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What is True Equality?

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Since the 1960s, there has been intense debate in the United States about the justification for, and the implementation and outcomes of affirmative action. In this same period, affirmative action policies and debates also have spread around the world. There are countries on every continent representing a wide range of economic and social conditions that have adopted policies. In some cases, the phrase "affirmative action" has been directly adopted from its U.S. origins, while in other cases, new phrases such as "positive action" (Europe), "reservations" (India), "employment equity" (Canada), and "special measures" (international law) are used. The different phrasing can indicate subtle distinctions in justification or policy area targeted, but the programs all share the core idea that temporary government actions are necessary to correct the social, economic, educational, or governmental conditions of a targeted group, so that members of that group can achieve effective equality with others in that society. Given the particular histories and current circumstances of the countries implementing affirmative action, there are differences in the specific policies implemented by the countries. There are, however, striking similarities in the overall societal context driving creation of affirmative action policies, in the broad policy patterns affecting implementation, and in the intellectual and practical challenges affirmative action policies have faced in all these countries.

Societal context begins with government identification of a group that is significantly lagging in achievement compared to other citizens. The group is almost always defined by visible, inherited traits such as race, gender, or ethnic origin as opposed to more flexible traits such as language or religion. The group often has suffered from past and ongoing discrimination and lack of access to resources. A societal desire to remedy historical inequality and ongoing unequal outcomes emerges in part from idiosyncratic country circumstances and guilt for past repression, but also from beliefs in the importance of equality. Experts have suggested different

reasons for this emerging belief. Evolutionary psychology suggests human nature supports fairness and justice for fellow societal members (Yang et al, 2006). Others stress economic desires to maximize societal utility (Becker, 1971). International law and communications have spread modern ideas of quality globally. Affirmative action policies are often developed in democracies because modern democracies stress equality of citizens and those aided can become a large voting block.

When attempting to establish equality, countries usually do not jump right to affirmative action; instead, they first pass laws banning active discrimination in order to create equality of opportunity. Then, if achievement gaps persist, government may conclude that deeper barriers such as ongoing subtle discrimination, lack of access to education, and lack of resources are preventing effective equality of outcomes, so they must take positive steps to assist the target group. The next key challenge is deciding exactly which groups needs assistance and how to define those groups. Often, countries expand the number of protected groups over time, for example beginning with a racial group, but later adding women. These expansions can complicate the definition of groups and the justifications behind policies. Countries usually seek equality in jobs and income as key measures of effective equality, but they differ on whether to focus directly on employment policies or focus on indirect efforts such as improved access to education or government power.

As they implement policies, countries face common challenges and criticism. Often, views emerge that government assistance is a form of reverse discrimination against other groups and undermines the principle of achievement through merit. A common complaint is that assisted groups may include some wealthy, educated members who do not need assistance, while poorer or less educated members of the group do not actually benefit significantly. There are

complaints that a focus on inherited group traits reinforces, or even creates, divisions within

society and keeps countries looking at their past rather than moving forward as a unified society.

Another key challenge is deciding when affirmative action policies have met their goals and

should be ended. Such policies are always intended to be short-term remedial measures, but

there are only a few cases when they have in fact been terminated. The commonality of

challenges show that they too are not based entirely on particular circumstances, but instead

reflect deep intellectual debates about how to measure and achieve true equality. Therefore,

when scholars and others review affirmative action across countries some applaud the global

development of policies and point to successes, while others lament the spread and argue it is

recreating the same problems time after time (compare Weisskopf, 2004; and Sowell 2004).

In recent decades, there has been some retreat from affirmative action policies in the

United States. Globally, though, affirmative action appears much stronger. International treaties

and laws have become increasingly supportive of affirmative action. Core programs have been

embedded in many countries' national laws and even constitutions, and policies have been

upheld in courts. Important countries have adopted new policies in recent years. To demonstrate

some of these trends, as well as the common societal contexts, implementation issues, and

challenges, the affirmative action programs of several countries and one region, namely, India,

Europe, Canada, and Brazil, will be reviewed. These cases have been selected in part because

they are ones that have drawn more attention as analysts have explored and started to compare

policies. They also are countries with some economic, political, social and size similarities to the

United States, so they serve as more useful comparative examples than some other countries

such as Malaysia, Sri Lanka, and Israel, that also have adopted notable affirmative action

programs. Before turning to specific countries, some review of trends in international law is

important. International law has become an important new legal arena as well as a way to gauge global views. International law also can be important in encouraging countries to adopt new domestic policies. Further, it has been argued by some scholars that U.S. treaty obligations to employ affirmative action may constitute a compelling government interest thus meeting the strict scrutiny test established by the U.S. Supreme Court to justify use of affirmative action (de la Vega, 1997; Paust 1998; Cohn 2002). With the review of international law and specific countries in place, it is possible to consider whether other countries' ideas might be brought into U.S. debates.

Affirmative Action in International Law

The 1948 Universal Declaration of Human Rights is the foundational document of contemporary international human rights law and discourse. In 1948, affirmative action had not yet been developed as a term or coherent policy, but U.S. Supreme Court Justice Ruth Bader Ginsburg and others have argued that the Declaration does contain the "intellectual anchors for affirmative action" (Ginsberg, 2000). The Declaration endorses the principle of human equality and declares that all humans have rights to work, adequate living standards, and education. In Ginsberg's view, these guarantees in the face of known discrepancies in the success between black and white Americans demands "affirmative government attention."

Since the Universal Declaration, human rights law has developed through a series of more specific treaties and covenants, and by the statements and actions of multilateral institutions. The premise that governments have pledged equality and non-discrimination and guaranteed certain rights for their citizens has become a strong force shaping this subsequent development. As a consequence, affirmative action has received more explicit international legal

support over time. One should note, though, that some of the later treaties have not been agreed to or fully implemented by all parties, including the United States, and that some of the most direct language about affirmative action has come in the General Comments and Recommendations of implementing committees rather than in the fully binding treaty texts.

In international law, affirmative action is usually referred to as "special measures." The first major mention of this term came during the drafting of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in the mid-1960s. The Indian delegate, noting his country's policies, argued that special measures used to advance socially or educationally lagging sectors of society should not be considered discriminatory under the treaty, since they were positive, rather than repressive, measures. After some debate, it was decided not to add a paragraph to the Covenant explicitly allowing special measures, but rather to have a supportive statement in the committee's records. The Committee on Economic, Social, and Cultural Rights' (CESCR) first General Comment notes that governments have pledged to provide equality for all citizens, so they should identify disadvantaged sections of society for further government action. Matthew Craven has argued that the Covenant does not seek to guarantee absolute equalization of results for all, but that it does recognize the need to equalize enough resources to satisfy the basic rights of all members of society (1995). Later, in addressing policies on education, the committee noted that "special measures intended to bring about de facto equality of men and women and for disadvantaged groups is not a violation of the non-discrimination [principle]." The committee further clarified that special measures must not lead to "the maintenance of unequal or separate standards for different groups" nor be "continued after the objectives for which they were taken have been achieved" (CESCR 1999). For the disabled, the Committee went further by stating in General Comment 5 that the convention "requires" states to take

actions to reduce structural disadvantages for the disabled and "to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality" (CESCR 1995). As of 2011, the ICESCR has 160 state parties. The United States signed the Covenant in 1977, but has not ratified it.

Affirmative action language has followed a similar pattern in the other main UN document the International Covenant on Civil and Political Rights (ICCPR). The Covenant includes articles on non-discrimination, the right to political participation without discrimination, and establishes general equality before the law. Each state also pledges to undertake necessary steps to adopt measures that will give effect to the recognized rights. Again here, the Indian delegate asked to have an article allowing special circumstances, but it was included only in the report. Later, General Comments by the implementing Human Rights Committee left no question about the possibility of affirmative action. The Committee stated:

> The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions…as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant (Human Rights Committee, 2000).

These principles have been applied in several subsequent discussions by the Committee and it has urged countries to adopt appropriate new laws. The United States ratified the ICCPR in 1992, but did so with a number of Reservations, Understandings, and Declarations (RUDs). Most crucially, the Senate said that the treaty was not self-executing. This means that the United States is bound by international law, but separate domestic legislation would need to be approved to implement the Covenant's terms and that U.S. citizens cannot sue using the Covenant's terms in U.S. Courts. Taken together, the two Covenants and their commentaries clearly allow

affirmative action, and in some cases encourage it, but they do not include a definite state obligation to develop programs.

Two more specific international treaties, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination of (ICERD) push international law on affirmative action even further. Article 3 of CEDAW establishes:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

This wording has been read by scholars and negotiators as requiring not just the end of discrimination, but overt state actions to achieve effective (MacKean, 1983). CEDAW also includes direct treaty language in Article 4 establishing that temporary special measures are acceptable and not discriminatory as long as they do not maintain unequal standards or remain after the goal is achieved. During drafting, France and England insisted on wording that allows, but does not require, temporary measures. Later, though, views evolved somewhat and the overseeing committee issued General Recommendation 23 stating, "The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public sphere of their societies are essential prerequisites to true equality in political life" (CEDW, 2000). CEDAW has 187 state parties. The United States signed the treaty in 1980, but is the only developed country that has not yet ratified.

ICERD gives the most specific treaty guidance on affirmative action. The treaty includes a list of rights that should not be limited by race, so requires states to end discrimination. It also goes further to achieve true equality. Article 1, Paragraph 4, says that special measures may be

necessary and should not be considered racial discrimination. Article 2, Paragraph 2 is

noteworthy in stipulating that:

> State parties shall, when the circumstances so warrant, take, in the social, economic, cultural
> and other fields, special and concrete measures to ensure the adequate development and
> protection of certain racial groups or individuals belonging to them, for the purpose of
> guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

The phrase "when the circumstances so warrant" could be read as a weakening limit, but the

implementing committee has stressed that this should be seen as a requirement for objective

measure of disparate enjoyment of rights (CERD 2009). The 2009 committee report on special

measures notes that, in addition to the usual caveats of not maintaining separate rights or

establishing permanent programs, special measures should be "appropriate to the situation to be

remedied" and "respect the principles of fairness and proportionality" (CERD 2009). Therefore

not all actions, even ones with good intent, are legally acceptable. In 2001, the United States

argued ICERD permits, but does not require affirmative action, but the committee responded that

there "is an obligation stemming from article 2, paragraph 2 of the Convention" (Concluding

Observations, 2001). The United States ratified ICERD in 1994, but again with an RUD that it

was not self-executing. The legal dispute around RUDs is extremely complex, but some legal

scholars argue the ratification, even with RUDs, means the United States can now be found to be

in violation of its international commitments if it does not pursue affirmative action (Cohn

2002).

   Affirmative action also has been considered by a number of multilateral institutions. The

International Labor Organization (ILO) has sought equality in employment and was one of the

first groups to explicitly permit special measures. UNESCO has worked to end discrimination

and increase access to education. The Organization of American States (OAS) has held a

number of meetings that concluded with supportive statements on affirmative action, and

regional courts have made some rulings in favor of particular programs. The European Union

has issued European Council Directives affirming the rights guaranteed in international treaties

and supporting the use of special measures. The World Conference Against Racism Programme

of Action calls for "[a]ction-oriented policies and action plans, including affirmative action to

ensure non-discrimination" (World Conference, 2001).

Given the various treaties and statements by multilateral groups, it is difficult to precisely

lay out a coherent set of existing international legal standards. Still, after a major review, the UN

Commission on Human Rights concluded:

> There is no doubt that a persistent policy in the past of systemic discrimination of certain
> groups of the population may justify- and in some cases may even require- special measures
> intended to overcome the sequels of a condition of inferiority which still affects members
> belonging to such groups (Bossuyt 2002)

Most international law arguments rest on the concept of providing equality of rights. They seek

objective proof of disparate outcomes. They focus more on current circumstances than the idea

of repairing specific past wrongs. They accept the idea of special measures with certain limits.

There is less clarity on when affirmative action is a legal obligation, how to define the specific

groups that need protection, and what specific actions and measures can and should be taken.

India

India adopted the concept of affirmative action, using the term "reservations," in its 1950

constitution, so is often considered the first major state to create an affirmative action policy.

Policies took several decades to be fully implemented and the reservations system has continued

to expand in the 21st century, so India is in some ways both an old and a new adopter of

affirmative action. The main focus has been on ending inequalities tied to caste, but there are

also policies for "other backward classes" (OBCs) and for women.

The millennia-old caste system divided Hindus into four broad hierarchical categories related to occupation and social function. Below these four was a fifth category often referred to as "untouchables" because of their total physical and social separation from others. In the 20th century, the term untouchable was replaced in government documents with the phrase "scheduled caste" (SC) and in their self-identification by "Dalit." India also had indigenous people living outside the caste system that received government recognition as "scheduled tribes" (ST). Collectively, SC and ST are indentified as "backward classes." Additionally, India recognizes OBCs consisting of identifiable groups, often subgroups of castes, that according to empirical government measurements of such variables as average income, education levels, housing quality, and occupation profiles are lagging compared to others (Jenkins 2003; Pager 2007). The Indian reservation system thus includes both groups based strictly on heritage and those based on current inequalities.

At India's independence, Bhimrao Ramji Ambedkar, the Chairman of the Constitutional Drafting Committee, led efforts to help the previously disadvantaged groups. Formal discrimination by caste was made illegal, and equality before the law and equal protection of the laws was guaranteed. The constitution also, though, stated, "Nothing . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." Further clauses and sections specifically allowed special provisions in educational institutions and government jobs, and mandated reserved seats in the national legislative Lok Sabha for SC and ST representatives in proportion to their percentage of population. The constitution also obligates the government to promote the welfare of the OBCs, but does not give them any parliamentary seats.

With the constitutional provisions in place and confirmed by several subsequent court cases, most focus shifted to fully defining SC, ST, and OBC groups, determining what percentage of jobs and seats should be reserved for them, and actually implementing policies. A 1953 commission identified over 2,000 SC and ST groups and recommended differing quotas for different institutions. These recommendations were rejected by the parliament. In 1980, the Mandal Commission on Backward Classes studied the issues and argued that, since SC made up approximately 15% of the population and ST 7.5%, they should have proportional reservations. In a 1963 case, the Indian Supreme Court ruled that total reservations for all groups could not exceed 50%. The Mandal Commission therefore recommended 27% of education seats and government jobs be reserved for OBCs, despite the fact that this group constituted a larger percentage of the population. It was not until 1990 that Prime Minister V.P. Singh began implementing the Mandal Commission recommendations. The 1990s also saw introduction of a new constitutional amendment to encourage women to enter local politics. One third of panchayat, or council, seats are reserved for women and lotteries are used to assign one third of all sarpanch, or mayoral, positions to women. An amendment to reserve women's seats in the national parliament has made progress, but has not yet been adopted.

In India, a country with high poverty and a large government bureaucracy, government jobs can be a particularly important path to wealth. Dalits have gotten many government jobs, but often not all of the reserved jobs are filled. A World Bank report attributed this to "indifference/hostility on the part of appointing authorities, insufficient publicisation of vacancies and the sheer expense of application" (Deshpande, 2005). Another path to wealth can be education. Dalits have taken advantage of their access to public education, but often have not fully filled their quotas at top universities. Also, India's public schools are not considered as

strong as private schools available to the rich. Also, Dalit students often face discrimination in public classes. In spite of these problems, some Dalits have become successful entrepreneurs in part because of the surge in India's economy since the 1990s. Overall, education rates and income rates between Dalits and others have begun to converge, but there are still significant inequalities. A 2010 India Human Development Survey found median annual household income for Dalits was 22,800 rupees compared to 48,000 rupees for High Castes (Sharma, 2011). Inequalities also remain in literacy rates, vaccine rates, and access to water. In the cities, particularly in the south, caste differences have lessened, although even rich Dalits cannot live in every neighborhood or marry everyone, but in the north and the countryside, caste remains a much stronger force and there is more active discrimination.

In line with their population percentages, 79 seats in the Lok Sabha are reserved for SC representatives and 41 seats are reserved for ST representatives. These numbers represent a huge shift compared to previous politics that was dominated by the elite and mean that Dalit issues are guaranteed some attention. They are not, though, close to a majority of seats in the 552 seat chamber and some reserved seats are won by members of traditional parties such as Congress, so the parliamentarians are not simply representing their caste. To increase their leverage, Dalit parties have formed. The Bahujan Samaj Party runs candidates nationally and hopes to win enough seats to act as a parliamentary king maker. Dalit parties have had significant influence on regional elections, particularly in the north where people often vote largely by caste. The most famous Dalit party leader is Mayawati who has risen to serve as chief minister of Uttar Pradesh and developed a cult of personality. Meanwhile, the seats reserved for women at the local levels have had some impact. Early on many of the seats were held by women, but really controlled by their husbands or fathers. Over time, more women have asserted their own

independent roles, pursued policies of particular interest to women, and even won elections in open seats (Nolen, 2011).

The slow implementation of reservations allowed under the constitution shows continued opposition of some Indians to affirmative action. When Singh announced plans to implement the Mandal Commission quotas, there were widespread protests, riots, and even self-immolations. When plans were announced to increase seats for OBCs in 2006, there were again massive protests and strikes. Opposition has been expressed over the loss of seats for people of higher castes when quotas are used. The government somewhat countered that problem by saying they could increase overall seats, but this raised fears that resources would be spread too thinly. There also has been opposition from those left out of the preferred categories, for example because of religious conversion, who feel they too suffer. The fact that the system depends on caste has been seen by some as reinforcing old identities and holding India back at a time that the country is trying to advance as a modern global power.

The Indian experience brings up several interesting considerations for others. First, by having rules in the Constitution, India took away one level of ongoing debate on affirmative action, but subsequent debates on implementation remained intense. Defining who should receive benefits has proven complicated. When the system was focused mainly on the SC, this meant India was protecting a group that did not fit easily into international treaty categories like indigenous people, racial, or ethnic groups (Waughray, 2010). This led to tactical and rhetorical disputes between international organizations/transnational advocacy networks and Indian Dalit organizations that limited the influence of outside pressure (Lerche, 2008). A wide focus on caste also raised the common issue of whether everyone in the group was equally deserving. In a 1993 case, the Indian Supreme Court established the "creamy layer" concept that excludes children

whose parents have certain jobs or who earn more than a set amount from receiving reservation spots. When the reservation system was expanded to OBCs, new challenges arose. More than 2,000 OBC groups have been recognized and there is ongoing pressure to add more groups, such as Muslims, or to carve out percentages within the OBC percentages for certain minority groups. Combining SC, ST and OBC, well over half of the Indian population is now in a protected group.

Poor enforcement of the quota system also has brought problems. There is little governmental monitoring, so government and educational institutions often make minimal efforts to recruit or train quota entrants. There is little punishments for making inaccurate or incomplete reports on quotas. The Indian case also highlights the problem of how to judge success of affirmative action. In the South, caste differences are lessening and some Dalits are entering the middle class. But, determining when their success is widespread enough to justify the end of reservations is difficult. Meanwhile, in the North, reservations have led to politics based around caste, so caste identities are being reinforced not disappearing. In time, the Dalit parties might have enough successes to better the Dalit's outcomes, but this strategy of highlighting difference first may make it even harder to eventually end affirmative action and relinquish the associated political leverage.

Europe

Across the individual countries of Europe and within the institutions of the European Community (now named the European Union), there has been a growing acceptance of "positive action" to assist disadvantaged groups. Particular countries have developed programs tied to their unique histories, for example, programs in Northern Ireland for Catholics, in the Netherlands for several immigrant groups that came from former colonies, and for Roma in

several countries. The greatest region-wide focus historically has been on programs for gender equality; only in the 21st century, has there been increased focus on racial and ethnic groups. By 2007, 20 states in the EU had national legislation providing some positive action (International Centre for Migration Policy Development 2008). In most cases, the prime intellectual justification for actions has rested on assuring equality for all citizens, rather than on correcting specific past wrongs.

The term and concept of "positive action" began to spread through Europe in the 1980s in relation to improving gender equality. It is often seen as a direct synonym for affirmative action, but increasingly EU officials and others have sought to draw a sharp distinction between "positive action" and "positive discrimination," which they argue are both incorporated within common conceptions of affirmative action. Positive action is used to mean measures that seek to aid a disadvantaged group by means such as recruitment or training, but that maintain a focus on merit and market processes by not giving unconditional preferential treatment to group members. In contrast, positive discrimination entails more proactive measures such as lowering admissions standards for group members or setting fixed quotas that may lead less qualified applicants to be admitted or hired solely because of their group membership. In many cases, positive action is permitted, but positive discrimination is seen as an unlawful case of reverse discrimination. By using only positive action, European societies thus hope to sidestep some of the fiercest affirmative action debates. In practice, the line between positive action and positive discrimination measures is not always clear, and the terms are not employed with the same meanings across various countries, so more work needs to be done to define the parameters of positive action (International Centre for Migration Policy Development 2008; European Commission 2009).

European policies are complicated by multiple levels of political authority. Most European states have been very active in drafting and ratifying international treaties and conventions, and legally acknowledge a commitment to enforce the treaties. For example, the terms of CEDAW affected the design of gender policies in Germany and the United Kingdom (Russell and O'Cinneide, 2003). One layer down, 27 European countries have joined the European Union. The regional EU establishes a legal framework for members through the European Community Treaty--which has been modified several times and serves as close to a *de facto* constitution-- Council directives, and case-law from the European Court of Justice (ECJ). Overall, "[t]he EC is now the dominant force setting the tone and content of national non-discrimination and equality laws across the 27 member states" (European Commission, 2009). Still, EU law is often broad and permissive, so individual countries retain a large degree of flexibility in whether and how to implement specific policies. In turn, the policies and views of the member countries can lead to changes in EU law. In the case of affirmative action, this influence has encouraged more EU allowance of programs since the late-1990s.

The earliest and most developed EU policies focus on achieving gender equality. Building off human rights treaties, the Council issued the Equal Treatment Directive (76/207/EEC) in 1976. The directive prohibited discrimination on the grounds of sex, but in section 2(4) did allow an opening for positive action by saying "The Directive shall be without prejudice to measures that promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities." Some countries, particularly Germany, developed gender programs, but some of were challenged at the ECJ. In the key 1997 *Kalenke* case, the ECJ ruled against a German program that allowed automatic preference for women who were equally qualified as men. This appeared to be a major setback,

but the ensuing debate led to more flexible EC and national laws. In the 1997 Amsterdam

Treaty, a new paragraph was added to Article 141 (formerly Article 119) of the EC Treaty:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The mention of "ensuring full equality in practice" made it clear that simply providing

opportunities without discrimination was not enough and "specific advantages" were now

allowable. In coming years, several new Directives further reinforced the 141 wording and

described gender equality as a fundamental goal of the EU that should be actively taken into

account when formulating laws. New national programs were developed; some were brought to

the ECJ. The ECJ has maintained opposition to programs with unconditional preference for

women, but allowed a wide range of programs that include overall targets and even quotas in

training and interviews as long as there is an objective assessment of each candidate , ongoing

inequality, and policies proportionate to the goal they seek.

Equal employment for women has long been an EU goal, yet despite early anti-

discrimination laws and a rise in the number of working women disparities continued. Section

141 and other Directives allowed for, but did not mandate, specific policies. A decade after 141,

the majority of member countries had not taken positive action measures mandating new policies

in the private sector. Only Estonia adopted a law requiring private sector companies to ensure

that the number of men and women hired and promoted is as equal as possible (Fredman 2009).

Other countries have tried to provide incentives, such as favoring companies with positive action

plans for government contracts. Others just ask companies to collect data on their hiring, with

the argument that equality plans can be developed once better data is available. Many

companies, though, have implemented their own policies motivated by a mix of wanting fairness, promoting a good corporate image, and appealing to and interacting with new consumers (International Centre for Migration Policy Development 2008). In the public sector, Austria, Germany, Spain, and several Nordic countries have adopted formal quotas for hiring women with usual targets being 40 to 50 percent of the government workforce. Other countries have non-binding government targets. Many of the countries focus on recruiting women, mentoring them or giving other job training, and adopting family friendly policies.

In order to achieve full gender equality, Europeans hoped to increase the number of women in national elected offices. This goal raised some challenges, since most Europeans were not willing to reserve quotas of seats for women. Political parties could increase the number of women candidates, but mandating parties is complicated because they are usually considered private entities outside of government regulation. Moves to increase the number of women candidates therefore began as voluntary actions by Norwegian parties, but soon parties across most West European nations were adopting voluntary targets (Krook et al, 2006). These voluntary actions sought fairness and fit with political ideologies on the left, made parties appear modern, and possibly encouraged women to support certain parties. Implementing policies was relatively easy in many European states that have parliamentary systems with lists of candidates offered nationally or by district. Implementation and legal issues proved more complicated in countries with single member districts. In England, parties adopted voluntary internal quotas in the late 1980s, but in 1997 the system was ruled to discriminate against men. England, therefore, passed a new law in 2002 saying that party choices were a specific place where quotas were allowed. In France, adopting candidate quotas required not only a new law, but a 1999

constitutional amendment. Interestingly, France subsequently joined a handful of countries instituting legal mandates requiring women candidates.

In comparison to the large focus on gender equality, racial concerns historically have gotten much less attention in Europe. Most countries have sought to assimilate small racial or ethnic minorities into their broader populace or used welfare policies to aid disadvantaged groups. There were the occasional exceptions, such as the U.K.'s Race Relations Act of 1976 that allowed for positive action such as increased training to encourage under-represented groups. In the 1990s, however, discussion of expanding European non-discrimination efforts culminated in the adoption of language in the Amsterdam Treaty that gave the European Community powers to combat discrimination on the grounds of racial or ethnic origin. In 2000, two Directives were issued on Racial Equality and Employment. These directives focus on discrimination, but do permit the use of positive action to ensure full equality. In subsequent years, EU members have implemented a wide variety of new anti-discrimination laws, but few have rushed to implement positive action measures (Dhami et al, 2006). The UK again led others with passage of the Race Relations Act 2000 that put a new statutory general duty on all public bodies to promote equality. The Netherlands has been another leader by building off its history of policies for ethnic minorities by first encouraging corporations to adopt voluntary plans, and then passing both The Equal Treatment Act and The Law on the Encouragement of Proportional Labour Participation by Ethnic Minorities in 1994. Under these laws, employers in public and private sectors with more than 35 employees are required to collect and report ethnic representation data and have plans to move to greater representation.

Since the racial policies are new, there is little data on their effectiveness in addressing the continuing racial inequalities across Europe. On gender, there is limited data on the impact

of specific policies, but more macro data shows progress. By 2010, the pay gap between men and women across the EU had been reduced to 17% (Gender Pay 2010). The continued gap is often attributed to more women working part-time and women still having more jobs in lower paid sectors. The gap is lower than that in the United States and many other countries. In legislatures, women's representation consistently rose after parties increased women candidates. Several European countries now have legislatures with over 40 percent women and most are higher than the U.S. percentage of 17 percent. The percentage of women winning positions remains lower than the percentage running because parties may choose to run women in districts that they are likely to lose or may place several women on the same candidate lists.

As Europe has adopted positive action, there has been some resistance. Men have successfully challenged several programs on the grounds of reverse discrimination. There has been frustration that data collection takes resources, raises privacy issues, and may reveal company plans to others. Interestingly, when the UK government announced in 2010 that it was enhancing positive action, it also announced that it was ending the requirement that companies publish data on employee pay. Overall, European positive action debates have not been as passionate as those in India and the United States. Several factors may account for this, including the focus on women rather than a small racial group, the focus on voluntary rather than mandatory programs, and the idea of positive action rather than positive discrimination.

European experiences are unusual in some other ways. Whereas most countries must blend national priorities with international law commitments, Europe faces the extra regional layer of government. To date, other regional groups like NAFTA, ASEAN and MERCOCUR have remained much less centralized than the EU, but it is possible that the EU will become the model for others further complicating many countries' affirmative action debates. Second,

Europe has put most of its focus on women. This likely reflects European's deep intellectual commitment to human rights across gender, as well as certain practical factors such as European women developing powerful political movements, most European countries having comparatively small and diverse racial minority and immigrant populations, and a traditional focus on trying to integrate racial and ethnic groups into existing national groups (Teles 1998; Dhami 2006). The gender focus does, though, raise a question of whether gender issues would get more attention in other countries if those countries did not have, or managed to solve, racial, ethnic, and caste issues. Lastly, Europe has put much of its focus on equality of work and pay. It has put less focus on equality of education than many countries, but more focus on equality of political representation.

Canada

Beginning in the 1980s, Canada has implemented affirmative action policies using the term "employment equity." This term highlights that the policy focus has been on making the workforce reflective of the population at large, but also shows a conscious effort to insulate Canadian policies from some of the controversies associated with U.S. "affirmative action" (Bacchi 2004). Programs have focused on people with disabilities, women, aboriginal peoples, and members of visible minorities, defined as "non-Caucasian in race or non-white in colour." Implementation has been affected by Canada's complex system of federalism that divides both the regulation of industries and the development of human rights policies between the national and provincial governments. The provincial governments have put less focus on employment

equity in the private sector, so, despite several national laws, well over 80% of Canadians still work in jobs that have no employment equity requirements.

Canada's policies have been shaped by domestic intellectual developments and public pressures, by observing U.S. debates and experiences (Brutus et al 1998), and by international law and discussions. Canada has a long history of active involvement in the U.N. and other international forums. It has ratified all the major international human rights treaties that cover affirmative action and has been particularly active in discussions of rights and policies for indigenous populations. Canadian policies also have been greatly affected by the country's changing demographics. Canada always has been a country of immigrants, and one that encouraged immigrants to maintain their distinct heritage. It has sometimes been described as a multicultural mosaic as opposed to the U.S. melting pot concept. Recently, Canada's birth rate has decreased and the existing population has aged, so the government has further encouraged immigration as a way to maintain a large and skilled workforce. In many years, over 200,000 new immigrants have come. There are still immigrants from Europe and the United States, but six out of ten immigrants now come from Asian countries. The high numbers and new countries of origin have rapidly shifted demographics. In 1981, less than 5% of Canadians were visible minorities, but by 2009 over 15% of the workforce was a visible minority and that number is expected to rise since almost all workforce growth now comes through immigration.

Canada took its first moves to employment equity with the 1978 Canadian Human Rights Act. This was followed up by the 1982 Canadian Charter of Rights and Freedoms that amended the constitution. Section 15(1) of the Charter guarantees equality before and under the law without discrimination. Section 15(2) then states:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Charter therefore established permissive laws for employment equity, but did not mandate it. In a number of subsequent court cases, the Canadian Supreme Court has held that the sections should be read together as a "unified approach," with the government both preventing discrimination and taking measures "to pro-actively combat discrimination" (Baker 2009; Tremblay 2012). The courts have stressed the goal of achieving effective equality of disadvantaged individuals and groups, so have accepted unequal treatment of other groups. The constitutional wording and court decisions give the government leeway to develop programs and place the burden of proof on potential challengers of government policies.

In 1984, Judge Rosalie Abella chaired a commission to study how to implement new policies. The Abella Commission created much of the terminology and concepts that were then adopted in the landmark Employment Equity Act of 1986. The Act's Legislated Employment Equity Programs (LEEP) applies to crown corporations (companies where the federal government owns a majority of the shares) and employers regulated in federal jurisdiction with more than 100 employees, which in practice mainly applies to banking, communications, and transportation. Separate legislation was adopted requiring employment equity in public services. Under LEEP, companies are required to compile employment statistics for women, aboriginal people, disabled people, and visible minorities and to submit reports. The law did not mandate companies hiring or promoting employees in the protected groups and there was only a minimal fine for failing to submit a report. The hope was that businesses would not find these requirements a major intrusion into market decisions and that statistical evidence would lead

many businesses to voluntarily shift practices until the percentage of employees in the protected groups was equal to the percentages of those groups in the available labor pool (Grundy and Smith 2011). Minority advocates felt the law needed more power of enforcement, but many businesses complained the law was already too intrusive. In a 1995 review of the act, Parliament decided that greater requirements and enforcement mechanisms were necessary. Following the law as passed in 1995, companies must compile statistics and reports, but also develop plans for how they will remove barriers to equity and make reasonable progress toward implementation. For enforcement, the Canadian Human Rights Commission became responsible for conducting compliance audits. If a company does not meet its legal requirements, the commission advises and negotiates with the company to seek compliance. If those measures fail, the employer can be brought before the Employment Equity Tribunal for mandatory compliance measures. In practice, few cases reach the Employment Equity Tribunal. The 1995 Act therefore is more demanding, but maintained a focus on encouraging companies to take action with relatively soft punishments for inaction. In addition to LEEP, the Federal Contactors Program (FCP) was developed in 1986. Businesses that have contracts with the federal government for more than $200,000 and more than 100 employees, must commit to implementing employment equity.

The number of businesses and employees covered under LEEP and FCP has grown over time. In 2009, there were over 740,000 employees in the federally regulated private sector, over 400,000 in the public sector, and over 1 million in companies covered by FCP. In early years, more progress was made on equity for women. By 2001, percentages of women employed were nearing the percentages in the available pool that had 43% women. By 2005, the overall employment percentage for visible minorities was approaching the 15% in the available pool, although the percentage in public employment was lagging. Breaking the numbers down, there

are clear differences by sector, with banking greatly exceeding target percentages, but transportation lagging well behind. There are differences by job level, with women and visible minorities still filling many lower level jobs and being underrepresented in upper level management. Looking more broadly, many companies not covered by law have adopted some equity policies from a belief in equality, a desire for a positive image, and a need for skilled employees. Despite these mandated and voluntary actions, overall Canadian statistics show that while minorities have made some progress over the last decades, they continue to earn 12% less than others on average, have higher unemployment rates, and report suffering from ongoing discrimination (Dhami et al, 2006).

Canadian employment equity programs have not drawn the same level of criticism as affirmative action programs in the United States, which may reflect both their limited scale and their soft implementation mechanisms. There have been complaints that the programs establish quotas under the terminology of equitable percentages. This has led to complaints of reverse discrimination and questions of whether true merit is being appropriately rewarded. There also have been complaints from business groups that the reporting requirements take time and resources without a fully clear indication of what will happen as a result of the reported data. One measure of the power of the opposition is that little equity regulation has been adopted at the provincial levels, so this means many industries remain without requirements. It is also noteworthy that much of the legislation was adopted in a span of just a few years in the 1980s and there have been few significant moves to expand programs to new groups, despite some efforts by advocates for sexual minorities.

Canada's experiences with employment equity have many similarities to affirmative action policies in other countries, but there are some differences. First, Canada's complicated

federalist structure has limited the number of employees covered, as well as led to very different legal requirements for different sectors of the economy. Second, Canada's rapid increase in non-white immigrants means there are an increasing number of citizens in protected groups and that the category of visible minority now includes some very wealthy and educated immigrants recruited for their skills. The rapid increase also complicates measuring progress, since often immigrants have difficulty finding employment for reasons such as language barriers and trouble transferring qualifications, so new immigrants may negatively skew statistics for the visible minority category. Third, the idea of achieving employment equity with percentages matching the available labor pool appears to gives Canadian law an unusually clear end point for policies. Often, though, when policy is based on numeric targets, political disputes arise over how to count and interpret the numbers. Finally, Canadian policies have relied on voluntary actions or soft punishments. The softer approach somewhat lessened business opposition to employment equity while still achieving some progress. The 1995 review did, though, conclude that more government pressure was necessary. Also, recent surveys show that businesses covered under LEEP and FCP are more aware of managing diversity and have done more in adopting new equity policies than other Canadian businesses that had only voluntary actions (Ng and Burke, 2010).

<u>Brazil</u>

Beginning in the mid-1990s and then greatly expanding in the following decade, Brazil has adopted affirmative action programs designed largely to address inequalities between white and non-white Brazilians. For centuries, Brazil was the world's largest importer of African slaves, with seven times as many slaves imported compared to the United States, and slavery continuing until 1888. Today, Brazil has the world's largest population of persons of African

descent outside of Africa. Notably, even during slavery, there were no laws against

miscegenation, and racial mixing only increased following abolition. There was little

institutionalized racism like U.S. "Jim Crow" laws. The Brazilian population therefore became

racially mixed. Census and other measures used color terms from white, through various shades

of brown, to black to describe the population. Sociologists, such as Gilberto Freyre, argued

Brazil was a "racial democracy," free from the racism and the antagonisms of countries like the

United States (Freyre, 1986). The racial democracy language was adopted by the government,

so there was no official recognition of racism and therefore few policies to combat it.

        With the move to democracy in 1985 and a growing Afro-Brazilian cultural movement,

some Brazilians came to argue that racial democracy was a myth (Reiter and Mitchell, 2010).

Responding to these views and to his own ideas, President Fernando Henrique Cardoso

acknowledged in 1996 that there was racism in Brazil and began moves that would lead to

affirmative action policies. The country also was influenced by discussions leading up to the

World Conference on Racism. In general, Brazil puts great focus on multilateral forums and

discussions and, under the Brazilian constitution, international treaties have the force of law.

Some of the racism discussions have raised Brazil's past slavery experience, for example

President Luiz Inacio Lula da Silva commented, "We're not doing people favors…We're paying

a debt built up over 500 years" (Global Rights, 2005), but most of the focus has been on

responding to current inequalities. In education, 42% of the black population had no schooling

compared to 23% of whites in 2000. Many prestigious universities had close to 70% white

students, and only 1.4% of blacks held an advanced degree compared 6.6% of whites (Junior et

al, 2011). Whites on average earn slightly more than double compared to black or brown

Brazilians. According a government linked thinktank, these income disparities also affect

variables such as access to health services, sanitation, and the chance of living in slums (Affirming a Divide, 2012). Government workers and political leaders predominantly have been white even though whites account for only roughly 50% of the population.

In 1996, Cardoso launched the National Human Rights Program to explore ways to reduce inequalities. By 2001, state agencies began announcing affirmative action policies. For example, the Ministry of Justice created quotas for blacks (20%), women (20%) and the disabled (5%) in senior positions and said that, for contracting firms, preference would be given to those with affirmative action policies. Some state and municipal governments also announced quotas, although many of the plans were not fully implemented. Affirmative action got a further push with the 2002 election of Lula who had leftist political views and drew much support from Brazil's poor. He soon created the Secretariat for Policies Promoting Racial Equality (SEPPIR). Lula increased the number of brown and black officials in key government posts and judgeships. He also encouraged drafting a Racial Equality Statute that, in early versions, would have established firm quotas in government jobs, established quotas for federal universities, and even mandated television and movie roles for Afro-Brazilians. The statute was finally passed in 2010. The Statute states:

> The equal participation by the black population in the economic, social, political and cultural life of the country shall be promoted, as a priority, via…the implementation of affirmative action programs to deal with ethnic inequality in education, culture, sport and leisure, health, security, employment, housing, the modes of mass communication, public finance, access to land and justice, among others.

The statute does not include any of the proposed firm quotas, so was viewed as a partial defeat by affirmative action supporters.

Higher education has been the policy arena where the majority of affirmative action debate has centered. In Brazil, public primary and secondary schools are considered inferior, so

many richer Brazilians send their children to private schools. At the university level, the pattern is reversed, as it is the public universities, some local or state sponsored and some federally sponsored, that are more established and enjoy better reputations. In 2002, public universities began introducing affirmative action in admissions. Over the next decade, the majority of public universities followed, many voluntarily and some in line with new state laws. Because of the decentralized process, there is great variation in the admissions policies. Schools typically target some combination of blacks and mixed race students, indigenous peoples, people with disabilities, and those coming from the public school system as a proxy for low income. Many schools have quotas, while others add points to admission test scores. The national government has encouraged private universities to implement similar policies by offering them tax breaks and setting up the federal University Program for All (PROUNI) scholarship system. PROUNI has quotas for targeted groups in proportion to the demographics of each state, and includes family income restrictions for full or partial scholarships. In a much awaited ruling, the Brazilian Supreme Court ruled in 2012 that quota systems were constitutional, both in admissions and in the allocation of government scholarships.

The quota systems had immediate impacts on the composition of university classes. Within five years, the number of black 18-24 year olds in higher education doubled. The numbers of whites in higher education also increased in this period, reflecting the rapid expansion of the private university system. This overall expansion of access likely made the introduction of quotas at this time easier. By 2012, over 900,000 students had received PROUNI scholarships. Some of the students struggled to meet the advanced level work, but many hundreds of thousands have completed their degrees.

As Brazilian policies developed, they faced many of the criticisms commonly heard about affirmative action. Some argued that reverse discrimination was denying qualified whites their equal rights to education. Some feared that all non-whites would face a stigma and assumptions that they were less qualified. Others argued that affirmative action was simply treating symptoms, and that the real focus should be on repairing early public schooling. These critics represent a significant block in Brazilian society with a 2010 poll showing that 27 percent of respondents disagreed with reserving public university spaces for Afro-descendants. Two-thirds of poll respondents did support the policies (Smith, 2010). Much of the support for affirmative action comes from poor, less educated citizens, while support from the rich and educated of all races and from whites of all incomes is much lower.

The Brazilian experience highlights some particular issues. First, the government has played a role in starting the discussions and moving forward on some policies, but many of the programs have been adopted by autonomous institutions. Next, determining who should receive assistance has been particularly difficult because of Brazil's complex racial mix. Until recently, color, not race, was used to categorize people in Brazil and the idea of racial democracy stressed that all people were equally Brazilian. Now, the programs encourage people to self-identify their racial group, which may in time encourage new group identities and cleavages. Self-identification also raises practical issues of differing conceptions of how much black ancestry is necessary to be part of the protected group, so there have been discussions of setting firmer standards. There have also been efforts to deal with the idea that race and class are closely, but not perfectly, tied in Brazil. Allocating seats for public school students is one way to address the problems of poor whites, but many scholars and others have argued the whole system should be structured entirely, or in large part, around class rather than race (Racusen, 2009; DiSchino

2010). It is also noteworthy that Brazil quickly adopted the use of quotas, which are often the

most controversial form of government action. Supporters have argued that using quotas jump-

started necessary discussions on race more than other methods would have (Jeter, 2003) and that

they achieve quick results. Detractors have claimed that quotas divided the society unnecessarily

and violate true equality. Recent court cases have upheld quotas, but the issue will likely be

revisited. Finally, Brazil has always taken pride in thinking of itself as different from the United

States. Even when Cardoso started the racial discussions, he noted that there should be Brazilian

solutions to Brazilian problems. There is a view that bringing the idea of affirmative action from

the United States is un-Brazilian and matching U.S. solutions to a different set of problems

(Maggie 2012). On the other hand, Brazilians are more accepting of influence from international

law, which is also encouraging development of affirmative action policies.

Bringing Ideas to the U.S. Debates

U.S. opponents of affirmative action may use the experience of others to show that

affirmative action policies have never been enacted without opposition and that no cases with

perfect results exist. Others, though, may look abroad and to international law for ways to

modify U.S. policies to garner more support for them or make them more effective. Those

looking to bring outside ideas to the U.S. debates should, though, acknowledge three main

barriers. First, the United States is many decades into debates, so some options already have

been considered and rejected. For example, the United States will not now adopt firm quotas

such as seen in Brazil. Second, although there have been some justices such as Ruth Bader

Ginsburg and Stephen Breyer that have shown interest in using international law and

comparative law in decisions, other justices have firmly rejected these ideas. There is a long history of the United States refusing to accept international treaties as domestic law. Third, there is a long tradition of American exceptionalism that holds that the United States by its historic circumstances and intellectual roots is distinct, and often superior, to other countries, so that the policies of others cannot, and should not, be brought to the United States. These barriers may shift over time, but in the short-term, it is more likely that U.S. debates will be influenced by broad concepts rather than direct application of specific policies.

One broad point is how affirmative action policies are justified. In the United States, the courts have narrowed the acceptable justifications of affirmative action and therefore the resulting policies implemented. Internationally, affirmative action policies often are adopted for large groups that do not need to show specific past discrimination and the policies seek broad societal shifts. These international policies rest on the idea of affirmative action bringing fundamental human rights to all. The rights argument does not demand complete equality of outcomes, but it does require that all citizens have at least the minimum level of means and opportunity necessary to work, to be educated, and to have an adequate standard of living. Phrased this way, affirmative action is not a benefit given to some favored group; it is a requirement filling in the gap for any who need it. Therefore, international law and many countries have adopted specific wording that affirmative action is not a violation of equality and nondiscrimination laws, but rather is a means to achieve equality. This phrasing does not end complaints of reverse discrimination, but it means those opposed to affirmative action are placed in the position of opposing equal rights. The rights argument also can help justify bolder and broader policies, such as numerical targets for whole groups of citizens, without focus on specific past injustice.

A second broad point is that in the United States the courts have played a very major role in deciding the course of affirmative action, whereas in other countries the courts have been less significant. Several countries have put wording into their constitutions that allows affirmative action and others have put similar wording into key legislation. These actions mean that controversial issues of how to define and pursue equality are being decided in the more popularly controlled branches of government, so may better reflect overall public opinion and thus future support. These constitutional changes added in recent decades also may mean that affirmative action policies are being shaped by modern opinion on equality. In the U.S. system, the courts and the constitution will always play central roles, but the moves to state referenda--although so far often being means to limit affirmative action--indicate a desire to bring affirmative action decisions back into the popular arena and to have constitutional guidelines evolve.

Lastly, deciding which groups should receive assistance will always be controversial in part because of the underlying question of whether groups based on ascriptive traits match those based on class or other measures of achievement. Brazilian policies limiting scholarships for high income minorities and the Indian concept of denying benefits to the "creamy layer," those is the ascriptive group who have already met certain income levels, suggests ways of addressing fears that successful group members are getting unnecessary assistance. The Indian concept of statistically measuring the achievement of "other backward classes" raises some ideas for determining what groups and subgroups truly need assistance. The idea of lookinging Indian policies already has been advanced by a group of U.S. scholars in an amicus brief before the U.S. Supreme Court (Brief 2001), although Pager has raised some difficulties about the implementation of such a policy in a society as diverse and fluid as the United States (Pager 2007). Brazil has tried to address the same issue by having university spots go to students from

disadvantaged public schools. While the system has not solved every issue, it shows that

establishing supported and effective affirmative action policies may mean considering new

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