications. p.33

⁴ Ibid. p.35

or through laws,⁵ taken in order to create a more fair and equal workplace, educational system or society as a whole. Gür writes about affirmative action: ”att genom kompensatoriska åtgärder ställa tidigare oförrätter till rätta, eller att understödja en svag grupp, som i ett formellt jämlikt system inte skulle uppnå ”verklig” eller ”faktiskt” jämlikhet.” Gür, as the title of his book *Positiv särbehandling är också diskriminering*, indicates, is not a supporter of affirmative action but sees it as discriminating.⁶ This is, as we soon shall see, one of the main arguments from the opponents of affirmative action; that these processes or measures are discriminating against the rights of people not belonging to the favored groups.⁷ Affirmative action is often applied to racial and ethnic minorities, women and physically disabled. However, also included in the debate and considered for affirmative action at traditionally female dominated workplaces such as kindergartens, is the maybe not so typical white male. In Sweden, one of the most famous cases of affirmative action is that of ‘Thamproffesurerna’, where the intentions were to increase the, at that point, very low number (seven percent) of women professors at Swedish universities.⁸ Affirmative action can be divided into a softer and a harder version. The far-reaching form of affirmative action is quotas; Merriam-Webster defines a quota as “a fixed number or percentage of minority group members or women needed to meet the requirements of affirmative action”.⁹

1.3 Method and Disposition

I have now introduced the aim of this essay, with its delimitations and some overall background information about affirmative action. I will here discuss my method together with the disposition of the rest of the essay.

As can be seen by my question this essay has a normative focus and my value of departure is equality. I have three faces of equality that I use to answer the question. Depending on what face of equality we look at we get different answers and therefore the essay more specifically follows a “given-that”-analysis.

In the coming chapter (2) where I look at the affirmative action debate I try to give a simple overview of the main arguments for and against affirmative action policies. It serves as a lead up for the coming discussion. What arguments are used to try and convince people that these kinds of policies can, respectively cannot be justified? I then continue, in Chapter 3, with an analysis of what I have chosen to call the three faces of equality; formal, actual and absolute equality. These three faces are the core of my essay. With these ideas of equality as my

⁵ Törnqvist, Maria. (2006): *Könspolitik på gränsen. Debatterna om varannan damernas och Thamproffesurerna*. Lund: Arkiv Förlag. p.11

⁶ Gür, Thomas. (1998): *Positiv särbehandling är också diskriminering*. Stockholm: Timbro. p.31

⁷ Dworkin. Ronald. (2000): *En fråga om jämlikhet: rättsfilosofiska uppsatser*. Göteborg: Daidalos. p.197

⁸ Törnqvist, (2006). Op. cit. p.145

⁹ <http://www.merriam-webster.com/dictionary/Quota> Visited 2009-12-14

base I then apply them to affirmative action and I will try to come to a conclusion of whether or not affirmative action can be justified. I chose this method of analysis of ideas as I find it most appropriate for my intentions and because I find it interesting that by having different ideas about the same value the results and therefore also the policies implemented will differ greatly.

Chapter 4 looks at a case-study taken from the resent (at this point actually ongoing) case between 44 women and SLU (Swedish University of Agricultural Sciences). I here try to relate my analysis to a real case and see which face of equality that was used. This gives my essay an external validity and gives me an opportunity to look a bit deeper into the problematic of affirmative action.¹⁰ The reason to why I chose this particular case is that it is current and highly relevant and shows the value conflicts involved with affirmative action. The case study is intended to show how the earlier analysis of different ideas of equality is used in reality.

Chapter 5 then finally concludes everything. At this point in the essay the hope is to have an answer to my question, whether or not affirmative action can be justified.

About the material can be said that I have solely been using secondary material. As you will notice I have not translated quotes but kept them in their original language. I decided to do so since I felt that by translating the quotes (either from Swedish to English or from English to Swedish) it would have weakened the strengths of the quote or points made. Since the majority of the people who will read this essay will be Swedish speakers I came to the conclusion that translating was not necessary.

¹⁰ Teorell, Jan., Svensson, Torsten (2007): *Att fråga och att svara. Samhällsvetenskaplig metod*. Malmö: Liber. p.267, 275

2 Affirmative Action – The Debate

“Affirmative action has always been motivated by our sense of justice, yet opponents argue that it is inherently unjust.”¹¹

Some of the major arguments against affirmative action are the same ones that those in favor of it use. Here we see how different ways of defining a value, how our background and also how we view our role in society contradicts one and other, hence creating conflicts among different individuals or groups of people. Below, I will first look at some of the main arguments against and then bring up some arguments in support of affirmative action.

2.1 Two Wrongs Don’t Make a Right

The most important argument for the opponents is probably that two wrongs do not make a right. Saying things should be equal for everyone and then make it easier for some to, for example, enter a certain program at university, is making it unequal for the people who do not get these beneficiary treatments. “You can’t sit there and preach about being victimized and... downtrodden and... discriminated against, and then turn around and do it to someone else.”¹² Should I have to compensate and be punished for what people have done before me? This argument says we should not try to solve inequality with unfairness: that is reverse discrimination. A problem here is also that individuals get discriminated against while we try to solve a ‘group-problem’. We need greater representation of certain groups in society but in order to reach this goal others get discriminated against on an individual level.

A second emphasize often made is that merit should be the primary choice. Worrying opponents of affirmative action argue that the quality of work will deteriorate, that there will be drainage of competence¹³ and that “unqualified women will displace qualified men”¹⁴ A problem with this argument is that by saying that the best qualified, man or women, should get a job (or whatever it may

¹¹ Mfume, Kweisi. Why America Needs Set-Aside programs. in Curry, E. George (ed.) (1996): *The affirmative action debate*. Reading, Mass., Addison-Wesley. p.127

¹² Ingraham, Rob. A thousand points of light. in Lipson, D. Helen. (2006) *Talking affirmative action: race, opportunity, and everyday ideology*. Lanham, MD.: Rowman & Littlefield. p.131

¹³ Freidenvall, Lentia. (2006): *Vägen till varannan damernas: om kvinnorepresentation, kvotering och kandidaturval i svensk politik 1970-2002*. Stockholm: Statsvetenskapliga institutionen, Stockholm Universitet. p.243

¹⁴ Freidenvall, Lenita., Dahlerup, Drude., Skjeie, Hege. The Nordic Countries – An incremental model. in Dahlerup, Drude. (ed.) (2006): *Women, quotas and politics*. London; New York: Routledge. p.67

be) it presupposes each job having a given or fixed set of knowledge required; which is not necessarily true in all cases.¹⁵ Thomas Gür points to another interesting aspect showing the problem with affirmative action and with leaving the merit system. He gives the following example:

“I starkt konkurrensutsatta sammanhang där vinstmarginalerna mot omvärlden är väldigt små – t ex professionell lagidrott som hockey, fotboll eller basketboll – är det föga tröst att veta att man anställt en kompetent person ut en ”underrepresenterad” grupp istället för den mest meriterande.” [...] Samma sak gäller för kunder och konsumenter av produkter eller verksamheter av livsavgörande slag.”¹⁶

Thirdly, others argue that affirmative action and quotas are demeaning for women and minorities. The line of argument here is that no one wants to be chosen because of his or her gender or race but for the qualifications and experiences he or she possesses.¹⁷ Maybe society will become more equal if we leave change up to time and stop interfering with policies such as affirmative action? It might very well be that “women can do it on their own”¹⁸ and as Mats Lundström very correctly states ”att tvinga fram en jämn könsbalans kan leda till att man döljer grundproblemen.”¹⁹

Personally I think, by giving some people in the population specific advantages we run the risk of adding to the ‘us and them’ feeling. This fear of balkanization²⁰ will make it even harder to build a society where people can work and cooperate on equal terms as it enhances the power relations. By creating us and them we increase the gap between people and discrimination will most likely prevail. A final question: if we are to use affirmative action policies, how far can or should it be taken? Women and minorities only? But who exactly is the minority? What about other groups such as the blind or the deaf? A voice from a worried interviewee can illustrate my thought here: ”det skulle inte finnas några gränser för vilka som skulle vilja bli inkluderade, allt från handikappade, cancersjuka och Volvoägare.”²¹

¹⁵ Törnqvist, (2006). Op. cit. p.59

¹⁶ Gür, (1998). Op. cit. p.71

¹⁷ Krook, Mona Lena, et al. Western Europe, North America, Australia and New Zealand – Gender quotas in the context of citizenship models. in Dahlerup, (ed.) (2006). Op. cit. p.203. & Dahlerup, Drude. Conclusion. in Dahlerup, (ed.) (2006). Op. cit. p.299. See also Freidenvall, (2006). Op. cit. p.243

¹⁸ Freidenvall, Lenita., Dahlerup, Drude., Skjeie, Hege. The Nordic Countries – An incremental model in Dahlerup, (ed). (2006). Op. cit. p.68

¹⁹ Lundström, Mats. (1996): *Jämställdhet eller sexistisk rättvisa?* Stockholm: SNS. p.119

²⁰ Freidenvall, (2006). Op. cit. p.38 & Dahlerup, Drude. Conclusion. in Dahlerup, (ed.) (2006). Op. cit. p.303

²¹ Freidenvall, (2006). Op. cit. p.243

2.2 Stick Up for the Underdog

Those who support affirmative action programs most often point to the fact that women and minorities historically in many ways have been discriminated against and excluded from society. “The reason we need affirmative action is because we minorities have suffered so much negative action throughout American history.” In America, since the end of slavery, the African-American population has struggled for equality: for equal opportunities to work, get an education and for economic justice.²² America is of course not the only place where this has taken place. Discrimination is universal and at some places the question is more focused on blacks and other minorities and whites (as in the Americas) while in other places the focus is more strongly focused on males and females (as in the Scandinavian countries). Freidenvall et. al. argues that affirmative action is not so much discrimination against men as it is a response to the discrimination faced by women.²³ Affirmative action can help those in need of help, to reach greater opportunities. Some seem to believe that it will not only help the one person, but it will also send a signal to others that there are ways of changing ones situation and live a better life. In other words there will be positive spin-off effects.

Maria Törnqvist distinguishes between three different main areas of argument in support of affirmative action. First, she mentions a resource argument: women are thought to have experiences and knowledge that differ from men.²⁴ By having too large of a male dominance in, for example, the political arena would result in a lack of diversity, a problem that could be eliminated or at least reduced if more women were to be included on the same premises as men. The argument can also be applied to minorities. This is a form of utility perspective where the collective utility will increase in the long run at the expense of (in relative terms) a few. The collective utility is supposed to enhance the ‘good’ for society as a whole.²⁵

The second argument is built on the idea of democracy. Törnqvist particularly focuses on politics, arguing that “beslutande församlingar bör representera ett tvärsnitt av samhället för att kunna betraktas som demokratiska”²⁶ but I believe this is relevant also outside of politics, for society as a whole. While some would say affirmative action is undemocratic, a distortion of “the democratic system” and that it goes against the idea of liberalism as it works as a “free ride” – it is no longer the competitive market that decides.²⁷ Others then counter argue that without equal representation of male, female, minorities and different ethical and racial groups we are not talking about a true democracy. This argument, built on

²² Berry, Mary Frances. Affirmative Action: Why We Need It, Why It Is Under Attack. in Curry, E. George (ed.) (1996). Op. cit. p.299

²³ Freidenvall, Lenita., Dahlerup, Drude., Skjeie, Hege. The Nordic Countries – An incremental model. in Dahlerup, (ed) (2006). Op. cit. p.67

²⁴ Törnqvist, (2006). Op. cit. p.50

²⁵ For an excellent example of this see Dworkin, (2000). Op. cit. p.201

²⁶ Törnqvist, (2006). Op. cit. p.52

²⁷ Freidenvall, Lenita., Dahlerup, Drude., Skjeie, Hege. The Nordic Countries – An incremental model. in Dahlerup, (ed.) (2006). Op. cit. p.68. See also Freidenvall, (2006). Op. cit. p.35

the idea of democracy, is interesting as it presumes the western worlds democratic system is the best system.

The final main argument is based on interest but goes hand in hand with the two other arguments just mentioned. Here the idea is that power relations between different groups due to unfairness and inequality causes problems in society as everyone's interests are not taken for consideration.²⁸ Freidenvall et al. point out that women are just as qualified as men but that female qualifications has been downgraded and that men tend to choose other men instead of possible women applicants; she refers to this as the “the Huey, Dewey, Louie-effect”. People tend to surround themselves with people of similar character.²⁹ With a more balanced and equal representation in politics, at a workplace or a university we would get a society that is design *for* and *of* the people together.

As a result of previous (and continuing) discrimination and inequality many other cultures have been “disqualified” at universities and different workplaces and we have lost a lot of important knowledge that these cultures could have taught us, hence contribute to society as a whole. “[...] affirmative action policies boost productivity and increase profits by creating a diverse workforce drawn from a larger talent pool, generating new ideas, targeting new markets, and improving workplace morale.”³⁰ If we can learn how to take care of and value these cultural differences and the knowledge they bring, “the whole world would be so much more efficient.”³¹ Personally I think this is one of the strongest arguments in support of affirmative action. To make an example, many indigenous people have for long lived and survived from what nature has to offer. They have used natural resources in order to cure sicknesses and so forth. I believe we could have learnt a lot of important information from these people, most of whom are gone today, thus the information is lost for indefinite.

The debate I have given expression to here will in the coming chapter be shown as different views of the equality.

²⁸ Törnqvist, (2006). Op. cit. p.53

²⁹ Freidenvall, Lenita., Dahlerup, Drude., Skjeie, Hege. The Nordic Countries – An incremental model. in Dahlerup, (ed.) (2006). Op. cit. p.67

³⁰ Lichtman, Judy L., Frye, Jocelyn C., Norton, Helen. Why women need affirmative action. in Curry, E. George (ed.) (1996). Op. cit. p.181

³¹ Zaluba, Dave. Playing the percentages. in Lipson, D. Helen. (2006). Op. cit. p.55

3 Three Faces of Equality

Affirmative action can be looked at from a variety of perspectives, such as freedom, justice and equality. I have chosen to look at equality and have within the perspective found what I call the three different faces of equality. Depending on what face you take we will see that the answer to the question of whether or not affirmative action can be justified will differ. The first face I call formal equality, the second actual equality and the third face is absolute equality. In what way do they differ?

Formal equality demands that everybody, regardless of race, ethnicity or religion, has equal rights to compete for a work- or university opportunity. People are equal under law. There is no open or direct discrimination in society.

With actual equality we mean equal opportunity. Everyone should *de facto* be treated equal; hence there are no discriminating practices, neither indirect nor hidden.

The last face, absolute equality is the more extreme version of the three. Here we want equal results, for example there should be a 50/50 division between men and women in the parliament.

Let us take closer look at these three faces of equality. I will try to connect as much as possible to the topics brought up in the previous chapter.

3.1 Formal, Actual and Absolute Equality

In the literature formal and actual equality is often referred to as soft versions of affirmative action while absolute equality is considered strong affirmative action. While both formal and actual equality is more concerned with creating equal rights and equal opportunities for people by for example targeting minorities for a special work, the stronger form is more directed towards getting equal results. Hence absolute equality puts more emphasis on the outcome being fair than the actual procedure itself being fair and it demands more directly focused measures.³²

In Bacchi the discussion of the different perspectives are divided a bit differently, but they are more or less understood in the same way. Here we are introduced to *pure equality of opportunity* which combines equal legal access and the idea of hiring on merit, and to *equal opportunity principle* or *merit principle* where the focus is that “all persons should have equal access to whatever goods

³² Åsard, Erik. Positiv särbehandling i Sverige och USA. in Åsard, Erik., Runblom, Harald. (red.) (2000). Op. cit. p.15

are needed to develop their natural talents so that persons with equal natural talents have equal opportunities and resources to develop their talents and compete on the market economy.” Affirmative action is here believed to fit with the second idea, with the argument that “it is about providing equal access to equal opportunities.” Affirmative action is then seen as a short-term policy: once equal opportunity has been reached the policies will no longer be needed.³³

If our intentions are equal results and we justify affirmative action we automatically say that formal and actual equality will not lead to equal outcomes. A problem arising if we look at formal and actual equality is that although everybody competes under the same rules this does not necessarily mean that everybody will reach the goal at the same time. Gür illustrates this with the example of a one-hundred meter race where everybody starts at the same starting line and they all start running at the same time. Still they do not reach the finishing line at the same time which should be the case if we want absolute equality; for that to happen some people would either have to start a bit further ahead (affirmative action), further back (discrimination) or be hindered from running their best.³⁴ As we can see, affirmative action is in one way or another followed by some form of preferential treatment of discrimination which means that for absolute equality to become reality the principle of equal opportunity will automatically be undermined.

3.1.1 The Collective Good

According to JämL rights and opportunities should be equal for men and women, they presuppose an individual perspective³⁵, and consequently there is no support in JämL for individuals representing an entire group or collective. As Mats Lundström states, in order to use JämL to argue for affirmative action one would need to prove that the long-term effects of affirmative action will decrease the discrimination towards the individual.³⁶ This can be seen from a consequential perspective as it looks not to the action itself but to the effects and results the action bring.³⁷ This hedonistic view says that we should do what gives most pleasure to most people.³⁸ This theory puts the group first and the individual second as it looks to the benefit of the masses but says nothing about its distribution. Other problems includes the fact that it is extremely difficult to calculate all possible outcomes of an action, a lot of consequences might not be visible right away, and it may very well take months or even years before one can tell whether an action had positive or negative effects. From this perspective it

³³ Bacchi, (1996). Op. cit. p.38f

³⁴ Gür, (1998). Op. cit. p.79

³⁵ Lundström, (1996). Op. cit. p.36

³⁶ Ibid. p.35

³⁷ Sjölin, Mats. (2004): *Politisk etik*. Lund: Studentlitteratur. p.19

³⁸ Tännsjö, Torbjörn. (2003): *Grundbok i normativ etik*. Stockholm: Thales. p.33

might be possible to justify affirmative action temporarily as its effects are intended to make society more just and more equal in the long run.

In his book *A theory of justice* from 1971, John Rawls gives us a theory where we are wearing “the veil of ignorance”. From this original position as he calls it people are to form a social contract. The idea is that “unfair principles are removed from consideration by the device of uncertainty”.³⁹ What principles of justice would we agree upon from this original situation, where we are unaware of our own position in the world we are making the rules for? Most of us would probably say that we should all have the same opportunities to create a good life (whatever that maybe) for ourselves, and many of us would most likely agree that if we were to end at the bottom of the hierarchy, we would want help to climb the ladder. Rawls was more concerned with the procedure being fair than the actual results being fair. He hereby goes against the utilitarian idea that it is the collective good that should be counted for. The utilitarian idea is that one persons ‘loss’ can be made up for if it means that one or more people gain from it⁴⁰ – it is the collected good that counts – hence the utilitarian theory is more concerned with absolute equality than formal and actual equality.

An important question that arises is what we mean with ‘good’. As Dworkin very correctly points out this can mean more than one thing. First, society can become better (more good) in a idealistic way which means that it becomes more equal or closer to an ideal society no matter the level of equality. Second, society can become ‘more good’ in a utilitarian way, meaning the collective good increases for the people although it decreases for a few. A problem here is how to measure the ‘collective good’ and how these should be compared to someone else’s loss so that we then are able to calculate whether or not there has been an overall gain or an overall loss for society as a whole?⁴¹ According to this, affirmative action can be justified as long as the collective good will increase.

3.1.2 The Individual versus the Collective

The debate is heavily focused on the individual versus the collective. Affirmative action categorizes people and puts everybody into different groups and each individual is thereby reduced to represent ”olika etniska grupper inom vilka det skall råda en balans eller mångfald i proportionalitet med omgivningen.”⁴² The problem with this, as Dahlerup among others discusses, is that representation needs to be based on the ideas and knowledge of individuals and not be group-based. Hence the importance is that different ideas are being represented, not different groups.⁴³ Both Lundström and Gür also talks a lot about this problem, of

³⁹ Dworkin, Ronald. (1977): *Taking rights seriously*. Cambridge, Mass.: Harvard University Press. p.150, 154

⁴⁰ Hanson, Sven Ove. Introduction. in *Tidens idéserie 1. Idéer om rättvisa: texter av John Rawls, Amartya Sen, Michael Walzer*. (1989). Stockholm: Tidens Förlag. p.16

⁴¹ Dworkin, (2000). Op. cit. p.207f

⁴² Gür, (1998). Op. cit. p.92

⁴³ Dahlerup, Drude. Conclusion. in Dahlerup, (ed.) (2006). Op. cit. p.298

making the collective more important than the individual and argues it goes against the law against discrimination as each individual is reduced to symbolize an entire group.⁴⁴

Lundström takes his perspective from an individual rights principle where equality can never be balanced or enhanced by letting one person compensate for another person's discrimination. Consequently by for example discriminating a man because a woman has been discriminated against earlier does not make the equality balance equal: one case cannot be compensated for by another case. Instead more people are then discriminated against and therefore Lundström argues that affirmative action can only be justified if it is implemented to prevent discrimination in the long run and not if the argument is that affirmative action will make up for past discrimination.⁴⁵ Lundström then totally goes against the utilitarian argument brought up in the earlier section. This also does not support the argument that women and minorities should be compensated for past wrongdoings. Although women and minorities de facto have not had the same opportunities as men (white men) they should not be compensated by reverse discrimination. Robert Nozick also shared this opinion. He argued that "[...] vi existerar åtskilda från varandra" and that individuals cannot be seen as resources for others.⁴⁶

According to these ways of looking at it, affirmative action does not go very well with actual equality as people are then not given the same opportunities, some will automatically be discriminated against, and from this point of view we can therefore only justify affirmative action if we look at absolute equality. However, with the exception that affirmative action might for a short period of time work to increase equality over a long period of time.

3.1.3 Democracy

As was mentioned in the earlier chapter democracy was often used as an argument in favor of affirmative action. Democracy is built on the idea that everyone should be included on the same premises'. It should provide a framework or foundation where all people have the same rights, are equal in front of the law and have the same possibilities to create the life they want for themselves.

By introducing affirmative action the basic idea of democracy is undermined as you automatically then enforces unequal possibilities as some will get preferential treatment.⁴⁷ On the other hand some believe the ultimate democratic society should represent as a diverse range of people as possible so that the collective competence comes to its maximum potential. Affirmative action can

⁴⁴ Lundström, (1996). Op. cit. p.65. & Gür, (1998). Op. cit. p.92ff

⁴⁵ Lundström, (1996). Op. cit. p.34

⁴⁶ Nozick, Robert. Individens rättigheter. in Ahlenius, Henrik. (ed.) (2004): *Vad är moraliskt rätt?* Texter i normative etik i urval av Henrik Ahlenius. Stockholm: Thales. p.65f

⁴⁷ Törnqvist, (2006). Op. cit. p.146

speed up and enhance these effects.⁴⁸ Here it is also often said that, for example women, have different experiences that will add to this diversity and that these experiences or this knowledge is necessary for an equal society. Sharon Rush interestingly asks the question whether or not there is such a thing as women's experiences, or blacks' experiences for that matter.⁴⁹ Are experiences more individual or more group-based?

If we look to liberalism and the idea of a free market society affirmative action can be seen as an attempt to make market competition more fair by letting people be "compensated for conditions which deprive them of the means to compete".⁵⁰ We are then talking about actual equality and affirmative action can from these aspects be justified.

An interesting question is whether it is up to the state or the individual company or school to enforce affirmative action. Formal equality is understood as equal rights hence laws and regulations made by the state will function as guidelines for the different institutions. Actual and absolute equality is not as obvious. Each individual institution can set their own guidelines in order to reach either form of equality. A risk with political interference is that interventions "som synes [cursive in original] öka jämställdheten" are applied, instead of focusing on the actual symptoms of the problems and try to fight both direct and indirect discrimination.⁵¹ It is often believed that affirmative action is to work as a reparations system which is not the case. I agree with Robert Fullinwider who argues it is instead suppose to function in a way as to prevent *future* victims of discrimination.⁵²

A final thing which is quite an intriguing though is brought up by Gür who acknowledge that affirmative action is, among other things, thought to diversify and make work places more equal. Minorities and underrepresented groups are to be included with the help of active measures. He then recognizes that, for example, most pizza and kebab places (in Sweden) are run by families of minority groups and that the disproportion here faces the ethnic Swedes who can then be said to be in minority. There are several other examples of this type of disproportion where the normally so called minority group/s are not the minority. "Gäller åläggandena om aktiva åtgärder för etnisk mångfald, som skall pågå tills proportionerna mellan olika etniska grupper bland de anställda i företaget också motsvarar dem i samhället?"⁵³

⁴⁸ Törnqvist, (2006). Op. cit. p.58, Freidenvall, (2006). Op. cit. p.35

⁴⁹ Rush, Sharon, E. Understanding Affirmative Action: One Feminist's Perspective. in Sellers, M.N.S. (ed.) (1994): An ethical education: community and morality in the multicultural university. Oxford: BERG. p.208

⁵⁰ Bacchi, (1996). Op. cit. p.39

⁵¹ Lundström, (1996). Op. cit. p.43

⁵² Fullinwider, Robert, K. Indefensible Defenses of Affirmative Action. in Sellers, M.N.S. (ed.) (1994). Op.cit. p.238

⁵³ Gür, (1998). Op. cit. p.75

3.1.4 Unknown Results

What the results from earlier programs of affirmative action have been is not fully clear. It is difficult to say whether for example increased female representation at high-position jobs is a result of these programs or by other changes in society. "On the whole, none of the research supports the notion that affirmative action in employment helps the best educated most. The progress that many observe for women and minorities in the professions is largely the result of increased educational opportunities." Nonetheless, women are now, for instance, earning more than before, although still a lot less than the men, ("on average, women earn only about 70% of what men earn for year-round, full-time work.").⁵⁴

Also, some research shows that it is not those people most in need that actually benefit from the programs of affirmative action.⁵⁵ Women, especially white women have benefited the most from affirmative action policies. Statistics also show that there has not been a strong increase in work opportunities for black workers but instead there has been a redistribution from smaller companies to larger businesses.⁵⁶ Gür talks about this and in five points he brings up the patterns of affirmative action that has been extracted by Thomas Sowell. In point two we can read that it in the groups chosen by the state to receive affirmative action often was the better off in that particular group that benefited the most.⁵⁷ Others argue that it has made a lot of difference, that it has helped people out of poverty and at the same time it provides others in similar situations with hope of a better future.⁵⁸ Rush for example, argues that it gives younger people in the 'outsider group' role-models to look up to.⁵⁹

This can be reconnected to the previous section: since we cannot for sure know and evaluate the outcomes of affirmative action we cannot know for sure that it is an effective method, some argue that it actually makes it worse as this kind of preferential treatment can enhance the feeling of inferiority. A more general view is that it will increase prejudice between groups "eftersom fördomar underhålls så snart åtskillnad mellan raser tolereras i något som helst syfte."⁶⁰ Bacchi writes in her conclusion that, "I also suggest that more attention be paid to the consequences of being categorized."⁶¹ It might be dangerous to put people into groups they actually might not even identify with. It increases the distance between people and power structures will remain. This idea of grouping people is problematic in another way as well. Where do the group-boarders go? In Maria

⁵⁴ Hartmann, Heidi. Who has benefited from Affirmative Action in Employment? in Curry, E. George (ed.) (1996) Op. cit. p.93f

⁵⁵ Woodson, Sr. Robert L., Personal Responsibility. & Mfume, Kweisi. Why America Needs Set-Aside Programs. in Curry, E. George (ed.) (1996) Op. cit. p.112, 115, 123

⁵⁶ Mfume, Kweisi. Why America Needs Set-Aside Programs. in Curry, E. George (ed.) (1996) Op. cit. p.123

⁵⁷ Gür, (1998). Op. cit. p.88

⁵⁸ Berry, Mary Frances. Affirmative Action: Why We Need It, Why It Is Under Attack. in Curry, E. George (ed.) (1996) Op. cit. p.305

⁵⁹ Rush, Sharon, E. Understanding Affirmative Action: One Feminist's Perspective. in Sellers, M.N.S. (ed.) (1994). Op. cit. p.204

⁶⁰ Dworkin, (2000). Op. cit. p.196

⁶¹ Bacchi, (1996). Op. cit. p.161

Törnqvists book *Könspolitik på gränsen. Debatterna om varannan damernas och Thamprofessorerna* this difficulty is discussed and shows how the categorizing of people might go on for indefinite.⁶²

It does not go with the concept of individuality and therefore actual equality is ignored if we look at it in this way – each individual is not given his or her right to equal opportunity. It is, naturally, not obvious that individuality is the given right. This is up to each and one of us to decide on our own. Affirmative action, as a result, cannot be justified if we favor actual equality and still want individualism to be a priority.

As long as discrimination takes place however I find it important that we continue working so that people can come to compete on the same premises' but are there perhaps other possibilities apart from affirmative action? At the Xavier University in Ohio USA institutional changes and radical reforms in teaching methods were made to enhance students possibilities to improve their grades hence get accepted to college. They did for example offer summer school with courses in subjects such as math and chemistry for 9th-11th year students. The last, 12th year of high school a four-week course as preparation for college was offered and some textbooks were even rewritten “to cover just the material they need to know in order to grasp the concepts, and they have vocabulary drills every day.”⁶³ This proved to be successful and shows that there *are other* possibilities and methods to use at different levels in society than affirmative action to come to reach a more equal society. It should be mentioned that those not in favor of affirmative action most often are not against a more equal society. In general it seems as if it is the actual method, the way there that is the problem for the opponents.⁶⁴

The possibility of the success of other methods combined with the fact that the results of the affirmative action policies, unfortunately, yet are being so uncertain it becomes difficult to justify affirmative action. If there are other methods to increase either face of equality, and if the most needed do not seem to be the ones benefiting the most from the affirmative action plans introduced we cannot really justify affirmative action.

3.1.5 Short Summary

From the above discussions we can draw the conclusion that affirmative action cannot be justified if we look at the first face, formal equality, as people will indirect be discriminated against. The second face is maybe not as obvious, but even here affirmative action cannot really be justified as it would be considered

⁶² Törnqvist, (2006). Op. cit. p.58

⁶³ Wilson, Reginald. The Threatened Future of Affirmative Action and the Search for Alternatives. in Lindsay, Beverly., Justiz, Manuel, J. (ed.) (2001): *The quest for equity in higher education: towards new paradigms in an evolving affirmative action era*. Albany: State University of New York Press. p.136

⁶⁴ Rush, Sharon E. Understanding Affirmative Action: One Feminist's Perspective. in Sellers, M.N.S. (ed.) (1994). Op. cit. p.201

reverse discrimination. Everybody would de facto not be treated equal and therefore not have the same possibilities. Possibly can, as I have mentioned before, affirmative action be justified from the face of actual equality as a temporary measure to be used in the short-term in order to enable actual equality in the long-run. Affirmative action policies here function as a catalyst. If however absolute equality is our goal then affirmative action can be justified. The problem with the first and the second face is that an equal society, based on either formal or actual equality, might be difficult to reach without some active measures, this however does not justify affirmative action. Maybe this favors absolute equality though?

This more radical way of looking at equality (absolute equality) is to me rather utopian. It demands that everybody has the same goals and interests in life which I do not believe is realistic nor desirable. To me it is more a question of overall access to information, participation and integration. The overall attitude of people needs to change before we will get a real sense of change. There needs to be an institutional change in society in order for real equality to get established; it is not enough to get in, once you are in, the system must be organized and built up in such a way that it enhances the intended results. Affirmative action may also create a lot of tension within, say a certain business. None the less state interference, in one way or another might be necessary.

4 Case-Study: 44 Women versus SLU

4.1 The Case

Everything started when Hanna Svederborn for the second time did not get accepted to the veterinarian program at SLU. Since there were more applicants than available seats at the veterinarian education, SLU used an admission system that say that when two or more applicants have the same merit value the seat should go to the underrepresented sex. This they do via weighted lottery which had given men 38 percent bigger chance of getting excepted although there were women with the same grades and qualifications. The reason for the weighted lottery was that more women than men are studying on the veterinarian program.

As a result she then in 2008 reported her case to JämO and won. At that point several other women (44) also acknowledge that they had been, during 2006-2007, discriminated against by being denied entry to the veterinarian program and together. A month after Hanna's case was settled the 44 women together sued the university and about a year later Uppsala district court found SLU guilty of illegal discrimination. According to the Center for Justice this is the first verdict that "slår fast vad som gäller när de som gynnas respektive missgynnas av särbehandling har lika meriter". Below I will look at the findings of the court and try to see what arguments, what theory of equality they have used to come to the conclusion that the university's actions were wrong. It should be mentioned that the case now has been forwarded to the Court of Appeal.⁶⁵

4.2 Court Order

In the case of Hanna Svederborn the court found that she had been treated unfairly and that because of her gender.⁶⁶ For the 44 women versus SLU the same verdict was ruled. The district court argued that the fact that the female applicants had less of a chance to get accepted to the program than had male applicants was discriminating against the women. They also stated that by using the system they

⁶⁵ <http://www.centrumforrattvisa.se> Visited 2009-11-03

⁶⁶ JämO. 2008-06-16 Ärendenummer (casenumber) 635/2007. p.4

did (weighted lottery) SLU used structural discrimination against women.⁶⁷ Not only does this go against the Swedish law of equal treatment of student at universities (now the law of discrimination) but it also goes against the EC-law. The EC-law states that ”principen om likabehandling för positiv särbehandling får ske endast om syftet är att säkerställa ”full jämställdhet i arbetslivet (cursive in original) mellan kvinnor och män””.⁶⁸ In the case of the veterinarian profession in Sweden it has been male dominated since the 1960s but has during the last decades become more and more equal. Today the profession is considered gender-balanced thus there is no reason strong enough to motivate affirmative action.⁶⁹ In both cases reference was made both to the 7§-law and the EC-law and focus was on the fact that the women had been discriminated against due to their gender and that all people should be treated equally.⁷⁰ The district court also took into account the fact that SLU is the only university for veterinarians in Sweden. Therefore the consequences for the excluded women were considered higher than if there had been other educational institutions where they could have applied.⁷¹

The different laws and paragraphs referred to seem rather blurry and controversial which might explain why the texts related to the court orders all refer more to the EC-law than to the Swedish laws. While it in the 7§ in the discrimination law manifests that it is a ”berättigat intresse att välja en manlig sökande för en kvinnlig sökande [...] för att förbättra rekryteringen av studenter från det underrepresenterade könet”, it at the same time does not suggest any rules or policies for affirmative action, ”i alla händelser hänvisas i förarbetena till EG-domstolens dom.”⁷²

4.3 How Does the Court Rule Relate To the Faces of Equality?

In both the case of Hanna Svederborn and the case with the 44 women the court argued that the women had been discriminated against. They also state that the results of the affirmative action policies taken by SLU, both at the university and on the workplace, was minimal if even existent from an equality perspective and that the suffering of the women involved was greater. Therefore, the court argued, affirmative action cannot be seen in the light of article 141.4 in the EC-law⁷³ which otherwise states that exceptions for affirmative action can be made if the goal is to reach equality at the workplace.⁷⁴ According to Swedish law no man or

⁶⁷ www.centrumforrattvisa.se Visited 2009-11-03

⁶⁸ JämO. 2008-06-16 Ärendenummer (casenumber) 635/2007. p.3

⁶⁹ Ibid. p.3

⁷⁰ Uppsala Tingsrätt. DOM. Mål-nr. (casenumber) T 3897-08. 2009-03-30. p.4, 18

⁷¹ Ibid. p.8

⁷² JämO. 2008-06-16 Ärendenummer (casenumber) 635/2007. p.2

⁷³ Uppsala Tingsrätt. DOM. Mål-nr. (casenumber) T 3897-08. 2009-03-30. p.22

⁷⁴ Uppsala Tingsrätt. DOM. Mål-nr. (casenumber) T 3897-08. 2009-03-30. p.7

women should be discriminated against because of his or her gender.⁷⁵ In other words should each individual be treated as a unique and special individual and not collectively as a group member. This supports the formal and actual faces of equality and does not seem to give way for affirmative action policies. This does not say though, that absolute equality is not to strive for or hoped for in the long-run. Only that it is the way there that should be based on actual equality. On the other hand, according to JämL should the employer actively ”anstränga sig för att få sökande av det underrepresenterade könet och söka se till att andelen arbetstagare av det könet efter hand ökar”⁷⁶ which goes more in line with and comes closer to absolute equality. In this particular case we have to remember that for the veterinarian profession the gender equality had already been reached which probably played a significant role in the verdict.

In the selection system used by SLU gender was considered underrepresented if their representation was less than fifty percent of the total number of qualified applicants. As stated earlier the EC-law primarily looks at the equality situation on the workplace, in this case for the working veterinarians, and not at the educational centers.⁷⁷ This means there are two different starting points which obviously will give two different views on what type of equality we are dealing with. If the goal is to have absolute equality on the workplace then SLUs affirmative action system for the veterinarian education could be seen in a different light than by the court and actually be accepted. However, according to what the court ruled they did not use this face of equality in their judging. Instead they pointed to equal opportunities and the importance on non-discrimination against individuals. Hence their argument goes in line with the face of actual equality. Where each individual should de facto be treated equally. The men and women applying to SLU should have the same chance of getting accepted (given they are qualified).

This case implies that it is the actual equality we prioritize. Although the long-term goal, or perhaps hope is a better word here, might be to reach absolute equality this is not the face of equality we are expected to work from. The individual equality seems to play too great of a role to be ignored for the good of the group as a whole. Nonetheless they did also state that the effects of the affirmative action used were not so large that it made any difference for the equality on the workplace. If this had been the case the ruling might have come out differently, with reference to article 141:4 mentioned earlier, but we cannot know this for sure. As the veterinarian profession is already considered gender-balanced this was an unlikely scenario.

Of course we have to remember I have only looked at one case and there might be, and probably are, a lot of different arguments going on for different but similar cases. Also, as I have mentioned earlier, this case has now been moved to the Court of Appeal and we do not know yet what the outcome from there will be.

⁷⁵ JämO. Positiv särbehandling enligt jämställdhetslagen (1991:433) och EG-rätten. Ärendenummer: 848/00 p.1

⁷⁶ Ibid. p.2

⁷⁷ Uppsala Tingsrätt. DOM. Mål-nr. (casenumber) T 3897-08. 2009-03-30. p.7

So the conclusion that can be drawn from this case is that we do not look at absolute equality but more to the importance of equal opportunity that is actual equality *in reality*. However, and this is not to be forgotten, this case only illustrates the difficulties involved with affirmative action and the problem as such, but does *not* actually answer the question of whether or not affirmative action can be justified. The question is normative and because reality shows one thing this does not necessarily mean that this is the given right.

5 Conclusion

*"Now is the time to make real the promises of democracy. [...] No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters, and righteousness like a mighty stream." [...] And so even though we face the difficulties of today and tomorrow, I still have a dream. [...] I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal."*⁷⁸

– Martin Luther King, Jr.

The question whether affirmative action can be justified or not is difficult since it is so strongly based on subjective feelings instead of objective principles. Both the supporters and the opponents of affirmative action want positive results, however, they do not see the same effects coming from affirmative action. As its effects are not yet clear, we cannot for sure say whether it is the policies or other programs that have had the larger impact of the changes we see, it is difficult to say what view is "the right one". It is simply too early to be able to tell if the effects of affirmative action policies have been mostly positive or mostly negative. But, if these are our only two alternatives (Yes to affirmative action or No to affirmative action) we should according to Jeremy Bentham and the hedonistic view choose the alternative that brings the most good to most people,⁷⁹ even though it might not benefit ourselves in any way – it might even be to our own disadvantage.

As I have tried to show, the question about affirmative action is a problem of value conflicts. The three faces of equality that I have looked at, formal, actual and absolute equality shows the problems involved, and it is evident that depending on what face of equality we look at, we get different answers to the question of affirmative action. After looking at these perspectives I have come to the conclusion that affirmative action cannot be justified if we look at the two first faces of equality: that is formal and actual equality. Possible we can justify affirmative action as a short-term method in order for equality to be installed in the long-term. If we however look at absolute equality we can justify affirmative action as we are then only concerned with equal results and not whether or not the way there is equal or fair. We must remember that there is nothing that says that just because we get 'varannan damernas' we get a workplace without discrimination and inequality. The power balance within a company might be discriminating still, thus we need a change internally before we can change it

⁷⁸ <http://www.usconstitution.net/dream.html> , Visited 2009-03-19

⁷⁹ <http://www.iep.utm.edu/b/bentham.htm>, Visited 2009-03-19

externally. Absolute equality is therefore not a guarantee neither for formal nor actual equality.

As the case-study showed absolute equality does not seem to be the face we choose to look at when it comes to reality. Instead actual equality is the face that is valued the highest – SLU was found guilty of discriminating women because of their gender – hence these women were not given actual equality. SLU's intentions were more directed towards absolute equality which did not find any support in the law.

While I do believe in a fairer society with a greater diverse representation of the population I am not sure affirmative action is the solution. First, I believe there are alternatives to affirmative action that might be both better and more equal to *everyone*. Also, I do not find it fair to punish people today for what others have done in the past. Furthermore, the argument that people, because of the past, should get compensated today is not a very strong argument. To illustrate, many people in North America use the continents slave history as an argument for affirmative action. Throughout history mankind has held slaves, we find this treatment of people all through history, all over the world, in all cultures and many different religions. Therefore I am not convinced this argument holds strong.

An interesting question that has come up during this essay is whether or not the affirmative action policies taken at different places such as schools or businesses around the world actually have made a difference and if they have, have they been for better or worse. Also, I have not looked at any alternative methods to enhance equality apart from affirmative action. It would be interesting to see if some region or country has tried any other policies and if that or those policies were successful. The only example I have encountered is the one at Xavier University brought up in chapter three.

Finally, I believe things are changing and quite a lot too. We have come a long way within quite a short time span although we are far from the finishing line, if there can even be said to be one. Maybe we are expecting too much of a change in too short of a time? After all, Rome was not built in a day...

Affirmative action is a highly controversial subject which nonetheless makes it an important one. What face of equality would you take on?

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