

The New Affirmative Action: Abandoning Race as a Proxy for Disadvantage¹

Introduction

The University of Cape Town (UCT) currently employs an affirmative action admissions policy that gives preference to members of designated racial groups. This policy has been criticized for discriminating against prospective students on the grounds of race. A commission of enquiry has been established to review the admissions policy and to investigate other ways of assisting prospective students who have been previously disadvantaged.



Mark Oppenheimer is a practising advocate and member of the Johannesburg Bar. He graduated from UCT in 2007 with degrees in law and philosophy. He has represented newspapers that are threatened by defamation suits, individuals that were wrongfully arrested by the police and employees that have been unfairly dismissed.



David Ansara is the Coordinator of the African Loan Market Association, a non-profit trade association dedicated to supporting and growing the syndicated loan market in Africa. David holds a master's degree in political science from the University of Cape Town and has a strong interest in economic and social development.

We will examine the arguments in favour of race-based affirmative action and argue that it is an inadequate policy to remedy the injustices of the past and does not create a future grounded in equality. We will demonstrate that the current policy of race-based affirmative action at UCT should be abandoned in favour of an affirmative action admissions policy that promotes equality of opportunity, without relying on race as a proxy for disadvantage.

Justice and Equality

Justice requires us to treat people in accordance with what they deserve. Individuals that work hard deserve to be rewarded for their efforts, while those that perform wrongdoings deserve to be punished. A proper understanding of justice must also be rooted in the value of equality. Paying due regard to equality does not require us to treat all people in exactly the same way, but rather to take the different needs and abilities of people into account when deciding how to treat them equally.

When we treat people differently, we must do so because of morally relevant considerations. For example, we would award a researcher the Nobel Prize for medicine if she discovered a cure for cancer, but somebody who invented a tooth-whitening product might not be as

deserving of the prize. The same applies for punishment. Somebody who has stolen a loaf of bread should not receive the same level of punishment as a murderer.

Sexism is wrong because it arbitrarily discriminates on the morally irrelevant basis of a person's sex. Similarly, treating people unequally because of their language, religion, race or sexual orientation is unjust because none of these features are morally relevant reasons for differential treatment.

Understanding Affirmative Action

Affirmative action (AA) policies are usually concerned with three goals: compensation, correction and diversification. Compensation is backward-looking in that it seeks to remedy past injustices. Correction aims to rectify present discriminatory practices, while diversification attempts to create a multicultural society. AA policies aim to achieve these goals either by being race-neutral or by placing some weight on the basis of race.

Race-based AA policies usually take three forms:

- i) Tiebreaker AA
- ii) Strong preference AA
- iii) Set-asides

Tiebreaker policies apply to situations where two candidates with equal qualifications or ability are contesting for the same position, but the candidate of the preferred race is chosen over the candidate from the non-preferred race.

Set-asides were commonplace in apartheid South Africa where 'whites' were accorded privileged access to elite universities, as well as most skilled jobs and positions of power.

Strong preference AA gives extra weight to candidates of a preferred race by actively selecting them for positions over other races even if these candidates are not as well qualified for the position. In this approach the stronger the preference for a particular race the less qualified the candidate has to be in order to be admitted.

Set-asides designate certain positions for candidates of a particular race and actively bar individuals of another race from winning these positions. Set-asides were commonplace in apartheid South Africa where 'whites' were accorded privileged access to elite universities, as well as most skilled jobs and positions of power.

Arguments for race-based AA in university admissions in South Africa

The racist system of apartheid divided people according to arbitrary criteria of race, ethnicity and linguistic origins and allocated resources and opportunities to 'whites' at the expense of 'blacks'. This has entrenched inequality between South Africans of different races - a legacy that we still live with today.

In order to correct this historical injustice, proponents of race-based AA argue that race should be used as the primary determinant of access to opportunities including jobs, places on national sporting teams and positions at university. They assert that since race was used to discriminate against 'blacks' in the past, that race remains the best proxy for disadvantage that we have.

Proponents of race-based AA also argue that by giving preference to members of specific races we contribute to greater diversity, which leads to a more just society.

Problems with race-based affirmative action

Compensation for past injustice

Race is not an accurate proxy for disadvantage. While this may have been the case immediately after the end of apartheid, redistributive measures and increased access to opportunities have resulted in a number of upwardly mobile ‘black’ people who can no longer be considered disadvantaged. While poverty is still endemic in South Africa, the income and social status of ‘blacks’ differs. Since apartheid ended in 1994 a new generation of so-called “born frees” who are of university-entry age may not necessarily be disadvantaged by virtue of their race.

Using race as a blunt instrument to determine who should be treated with preference in university admissions will result in the privileged receiving undeserved preferential treatment, while excluding the genuinely disadvantaged. Since there are a limited number of places available for prospective students, those that matriculated from elite private schools who happen to be ‘black’ will deprive other less fortunate ‘black’ students from being admitted.

The stronger the race-preference the less weight is allocated to academic achievement. Stronger candidates from non-preferred groups who might otherwise be eligible for admission may find themselves without a place at university for arbitrary reasons.

It is also unfair that some deserving ‘white’ candidates are turned away because of a race-preference policy. Born free ‘white’ South Africans took no part in the unjust practices perpetuated under apartheid. They should not be punished by being forced to forgo their equal right to higher education. Furthermore, not all ‘white’ people were beneficiaries of apartheid; some resisted the system and were victimized by the Nationalist government because of this. Notable examples include Beyers Naudé, Joe Slovo and Ruth First.

Set-asides and quotas also negatively affect academic standards by reducing admissions criteria on the grounds of race. The stronger the race-preference the less weight is allocated to academic achievement. Stronger candidates from non-preferred groups who might otherwise be eligible for admission may find themselves without a place at university for arbitrary reasons.

Diversity of race

Despite the fact that AA based on racial preference is unjust some argue that it ought to be used because it yields positive consequences. One of the main claims in favour of the policy is that it creates diversity which is either intrinsically good, or good because of the results that it produces.

A racially diverse range of students may be aesthetically appealing, but if we acknowledge that the colour of a person’s skin is as irrelevant as their height or hair colour, it becomes evident that there is nothing intrinsically valuable about it.

Others argue that racial diversity is valuable because it leads to a diversity of opinions. Providing room for a multiplicity of beliefs and ideas brings with it immense benefits. It allows for intellectual, cultural, artistic and scientific progress whilst provoking discussion and aiding the search for truth.

However, it is not clear that admitting students that are racially diverse will ensure that those students will hold a diversity of opinions. The assumption that all ‘black’ people

think in a particular way and that the opinions that they hold are fundamentally different to the opinions held by members of other racial groups is an absurd form of racial stereotyping.

It is possible for people from different racial groups to hold the same opinion on a matter. It is also possible for members of the same racial group to hold radically different views. The old adage that if you put two Jews in a room you will get three opinions illustrates the point that there is no connection between a person's race and what they believe.

If universities genuinely want diversity of opinion then they could admit students on that basis. Instead of focusing on race, universities could ensure that they admit enough Marxists, Libertarians, Feminists, Anarchists, Conservatives, Africanists, and religious fundamentalists to meet the objective of diversity of opinion.

The Burden of Racial Preference

One of the problems with race preferencing is that it assumes a notion of victimhood in the beneficiary of the AA policy, regardless of whether or not that person sees themselves as a victim. Moreover, it undermines the actual achievements of those who have excelled academically, but who have to endure the silent judgement of others who presume that they are the beneficiaries of an AA system. It creates the stigma that as a member of a preferred group you are not deserving of your admission, even if you excelled.

“You always want to believe that you were hired because you were the best... But everything around you is telling you you were brought in for one reason: because you were a quota ... No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome.”

Not only does race-based AA fail to produce the good results that it promises, it can produce results that harm the people that it aims to benefit. The policy undermines the achievements of those who belong to the racial group that the policy prefers. It imposes upon every member of the preferred race the demeaning burden of presumed inferiority.

'Black' candidates that are admitted to universities because they are the best qualified, are still forced to carry the stigma that were only chosen to fulfil a quota. Instead of being recognized for their genuine talents and abilities, they are viewed suspiciously by their colleagues, who are lead to believe that they were only appointed because they are 'black'.

The following quote testifies to the anguish that many highly qualified 'blacks' feel as a result of racial preference.

“You always want to believe that you were hired because you were the best ... But everything around you is telling you you were brought in for one reason: because you were a quota ... No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome.”

In the realm of education, the policy acts as a disincentive for preferred candidates to do their best. The more that they are rewarded for their race as opposed to their merits, the less reason they are given to develop their talents and strive for excellence when they are studying.

The preceding arguments should not be misconstrued to imply that members of particular racial groups are inherently less qualified or capable than members of other

racial groups. Such a claim is racist and obviously false. The claim is simply that the more emphasis that a preference policy places on race, the less weight it places on merit. The same would apply if preference were placed on some other feature like height or hair colour.

Racial Classification

In order to adopt a policy that takes account of race, some form of racial classification must be used in order to determine who counts as 'black' or 'white'. Every person would have to be identified as being part of a particular racial group. Such a system would be undesirable since it would reinstitute the humiliating classificatory processes that were used in Nazi Germany and Apartheid South Africa. The classifications would often be arbitrary since people of mixed racial descent cannot be easily classified.

Race preference does this terrible thing to our community and ourselves; it compels us to do what the Nazis urged - to think with our blood.

Race preference requires us to ask a series of repulsive questions. In order to determine how benefits are to be allocated it must be decided how much "blood" from a particular race is required to be considered a part of that race. Is one 'black' parent, grandparent or great grandparent enough to be considered 'black'? Would the same test be used to determine who is 'white'?

A clear line would have to be drawn between those who would benefit from the preference and those who would not. But on what basis would such a line be drawn? In Nazi Germany a person's status as a Jew was determined by how much Jewish blood they had. Having one Jewish grandparent was enough to be sent to a concentration camp. In South Africa would having one 'black' grandparent be enough to secure a favorable position in a university?

Who gets to decide what racial group people belong to? If people were given the power to assign themselves to a race of their choosing the results would be inconsistent. Preferential policies would incentivise people to categorize themselves as being members of the preferred racial group. Given that the stakes will be high for people to prove that they belong to a preferred group, there will be much contestation among those who fall into ambiguous racial categories.

The system would require administrators to engage in the same kinds of repugnant classification tests that were used in the past. Race preference does this terrible thing to our community and ourselves; it compels us to do what the Nazis urged - to think with our blood.

Race preference is at odds with the aim of non-racialism, since racial identity would be deemed to be as important today as it was under the apartheid regime. Instead of seeing each other as fellow human beings, people would be inclined to think of each other in terms of their race identity.

This would hinder the noble goal of racial integration and encourage people to separate themselves into racial groups. Instead of creating a pluralist society where everyone can feel proud of their heritage, racial preference makes some citizens feel less worthy. Those who are not given preference are deprived of an equal opportunity on the basis of the race that they were born into. In other words, "preference by race yields disharmony, distrust and disintegration."

Alternatives to race-based AA in university admissions

Given the history of discriminatory practices in South Africa there is a cogent need for measures that enhance equality of opportunity, without introducing new forms of discrimination.

As an alternative to race-preferencing we would support the proposed policy revisions made to the UCT council by the Commission into Student Admissions. The commission recommends that a basket of socio-economic indicators be used to evaluate varying levels of disadvantage. These criteria could take into account the particular circumstances of applicants; such as their financial situations, their educational backgrounds and those of their parents. For example, a prospective student who is not a mother-tongue English speaker would be at a disadvantage at UCT, where the language of instruction is English. UCT could help those students overcome this disadvantage by providing bridging courses in English.

The notion of what constitutes the best candidate must also be overhauled to eliminate bias against people with different racial and cultural backgrounds. In addition to academic ability, qualities like the ability to overcome disadvantageous obstacles should be taken into account. This means that if two candidates both achieved the same qualifications at similar institutions but the first did so while aided by privileged surroundings while the second did so despite the presence of discrimination and lack of opportunity, the second ought to be preferred on the basis of merit since she has the added ability of determination in the face of impediment.

It is important to acknowledge that because of its past, the South African educational system is by no means an even playing field. In this regard, grades should not be the sole criterion for evaluating academic potential.

Measures that could be put in place to assist disadvantaged students could include a sliding scale of financial aid, which takes into account the income of the student's family and the student's living and studying expenses. For example, a poor student from a distant rural area could benefit from a housing stipend.

Conclusion

Our conclusion is that race-based AA seeks to correct past injustices, but creates present and future injustice by enforcing discriminatory practices. When seeking to compensate those who are disadvantaged by discrimination, it is important to address the disadvantage itself, rather than introducing set-asides or quotas that enforce racial preferences.

Our recommendation is that UCT should abandon race as a proxy for disadvantage and pursue an equal opportunity affirmative action that takes into account the social and financial circumstances of individuals on a case-by-case basis.

Bibliography

David Benatar, Justice, Diversity and Racial Preference: A Critique of Affirmative Action, in *South African Law Journal*, Vol 125, Issue 2, 2008.

David Benatar, Affirmative Action Not the Way to Tackle Injustice, in *Monday Paper* (April 23-May 6, 2007, Volume 26 #05)

Carl Cohen, Naked Racial Preference: The Case Against Affirmative Action

Michelle Jones, UCT to revise admissions, *IOL News*

Michelle Jones, Revise race-based policy but retain affirmative action, UCT told in *Cape Times*, 15 Feb 2013

Gwen Ngwenya, DASO Submission to the Commission into UCT Students Admission on the UCT Admissions Policy

Mark Oppenheimer, Race Preferences in Academia, in *Politicsweb*, 29 March 2012.

George Sher, "Diversity", *Philosophy and Public Affairs* 28, no 2 1999

Celia Wolf-Devine, "Proportional Representation of Women and Minorities" in *The Affirmative Action Debate*

Admissions policy for undergraduate admission to the university in 2013 (as determined by the council in Consultation with Senate) University of Cape Town.