A CRITICAL RACE THEORY PERSPECTIVE ON AFFIRMATIVE ACTION

PROGRAMS

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ABSTRACT

Though it has been nearly six decades since affirmative action policies first gained way, time has not quelled controversy. While these policies are in place with the aim to allocate additional resources for those belonging to groups known to have been discriminated against historically- both the acceptance and effectiveness of this mandate are debated against by the broader society (Velasquez et al., n.d). Critics of this program argue that when distributing social benefits such as jobs or educational opportunities, recipients should be treated as equals unless there are morally relevant reasons for treating them differently (Velasquez et al., n.d). Supporters of the policy argue that it is the most expedient and fairest way to overcome racial and sexist barriers in our society (Velasquez et al., n.d). Nonetheless, it is questionable whether the government actually achieved its mandate to help disadvantaged people through this program, or not. Specifically, for those who belong in racially disadvantaged groups. As such, this paper seeks to analyze, *through the critical race theory perspective, to what extent do affirmative action policies succeed in their mandate to aid members of traditionally disadvantaged groups?*

HISTORIC OVERVIEW OF AFFIRMATIVE ACTION PROGRAMS

Human rights in Canada initially started to make headway post World War II (Kuspinar, 2017). During this time, there was an emergence of human rights policies in Canada to both advance equality rights and protect citizens from discriminatory policies. Federal and provincial governments, agencies, organizations, and commissions had a goal to abolish issues relating to discrimination through advancing programs in the public education and employment sectors. In order to alleviate systemic discrimination, affirmative action policies were developed (Kuspinar, 2017).

In Canada, throughout most of the 20th century, institutions of higher education were reserved for upper class Anglophone Canadian males (Kuspinar, 2017). As a result, access to minority groups and affirmative action programs initially began with respect to women's access to education (Kuspinar, 2017). Later on, in the 1970s and 1980s, the focus shifted to ensuring access to other minority groups, particularly Indigenous populations (Kuspinar, 2017). Shortly thereafter, during the era of *the Charter of Rights and Freedoms* in 1982, affirmative action began to be viewed as a "core strategic government intervention geared toward the struggle for equality" (Kuspinar, 2017). Specifically, section 15(1) was thought to be a monumental stride towards achieving this goal:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (Charter of Rights and Freedoms)

There was a spark of discourse surrounding the continued under-representation of women, persons with disabilities, Aboriginal peoples and racialized communities in the

employment sector (Kuspinar, 2017). In order to address the lack of representation of these groups, *a Royal Commission on Equality in Employment* of 1983 was set up to examine equal employment opportunities. Justice Rosalie Silberman Abella was appointed by the commission to conduct the report. In her report, she stated that "systemic discrimination requires systemic remedies" (Abella, 2014). She referred to affirmative action and equity initiatives as a systemic approach to remedy systemic discrimination that may have negative impacts on certain groups in our society (Abella, 2014). According to Abella, these initiatives are designed to "improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices" (Abella, 2014). Furthermore, the systemic remedial strategy can be understood as a way to "put an end to the hegemony of one group over the other and to remedy historically embedded inequalities" (Abella, 2014). Abella addressed concerns regarding affirmative action being used as a mechanism for governments to reach quotas by employing the term "employment equity" rather than "affirmative action" (Abella, 2014).

Following Abella's report, the *Employment Equity Act* of 1986 was adopted by the Federal government. The purpose of this legislation was to ameliorate the condition and access of disadvantaged groups in the workforce. Within this act, the term "equity" implied more than just to treat people equally. It demanded employers to implement employment equity by:

> **"5 (a)** identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and

5 (b) instituting such positive policies and practices and making such reasonable

accommodations as will ensure that persons in designated groups achieve a degree of

representation in each occupational group in the employer's workforce that reflects their

representation in:

(i) the Canadian workforce, or

(ii) those segments of the Canadian workforce that are identifiable by

qualification, eligibility or geography and from which the employer may

reasonably be expected to draw employees" (Employment Equity Act, S.C 1995)

In other words, employers now had the obligation to develop equity plans in the

employment sector in order to increase the representation of disadvantaged groups in the

workplace (Employment Equity Act). Such groups can be defined as (1) Women, (2) People with

disabilities, (3) Aboriginal Peoples and (4) visible minorities. However, it is important to note

that the Employment Equity Act is federal legislation, and as such, can only apply to a narrow

group of industries regulated under the Canadian Constitution. This includes banks, broadcasters,

telecommunication companies, railroads, airlines, private businesses necessary to the operation

of a federal act, maritime transportation companies, other transportation companies if

inter-provincial in nature, uranium-related organizations, federal crown corporations, and

corporations controlled by two or more provincial governments (Kuspinar, 2017). Such sectors

cover approximately 10% of the Canadian workforce and thus, the vast majority of employers

fall outside its jurisdiction (Kuspinar, 2017). Nonetheless, some provinces have implemented the

term "employment equity" within their enforcement of provincial-level human rights legislation

(Kuspinar, 2017).

The Canadian Human Rights Commission (CHRC) is responsible for conducting audits to assess employers' compliance with the obligations of the act. Employers are randomly selected for auditing (CHRC, 2010). Their assessment evaluates the employers (1) collection of workforce information, (2) analysis of the workforce to determine the degree of under-representation of designated group members, (3) review of employment systems, policies, and practices, (4) preparation of an employment equity plan, (5) implementation and monitoring of the plan, (6) periodic review and revision of the plan, (7) provision of information about employment equity to the workforce, (8) consultation with employee representatives and (9) establishment and maintenance of employment equity records (CHRC, 2010). If one or more of these requirements are not met, then the employer remains non-compliant (CHRC, 2010). Further, should the employer fail to comply with the commissioner's direction, the Commission may refer the employer to an employment equity tribunal (CHRC, 2010).

TRENDS ON EMPLOYMENT EQUITY IN THE LABOUR MARKET:

The Minister of Labour conducts a yearly report on the efforts and progress of employers to adhere to the mandates presented in the Employment Equity Act (Hajdu, 2018). In the 2018 report, the representation of visible minorities and Aboriginal peoples since 1987 was tracked. To measure the progress of these groups, their representation (i.e. the number of designated group employees divided by the number of all employees) in the federally regulated private sector is compared to their availability in the workforce population. The availability data is obtained from census data or surveys, as conducted by Statistics Canada every five years. As a result, the labour market availability (LMA) for 2018 is based on the 2011 National Household Survey (Hajdu, 2018).

As depicted in *Figure 1* below, the representation of visible minorities has been increasing steadily since 1987 (Hajdu, 2018). In fact, representation has surpassed its LMA.
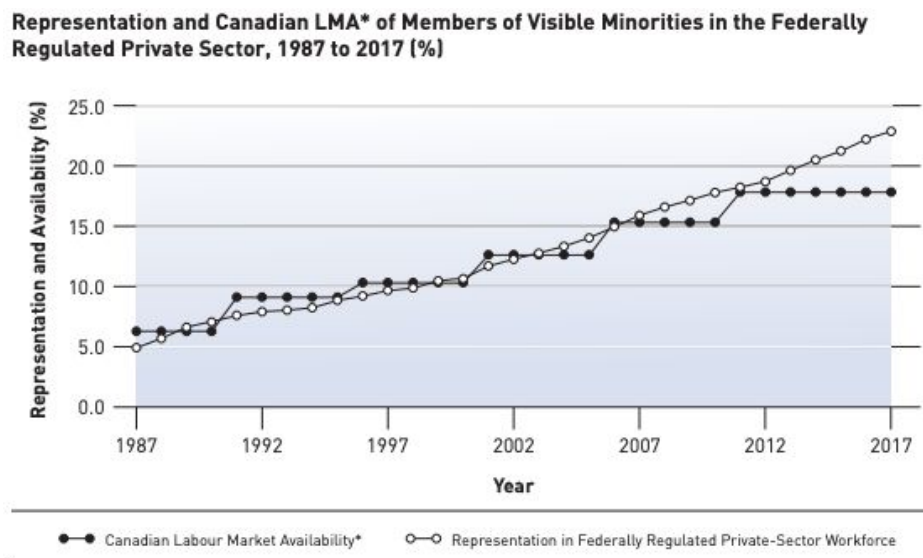
Representation and Canadian LMA* of Members of Visible Minorities in the Federally Regulated Private Sector, 1987 to 2017 (%)

Figure 1: Representation of Visible Minorities in the Federally Regulated Private Sector (1987-2017)

Representation and Canadian LMA* of Aboriginal Peoples in the Federally Regulated Private Sector, 1987 to 2017 (%)
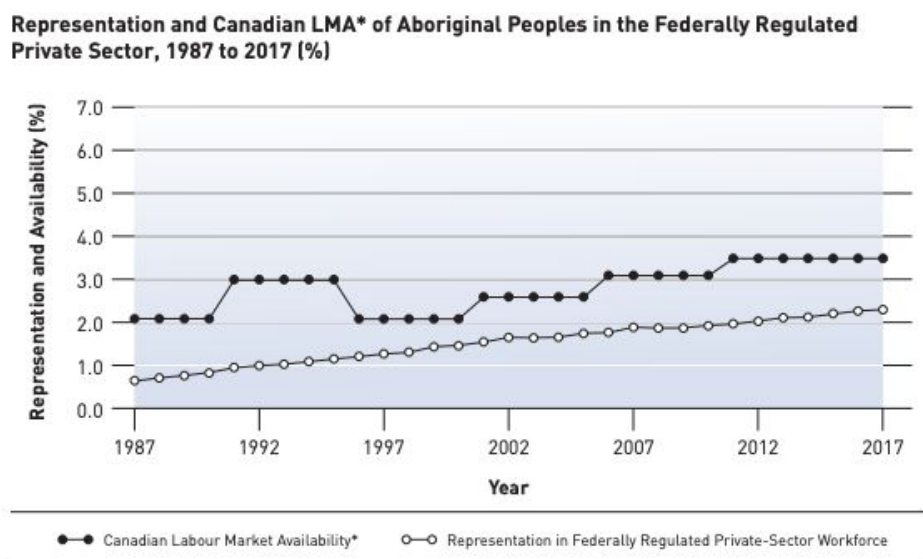
Figure 2: Representation of Aboriginals in the Federally Regulated Private Sector (1987-2017)

As noted above, figure 2 depicts that the representation of Aboriginal people remained short of the 3.5% Canadian LMA. While the representation of Aboriginal people has increased steadily since 1987, there is a much-needed room for improvement.

It is important to keep in mind that the above-noted charts only represent the federally regulated private sector. However, since the Employment Equity Act only has jurisdiction over Federally regulated private sectors, it serves as the base of our analysis. We can conclude that for both visible minorities and for aboriginal peoples, since the implementation of the Employment equity act in 1983, the rate of employment within the federally regulated private sector has increased.

THE CRITICAL RACE THEORY (CRT):

The critical race theory first emerged as a response to the inability of legal scholars to sufficiently address issues of racial inequality, racial ideology and racial identity (Gómez, 2004). Race was viewed as a "readily measurable, dichotomous (black/white) variable that affects the law at various points". Race was overwhelmingly viewed as a concept that is simple to map; however, CRT asserts that race is complicated and the relationship between the law and race is messy. Theorists synthesize that race is constituted by the law and race does not exist outside of the law. By extension, the law does not exist apart from race and it is constituted by racial classification systems, racial ideology and racial inequality (Gómez, 2004).

Law's Construction of Race:

Crenshaw et al., describe critical race theory as a way to "uncover how the law was a constitutive element of race itself: in other words, how law constituted race" (Crenshaw et al., 1988). It has been agreed upon by scholars that race is a socially constructed concept and that

racial classification is historically contingent- the product of political contestation (Gómez, 2004).

Canada has a long history of maintaining discriminatory policies, and practices towards Canadians deemed to be racially different based on skin colour and other superficial features (Li, 2000). Examples of policies include *the Indian Act* of 1876, *the Chinese Immigration Act* of 1907 and *the Immigration and Refugee Protection Act* of 2001. Examples of practices include immigration trends and preferences. Over time, differential treatments and unfavourable policies targeted towards racial minorities become in themselves identifiable characteristics of these groups. In this way, the superficial characteristics of racial minorities are inseparable from unfavourable social features attributed to them. There is substantial evidence to indicate that to this day, Canadian society continues to attribute unequal social value to people of different origins. Many studies have shown that Canadians regard non-white minorities as socially less desirable and less favourable than people of European origin (Li, 2000).

The Royal Commission on Bilingualism and Biculturalism in the 1960s coined the term the "Third Force" to refer to Canadians, not of British and French origin (Li, 2000). In 1984, the term "visible minorities" received official recognition when Commissioner Rosalie S. Abella identified this group as constituting one of the four designated categories in the Royal Commission Report on equality in employment (Li, 2000).

Why CRT?:

The Critical Race Theory perspective is written against the anti-discrimination model that has been dominant in American jurisprudence and legal scholarship for much of history (Nan, 1994). Such literature has been written, predominantly, by white men. The anti-discrimination

model encapsulates racism and racial discrimination as individualized, aberrational and capable

of remedy with the current jurisprudence framework. However, the critical race theory dives

deeper. CRT scholars view racism as systemic (institutional) and endemic. As a result, many

anti-discrimination remedies and attempts are immune to fixing the depths of the problem (Nan,

1994).

As Justice Rosalie Silberman Abella wrote in her report: "systemic discrimination

requires systemic remedies" (Abella, 2014). She referred to affirmative action and equity

initiatives as a systemic approach to remedy systemic discrimination that may have negative

impacts on certain groups in our society (Nan, 1994). Through Justice Abella referring to

discrimination as "systemic", she takes on a similar viewpoint to that of Critical Race Theorists.

As such, I would like to focus the remainder of my paper on analyzing Affirmative Action

programs through a Critical Race perspective. As the CRT approach is explicitly focused on

analyzing racial studies including racial classification and racial ideologies, I believe it is the best

way to analyze the effectiveness of affirmative action.

DIFFERENCE OF OPINIONS:

This paper will highlight CRT's contributions to the debate over affirmative action

programs and subsequently, will examine the effectiveness of affirmative action from a CRT

perspective. Ultimately, answering my original question of *to what extent do affirmative action*

policies succeed in their mandate to aid members of traditionally disadvantaged groups?

The core founders of the CRT include Derrick Bell, Kimberle Crenshaw, Richard

Delgado, Charles Lawrence, Mari Matsuda, and Patrica Williams (Nan, 1994). Not all CRT

scholars adhere to a particular philosophy of thought and as such, the theory has received some

criticism regarding it "lacking formal structure". As a result, some CRT scholars support

affirmative action programs. Some are critical to its effectiveness. Others are skeptical and

suspicious of its intended purpose (Nan, 1994)

Positive Feedback:

According to Patricia Williams, affirmative action programs "is an act of verification and

vision (Nan, 1994). It is an act of social as well as professional responsibility". Robin Barnes, a

Critical Race Theorist, strongly recommends affirmative action programs and believes that it

helps minority citizens. She believes that affirmative action programs act as a benefit, or "a small

measure of reparation for past injustice, greater economic efficiency by providing poor, working

poor, middle class and upper-class blacks employment, and business opportunities, and improved

opportunities for integration and diversity". She believes that women, people of colour and the

disabled are "entitled to the preferences not only to remedy past discrimination and abate the

effects of today's exclusionary practices but also to stem the tide of perpetual domination that

has been the prerogative of the 'normal' white male for all too long" (Nan, 1994).

Negative Feedback:

In contrast, there have also been scholars who argue the ineffectiveness of such

programs. Derrick Bell believes that affirmative action is "the latest contrivance society has

created to give blacks a sense of equality while withholding its substance" (Nan, 1994). He

suggests that these policies are only intended to benefit minorities only to the extent that their

gains do not affect the success or status of the whites. Bell writes:

> "Those who wield effective control in the nation make, when considered necessary, that amount of social
>
> adjustments that will help to siphon off sufficient discontent to enable the societal status quo to be

maintained .... [Tioken or cosmetic gains are extended under the formal Constitution, while, under the

operational code, of the unwritten basic law, no real redistribution of wealth, prestige, or social power takes

place" (Nan, 1994).

In agreement with Bell, Richard Delgado also critiques the model of affirmative action

programs (Nan, 1994). He suggests that such programs were "designed by others to promote

their purposes, not ours" (Nan, 1994). He adds that "affirmative action serves as a homeostatic

device, assuring that only a small number of women and people of colour are hired and

promoted" (Nan, 1994). The skepticism of Bell and Delgado is the most controversial within

CRT scholarship. The dominant culture suggests that disadvantaged groups should be grateful

and optimistic about the state's attempt to ameliorate its racial problem (Nan, 1994).

Furthermore, CRT critics of affirmative action argue that due to affirmative action

programs, there is an emergence of people claiming that "reverse discrimination" exists (Nan,

1994). Particularly, making white males more hostile towards minority groups due to claiming

that they have preferential treatment (Nan, 1994). As a response, Daniel Maguire suggests:

"only if preferential affirmative action required the "niggerization" of white males - to use with apologies that cruel

term that connotes the spirit and effects of the caste system. But in what sense are we planning to systematically

insult white males and put them in the lowest caste in society? In what sense does preferential affirmative action

plan to decrease the lifespan of white males and their wives and children? Is this policy geared to making white

males hate themselves and be ashamed of their physical appearance? Will it make white male unemployment double

that of blacks and will it reduce white male salaries to 60% of that of blacks? Will it confine white males to ghettos

where there are more rats than people and no hope? To truly reverse the discriminatory process would require all of

that. Obviously, none of that is contemplated or possible. The term 'reverse discrimination' houses a big lie"

(Maguire, 1980)

Furthermore, CRT critics of affirmative action claim that these policies are a way for the government to make up for and erase the historical discrimination they have enacted towards disadvantaged groups (Nan, 1994). Claiming that the white society is "neatly [taking their] eyes off the system of arrangements that brought and maintained them in power, and enabled them to develop the rules and standards of quality and merit that now exclude us, make us appear unworthy, dependent (naturally) on affirmative action" (Nan, 1994).

Lastly, Delgado attacks the role of affirmative action and its way of depicting people of colour as "ornaments" in workplaces (Nan, 1994). He suggests that employers hire people of colour as a way to prove to society that the company has good values. He expands his argument by also attacking the role model argument for affirmative action. He insists that the disadvantaged people who end up in corporations act as a "role model" for their "people" to give hope that they too, can attain the job. Additionally, being a role model requires you to "uplift your entire people, complete the duties required in the job description, as well as assist your community whenever it affects your position or that of your employer; conform to the behaviour that encourages people of colour to adapt majoritarian social mores" (Nan, 1994).

DISCUSSION:

The overwhelming majority of the discourse surrounding affirmative action programs from the critical legal theory perspective suggests that it fails in its mandate to aid members of traditionally disadvantaged groups has failed (Nan, 1994). Instead, Critical Race Theorists have developed two alternatives for disadvantaged groups with respect to how they can fix society's racial problems and be productive members of the labour market (Nan, 1994):

First, CRT scholars suggest that disadvantaged groups should "expect nothing but the worst from the dominant" (Nan, 1994). They state that history has provided enough evidence as to what Anglophones have accomplished. They suggest that the extent to which the dominant culture has an interest in ending racial dilemmas and healing wounds is limited. So long as such "healing" does not infringe on whites' property interest or status. They claim that attempts the dominant culture makes to ease racial tensions are only a vehicle to prevent civil disorders rather than to repair the destruction inflicted on communities of colour (Nan, 1994).

Secondly, CRT scholars suggest that disadvantaged groups must take "[their] own program, with [their] own goals, [their] own theoretical grounding, and [their] own managers and call it 'affirmative action'" (Nan, 1994). Scholars suggest that reality has largely been constructed by the small minority of white men who live in Europe and North America. CRT scholars seek to abandon this conceptualization and create new concepts that release the reality of people of colour. Lerone Bennett argues that "we must say to the white world that there are things in the world that are not dreamt of in your history and your sociology and your philosophy". In other words, people of colour can evaluate and confront issues encountered surrounding their community (Nan, 1994).

CONCLUSION:

Numbers show that affirmative action programs have proven to be effective, to a degree. However, through the critical race theory perspective, they are thought to be a tool for the dominant culture to rid itself of the guilt and responsibility of historical discrimination. Thus, through the critical race theory perspective, affirmative action policies have not succeeded in their mandate to aid members of traditionally disadvantaged groups.

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