

Discrimination with Reason? The Policy of Reservations in the United States, India and Malaysia. By Devanesan Nesiiah, 344 Pages. Delhi: Oxford University Press, 1997. Price: IRS. 495/=

RE-ASSESSING AFFIRMATIVE ACTION

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Introduction

To write a book about such a contentious and controversial issue as affirmative action (or quota system as it is referred to in Sri Lanka) is no easy task. In fact, given the complexity of the issues involved and the vast gap between those who support and those who oppose affirmative action, it seems reasonable to assume that no definitive study of the subject could ever be undertaken or completed. With such restrictions clearly in mind, Nesiiah's attempt has been much more achievable and clearly defined from the beginning. He attempts to compare the inception, the logic, the historical development, the problems of implementation, successes and failures of affirmative action programmes in three diverse countries: the United States of America, India and Malaysia. Affirmative action of course is the legal reservation of placements in such spheres as education, employment, land allocation and so on for specific groups in a given society on the assumption that they have been previously discriminated against in those spheres.

Often affirmative action is based on group identities such as ethnicity, religion or gender. One of the major criticisms levelled against affirmative action is that it violates the notion of equal rights and legitimizes the entrenchment of group rights. It was perhaps to avoid such seemingly legitimate ethical problems that the International Convention on the Elimination of All Forms of Racial Discriminations attempted to defend such policies by rationalizing it in the following words:

"Special measures for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms *shall not be deemed racial discrimination*, provided however, that *such measures do not, as a consequence, lead to the maintenance of separate rights* for different racial groups and that *they shall not be continued after the objective for which they were taken had been achieved*" (quoted in Nesiiah 1997: 5)

The above statement, in my view, places in context the widely accepted rationale as well as the areas of contention which emerge with the implementation of affirmative action programs. For instance, while affirmative action programs may not constitute racist policies in the minds of those policy makers who devise them and in the minds of those who benefit from them, the perception of those who do not benefit would precisely be the opposite. For those who do not benefit, and in fact may suffer as a result, these policies would simply become "reverse discriminations" as opponents of affirmative action describe the policy in the United States. Even in Sri Lanka when affirmative action programs of a particularly problematic type were introduced in 1971, the sentiments of those who benefitted and those who did not were distinctly different as were they clearly confrontational. In 1971, in place of the single qualifying mark for entry into Sri Lankan universities thus far adhered to, the state instituted two qualifying marks. This was based on the medium of instruction and a lower qualifying mark was set for Sinhala medium students so that a politically acceptable number of Sinhala students could be admitted to universities. In 1971 the qualifying mark for admission to the medical faculty for Tamil students was 250 out of a possible total of 400. For the Sinhalese this mark was 229 out of a possible 400, 21 marks less than the minimum required for Tamil students.

On the other hand, what are the guarantees that affirmative action would not lead to permanent rights and privileges purely based on group affiliation. In fact, in all of the countries that Nesiiah looks at, affirmative action programs continue, apparently still without achieving equality for all groups and with no end for such policies in sight. Even in Sri Lanka affirmative action programs designed to favor students from certain pre-identified under-privileged areas as well as policies in favor of Sinhalese in University admissions continue to be in force years after initial introduction — even though some of the overtly discriminatory features of these policies have been removed to some extent. Besides, who and when does one decide if such goals have been achieved. More often than not, once such policies are politically entrenched it may become very difficult to remove them.

The problem of affirmative action as well as writing about it is based primarily on the paradoxical and contradictory situation presented in arguments supporting such policies and those opposed to them. All of these arguments may have perfectly valid positions. As such, such contradictory arguments cannot be simply disregarded on the basis of one's ideological inclinations alone.

Affirmative Action in the US, India and Malaysia

Even though the book has a separate brief introduction, the study is more clearly placed in context in Chapter 1 where Nesiiah describes some of the conceptual issues central to the understanding of affirmative action as well as his methodology and the rationale for the selection of the three specific countries in his study. From Chapter 2 to Chapter 4 Nesiiah clearly traces the reasons that paved the way for affirmative action to be adopted in the US, India and Malaysia respectively, as well as a brief socio-political history of events since their adoption, including the acrimonious debates surrounding the implementation of these policies. Chapters 5, 6, and 7 gives a detailed account of the impact of these policies, and the book ends with chapter 8, which offers a series of recommendations on the basis of information presented in the previous chapters.

It is important to note that there are fundamental differences in the underlying structures and patterns of implementation of the respective affirmative action programs in these countries. For instance, in Malaysia affirmative action favors a politically and socially dominant group, the Malays. In India and the US such policies favor groups which are supposedly politically, socially and economically backward. However, in the case of some minority groups (eg, the American Chinese and Japanese) who according to some critics reap the benefit of affirmative action programs, the conditions of economic and social marginalization may not apply in the same sense as it does to a majority of Blacks in the US or specific tribes in India. In Both Malaysia and the US, affirmative action programs cover both the private and public sectors whereas in India only the public sector is affected by such policies (Nesiiah 1997: 12).

In the US, current affirmative action policies favor both women and members of specific minority groups. The genesis of affirmative action in the United States can be traced to the civil rights movement of the 1950s and 1960s and its relative success in making a serious impact on the thinking of liberal sections of the American public and policy makers. Affirmative action as a concept and principle was introduced in the Civil Rights Act of 1964. Since that time affirmative action has made steady in-roads into the spheres of education, private and state sector employment in the US and has forced these institutions to adopt a selection criteria "which did not disproportionately screen out minorities and women" (Nesiiah 1997: 27).

But the opposition to affirmative action in the US has been swift, vociferous and has been levelled against it from the very beginning. Many proponents of affirmative action, especially members of ethnic minorities, have argued that since ethnicity has been used as a means of oppression and because much discrimination is linked to

group membership, remedies to combat such situations also should be based on group terms — at least to a certain extent (Nesiiah 1997: 28). Opponents, on the other hand, also have what seems to be an equally reasonable argument which suggest, that such group-based remedies "undermine the fundamental commitment of the American nation to individual rights" (Nesiiah 1997: 28). But as Nesiiah correctly points out, this kind of opposition must be separated from clearly racist reactions (1997: 28).

Certain prominent members of the US civil rights movement of the 1950s and the 1960s, particularly Jewish activists, also became opponents of affirmative action as its implementation gathered steam. As Nesiiah suggests, they were perhaps motivated by fears that quotas "initially introduced to ensure the recruitment of women, Blacks and other under-achieving minorities, might be extended to limit the recruitment of 'over-achieving' minorities (1997: 29). On the other hand, an increasingly vocal group of Black intellectuals have also joined the ranks of the protestors. Thomas Sowell, one of the better known and more vocal of the Black opponents of affirmative action, has suggested that preferential policies have made suspect the qualifications and occupational status of all members of the groups who are supposed to benefit from such policies (Quoted in Nesiiah 1997: 30).

If one were to take a cursory look at the social history of India, one would be immediately struck by its rather entrenched caste-based social organization, in addition to many other kinds of hierarchies. As such, it would appear that in modern Indian society there would be much legitimate space for its ethnic as well as other socio-political minorities to demand preferential policies. The preferential policies in India are designed to help women, Scheduled Castes, Scheduled Tribes and other backward classes (Nesiiah 1997: 57). The politics of preferential policies can be traced to the period immediately prior to India's independence from Britain. A major force behind the elaborate designing of such policies was B.R. Ambedkar, the then leader of the Dalits — or untouchables as they were then called (Nesiiah 1997: 38-48, 60-61).

A number of clauses in the Indian constitution clearly identifies the specific tribes and castes who are eligible for preferential treatment. They are perceived as people who have been historically oppressed. Among these clauses are Article 14 which permits ethnic and gender based preferences. Similarly, Article 15 (4) permits special provisions to upgrade the conditions of socially and educationally backward classes of citizens as well as clearly identified scheduled castes and tribes. In the same manner, Article 16 (4) paves the way for the reservation of jobs in favor of similarly identified groups who the state believes are not adequately represented in the state sector (Nesiiah 1997: 57-58).

As Nesiiah points out, preferential policies in the initial stages of their designing and implementation soon after independence did not run into major political problems due to the prevailing sense of idealism that marked the independence struggle and also because many of the Congress Party politicians were reasonably entrenched in their socio-economic positions at the time. However, the opposition to such policies have been mounting over the years particularly as a result of increasing economic difficulties faced by high

caste Hindus and others who do not benefit from such policies. In fact, one reason for the violent reaction against and the ultimate downfall of V.P Singh's government in 1990 was its decision to seriously implement the recommendations of the Mandal Commission which, among other things suggested that nearly 50% of reservations be set aside for those deemed disadvantaged (Nesiah 1997: 63-65).

The main distinguishing feature of the Malaysian affirmative action program is its commitment to reserve quotas in education, employment and other areas on behalf of the Malays who are the politically most dominant group in the country. In that context, Malaysian affirmative action is based on the concept of *Bumiputra* or the sons of soil, which is a reference to Malays and tribal groups in the country. The definition of *Bumiputra* clearly excludes the Chinese and Indian minorities in the country. On the other hand, as Nesiah points out, the tribal groups only reap insignificant and marginal benefits from these preferential policies (Nesiah 1997: 96).

Malays have been used to the idea of preferential policies from the time of British colonialism during which time certain government and administrative positions as well as extensive tracts of land were reserved for the Malays. Similarly, the Malay Reservation Enactment of 1913 strived to "protect" the Malay peasantry by prohibiting the sale of land reserved for them which led to the fall of value of such land (Nesiah 1997: 80). However, it was in the 1957 constitution that much more clearer and far reaching pro-Malay preferential policies were adopted: it declared Malay the official and national language and made Islam, the main religion of the Malays, the state religion, and special quotas were set up for Malays with regard to employment, scholarships, business permits and land alienation (Nesiah 1997: 88). Even so, Malay dissatisfaction continued particularly with regard to the economic success of the Chinese, and preferential policies were poised to become stronger and more entrenched. Thus, far reaching constitutional amendments favoring Malays were enacted in 1971 allowing more preferential policies to be adopted (Nesiah 1977: 91). Moreover, talking about or critiquing these policies were made seditious. As a result of such policies the civil service is dominated by Malays as are the armed forces while opposition to the policies have been muted to the extent of being non-existent. However, these preferential policies have not completely displaced certain non-Malay groups from the relatively prosperous position they had enjoyed. For instance, despite these policies, the mostly urban based Chinese are still the dominant force in business (Nesiah 1997: 201-265).

From Chapter 5 to 7 Nesiah presents an exhaustive assessment of the impact of the affirmative action policies on the three countries

in his study as well as on the target groups ear-marked for preferential policies and on those who did not benefit from these policies (1977: 102-265). In the last chapter Nesiah summarizes his findings and places in context particular problems of affirmative action programs in general such as its elite bias and the political consequences of such policies (Nesiah 1997: 296-300). Finally he offers a series of recommendations that could, in his view improve affirmative action programs.

Concluding Comments

Nesiah has written a useful book that is of particular help as a reference source. The main contribution of this book is its ability to bring into comparative perspective through detailed descriptions the genesis, failures, successes and problems in implementation of affirmative action policies and programs in three diverse countries, rather than its originality in analysis. At this point, certain limitations of the book may be commented upon. For one, it seems to me that the book often tends to offer too much information, which creates the problem of distraction from the main themes of the book. For instance, Chapter 7 presents a steady flow of information under 18 separate sub-topics while Chapter 8 has 15 such sub-topics. In my view, quite a bit of the information thus presented could have been edited out without harming the main arguments of the book. In fact, such an endeavor would have placed such arguments in clearer context, while making the information thus provided directly relevant to those arguments.

The second critique I want to offer is, however, more rooted in my own academic biases as an anthropologist than due to a specific weakness in the methodology Nesiah has selected for this analysis. As one would see, the major sources of the book constitute of legal documents such as court orders, court decisions and constitutions, commentaries by scholars and jurists and other such texts. In this regard — that is with reference to its sources — the book does not differ from many other books written on the subject.

In my own wishful thinking, I hope there would be a book in the future on affirmative action which, in addition to the kinds of sources mentioned above, would also be based on anthropological field-work with enhanced access to interviews with ordinary people and extensive narratives of such individuals. Even though such a project would be much more difficult to implement in terms of time and cost, it would nevertheless give us a sense of what the people who have benefitted from affirmative action and those who believe they have been discriminated against as a result of such policies really think. That would add more color, dynamism and a sense of reality to otherwise abstract analyses. ■