AFFIRMATIVE ACTION IN QUEBEC AND INDIA: AN ASSESSMENT OF OUTCOMES AND UNEXPECTED CONSEQUENCES

Éric Charest, Professor, École nationale d'administration publique, Montréal.

Marie-Thérèse Chicha, Professor, School of Industrial Relations, Université de Montréal.

Priti Singh, Assistant Professor, Centre for Canadian, US and Latin American Studies, School of International Studies, Jawaharlal Nehru University, New Delhi.

REACTIVE AND PROACTIVE APPROACHES TO DISCRIMINATION

Most countries have in place laws which prohibit discrimination as well as preferential or exclusionary treatment in the work place based on different grounds. In this context, refusal to hire, promote or dismiss an employee based on his/her gender, race, ethnicity, religious background, etc. is considered as an unlawful employment practice (Dobbin, 2009). Individuals who believe that they are victims of discrimination can file a complaint with a human rights commission or an equivalent body, which will investigate the case. At the conclusion of the investigation, the individual is entitled to reparations if the employer is found guilty of discrimination. This process is traditionally described as a reactive approach to discrimination (Chicha, 2001).

Proactive policies were adopted due to the challenges of processing discrimination-related complaints; the difficulty of proving that discrimination actually took place; unreasonable delays in the investigation process; and the related costs. Because members of discriminated groups often have precarious positions in the labour market and have limited knowledge of their rights, it is also expected that many will refrain from complaining because of the risks associated with losing their job, or being perceived as "trouble-makers."

Moreover, even if an employer is found guilty of discrimination, the reparations awarded to the employee will probably fail to initiate significant changes in the attitudes and behaviours of other employers; therefore it will have a limited impact on combating discrimination (Garon and Bosset, 2003). In order for socio-economic changes to occur, one could argue that the State needs to recognize the issue of durable inequality between social groups as one of the fruits of discrimination (Tilly, 1998). The proactive approach to discrimination encompasses a broad perspective and could assist in alleviating inequalities and might make the labour market more welcoming for members of target groups. The majority of proactive measures found throughout the world today have been inspired by the various affirmative action policies implemented in the United States in the late 1960s. Numerous studies have shown that these programs had a very positive impact on the representation of discriminated groups (Holzer and Neumark, 2006).

AFFIRMATIVE ACTION PROGRAMS IN QUEBEC

In 1985 the Quebec government officially adopted a proactive approach in order to combat employment discrimination. A new chapter dedicated to affirmative action programs was introduced in the Charter of Human Rights and Freedoms (L.R.Q., ch. C-12):

> *"The object of an affirmative action program is to remedy the situation of persons belonging to groups discriminated against in employment or in the sector of education or of health services and other services generally available to the public. An affirmative action program is deemed non-discriminatory if it is established in conformity with the Charter."*

The main reason that led the government to change the legal framework is the shared observation, based on a series of social and economic indicators of the labour market, that significant differences persisted between

social groups in Quebec society, including women and members of visible minorities when compared to white men.

Women in the labour market are still largely concentrated in a limited number of professions. It is also more common for them to work part-time and they are more likely to experience episodes of acute poverty (Secrétariat à la Condition féminine, 2007). In the last two decades, the gap between participation rates of women and men in Quebec has narrowed but it remains considerable (59.5% VS 70.6%; Statistics Canada, 2006a). In 2006, women working full time throughout the year were only making 73.8% of the salary of their male counterparts (Statistics Canada, 2006a).

The visible minority population is currently experiencing a period of unprecedented growth in Quebec: they now represent 8.8% of the population (Statistics Canada, 2006b). Their participation rate is somewhat similar to the rest of the population, yet their unemployment rate is twice as high: 13.1% VS 6.4% (Statistics Canada, 2006a). In terms of employment income, they earn an average of 73.3% of the incomes of those who are not visible minorities (Statistics Canada, 2006b).

Affirmative action programs are intended to achieve equality of results – or equality of outcomes – between the designated groups (women, members of visible minorities, Aboriginal people, disabled persons, and ethnic minorities) and the reference group (men who are not members of a visible minority). In any given organization, a comparable rate of success in the dotation process should be observed between members of the target groups and the reference group should their qualifications be equal. Therefore, equality of results is a much broader concept than equality of opportunities which usually involves the removal of alleged barriers in the employment system that could hamper applicants from certain groups in the competition for jobs, but without monitoring the final results (Chicha, 2001).

Affirmative action programs should be based on a structured process that follows an exact schedule and is adapted to reflect the specificities of an organization. In 1985, three types of affirmative action programs were designed:

1. Programs recommended by the Human Rights Commission or ordered by a Tribunal.
2. Programs for the public departments and agencies whose personnel is appointed in accordance with the Public Service Act (chapter F-3.1.1).
3. The Voluntary Program.

Since 1985 two additional programs have been adopted:

1. The Contractual Obligation Program. Adopted in 1987, the Contractual Obligation Program requires that private firms with 100 employees or more who wish to apply for provincial public contracts worth $100,000 or more, or who receive a subsidy of $100,000 or more, must implement an affirmative action program.
2. The Act Respecting Equal Access to Employment in Public Bodies (Loi sur l'accès à l'égalité en emploi dans des organismes publics – L.R.Q., chap. A-2.01). Adopted in 2001, this law requires that public and semi-public bodies which employ 100 persons or more provide a breakdown of target groups and put in place the appropriate measures to attain acceptable representation in their workforce.

Several employers are thus now covered by different types of affirmative action programs in Quebec and the legal framework could potentially have a noticeable impact on combating systemic discrimination. Yet because the government decided to increase the quantity and type of affirmative action programs instead of creating a unified and coherent framework, global monitoring of the programs is more difficult and confusion is often observed.

It is also important to note that with the absence of a formal and independent evaluation of these programs – mostly because the data is either confidential or extremely hard to access – a situation has been created whereby the programs remain suspect in the eyes of the public. Widespread misunderstanding of affirmative action and prejudices also contribute to the public suspicion. Many people who are oblivious of the historical roots of collective inequalities, denounce affirmative action programs as synonyms of reverse discrimination: Others think they are mostly about arbitrary quotas which, as seen above, is not the case in Quebec. Finally one hears often that affirmative action programs question the primacy of merit: while in reality preferential treatment for members of target groups applies only between candidates with similar qualities and credentials.

These prejudices have the potential to stigmatize members of the target groups, which in itself is a serious barrier for the development of affirmative action programs. Another factor that can explain the limited results of the affirmative action programs is the lack of commitment by two of the most important stakeholders, namely the government and the employers, toward the aims of these programs, combined with a denial to acknowledge the very existence of systemic discrimination in the labour market.

INDIA'S RESERVATION POLICIES

Reservation policies in India are based on quotas, targeted towards several identified minority groups which have been historically discriminated, namely the Scheduled Castes (SC), Scheduled Tribes (ST) and the Other Backward Classes (OBC). These policies existed even at the time of the British rule in India. At the time of independence in 1947, the provisions of reservation in education, employment and political representation were included in the Indian Constitution.

The caste system is estimated to be over 2,500 years old in India and has undergone many transformations. It originated from ancient times when society was divided into four classes based on their occupations: the *Brahmin* (the learned); *Kshatriya* (the warrior); *Vaishya* (merchants, traders and business); and *Sudra* (peasants, cobblers and servants). However, the rigidity of the class system over time gave way to the caste system which was determined by birth.

In spite of a raging debate on the rights of religious minority communities such as the Muslims and Christians, reservation policies target the lower caste groups (Sudras) conventionally associated with Hinduism. While caste groupings have been observed in all religions in India including Islam and Christianity, there is no reservation policy towards these groups as yet. The main idea behind reservation was to reduce the rigidity of the hierarchical caste-based structure where the lower castes continue to be socially, economically, educationally and politically backward. These backward castes are identified as Scheduled Castes (SC) and are listed in a government schedule. SCs are also commonly known as Dalits or the "oppressed."

Scheduled Tribes (ST) belong to tribal communities and are distinct from the Hindu caste system. Also known as *Adivasis* (meaning original inhabitants), the tribal population constitutes 7% of the landless people in India which is the second-largest section after the Scheduled Castes (10%) and they own only 3% of the large landholdings (Planning Commission, 2006). Even their school attendance which had risen in the late 1980s and early 1990s has gone down during the period of 1994-2000 (Rath, 2006).

The Constitution classifies SCs and STs in its articles 341 and 342 and provides for special policies in the form of affirmative action/reservations for these categories in higher education, employment in government institutions and political representation through its articles 330, 332 and 334. The list of Scheduled Tribes and Scheduled Castes of each individual state varies in India and further complicates the issue. Having constitutionally confirmed reservation for SCs and STs has ensured that it is mandatory and cannot be questioned in theory but "its implementation is indifferent and often quotas remain incompletely fulfilled" (Deshpande, 2009, p. 66). Further, the creation of other categories like the Other Backward Classes (OBCs) and the "Mahadalits" (very oppressed) have added to the quagmire of confusion. While identification in the case of SC and ST can be said to be relatively easy, the status of OBC being granted to certain groups is difficult and controversial. It is not clear that all groups claiming an OBC status are descendants of the *Sudras*. Each state has its own list of OBCs. Thus, it has taken a long time for the OBC quota to be implemented.

There is now an increasing demand for reservation for women in India. There has been a proposal to introduce reservation of 33% of seats for women in the Lower House of the parliament of India, the Lok Sabha, and in state legislative assemblies. The bill is pending and has yet to be passed. The mechanics of its overlap with the caste-based reservation need to be worked out apart from the opposition that the bill has generated from certain sections of the population (Times of India, November 9th, 2012).

The main criticisms of reservation policies centre around the fact that while SCs and STs have constitutional sanction, OBC reservation does not. The argument that caste cannot be the main indicator of backwardness and reservation should be class-based, does hold some merit as the ultimate goal of the state should be the abolition of the caste system. The fear is that the reservation system has become more of a political gimmick and vote seeker, rather than a genuine effort at uplifting the backward sections of society.

Implementation of reservation looks impressive when one looks at the caste-based quotas in the electoral sphere, but the problem becomes evident in government employment and education. In the latter two areas, quotas remain unfulfilled especially in the higher categories of jobs. While reservation in India cannot be said to be a resounding success, and does have numerous flaws in its conception and implementation, it has nevertheless led to the emergence of a new middle class among the socio-economically suppressed groups. A genuine effort by the politically and economically powerful would go a long way towards resolving the problem.

AFFIRMATIVE ACTION POLICIES IN QUEBEC AND INDIA: SAME GOAL BUT DIFFERENT CONTEXTS?

While both policies share a common goal, social conventions, the general legal framework and the nature and level of political mobilization in Quebec and India have resulted in distinct policy responses. But regardless of the details of the policies in place, it appears that three crucial dimensions should always be considered in policy design: 1) Should the policy be based on strict quotas, or on more flexible representation targets? 2) Should we focus our

efforts on a limited number of groups, or attempt to cover a larger proportion of the population? 3) Can affirmative action eliminate social inequality on its own, or should it be treated only as one dimension of a broader social policy agenda? The first question relates to the different forms of affirmative action policy and their relative strength (Bader, 1998). A stronger version, like the reservation policy in India, is based on the idea that an individual could get a job if he/she belonged to one of the target groups. In contrast, the affirmative action policy in Quebec can be considered weaker because individuals belonging to one of the target groups can be offered a job only if their qualifications are equal to those of other candidates. A moderate version exists between these two extreme positions: an individual would get the job if he/she met certain essential minimal standards of competence, even if a candidate from the majority group were better qualified. The weakest version of the policy is much easier for the general public to accept as legitimate. However, its impact on the labour market is likely to be more limited.

The second question is more political than the first, as it focuses on the choice of target groups. Such decisions could well be considered arbitrary. On what criteria should the selection of target groups be based on? How extreme does inequality have to be for the State to intervene in favour of a specific group? Political mobilization is a key variable to consider here. Over time, the inclusion of new groups is likely to lessen the impact of affirmative action policies: instead of focusing on achieving better workforce representation for a limited number of groups, organizations will have to manage a range of specific measures for different groups with varying experiences in the labour market. While both Quebec and India are experiencing pressure to include additional groups, caution should be exercised when extending the policy is being considered.

Finally, believing that affirmative action policies are sufficient in addressing social inequality is likely a mistake. These policies must be part of a broader social agenda that also includes measures to strengthen the capacities of people in disadvantaged groups. For instance, significant investments in schools located in poor neighbourhoods are required, as are active measures to fight poverty, etc. In the fight against inequality, affirmative action is just one tool among many. If significant results are to be achieved, the state needs to adopt a systemic perspective of inequality.

Affirmative action policies have always been a subject of heated debate, both for the general public and policy-makers. For this reason, transparent national mechanisms are needed to objectively monitor and evaluate whether or not a policy is achieving its goal. Fear of backlash is arguably one of the reasons why many politicians have demonstrated a lack of enthusiasm for affirmative action. Bakan and Kobayashi (2007) argue that backlash is understood as a "negative response to a progressive policy, campaign, or event […] Typically, it can be traced to a "trigger" or a "spark" that provokes a response that is otherwise either non-existent or dormant and lacking substantial influence" (p. 147). Backlash can lead many politicians to avoid debates, make concessions that ease the obligations of subjected organizations, or even limit access to relevant policy-related information and data that are required to objectively assess a policy's impact. Certainly, opponents' potential reactions must be anticipated in the policy-making process. It is also necessary to give serious thought to the modalities of implementation of affirmative action. However, this does not mean that policy-makers should shy away from making bold political choices. The human costs of inaction and the related social risks are too high to leave the status quo unchallenged.

REFERENCES

Bader, V. M. [1998] Dilemmas of Ethnic Affirmative Action: Benign State-neutrality of Relational Ethnic Neutrality? *Citizenship Studies*, 2(3): 435-473.

Bakan, A. B. & Kobayashi A. [2007] Affirmative Action and Employment Equity: Policy, Ideology, and Backlash in Canadian Context. *Studies in Political Economy*, 79 (Spring): 145-166.

Chicha, M.-T. [2001] Les politiques d'égalité professionnelle et salariale au Québec: l'ambivalence du rôle de l'État québécois. *Recherche féministes*, 14(1): 63-82.

Chicha, M.-T. & Charest, E. [2013] Le Québec et les programmes d'accès à l'égalité: un rendez-vous manqué? Research Report for the CEETUM (accepted for publication).

Deshpande, Ashwini [2009] Affirmative action in India. In Elaine Kennedy-Dubourdieu (Ed.) *Race and Inequality: World perspectives on affirmative action*: 63-76. Surrey: Ashgate.

Dobbin, F. [2009] *Inventing Equal Opportunity*. Princeton (NJ): *Princeton University Press*, 310 p.

Garon, M. & Bosset, P. [2003] *Le droit à l'égalité: des progrès remarquables, des inégalités persistantes*. Montréal, study N°2 prepared for the Commission des droits de la personne et des droits de la jeunesse (CDPDJ) «Après 25 ans, la Charte québécoise des droits et libertés», 160 p.

Holzer, H. J. & Neumark, D. [2006] Affirmative Action: What Do We Know? *Journal of Policy Analysis and Management*, 25(2): 463-490.

Planning Commission [2006] Scheduled Caste Sub Plan: Guidelines for implementation. New Delhi: Planning Commission.

Rath, Govind Chandra (Ed.) [2006] *Tribal Development in India: The contemporary debate*. New Delhi: Sage Publications.

Secrétariat à la condition féminine [2007] *Pour que l'égalité de droit devienne une égalité de faits: politique gouvernementale pour l'égalité entre les femmes et les hommes.* Québec: Gouvernement du Québec, 91 p.

Statistics Canada [2006a] *2006 Census.* Number in catalogue: 97-562-XCB2006017.

Statistics Canada [2006b] *2006 Census.* Number in catalogue: 97-563-XCB2006060.

Tilly, C. [1998] *Durable Inequality.* Berkeley (CA): *University of California Press*, 299 p.

Times of India [November 9th, 2012] Can consider supporting Women Reservation Bill: Mulayam. *Times of India.*

L'ACTION POSITIVE AU QUEBEC ET EN INDE: UNE ÉVALUATION DES RÉSULTATS ET DES CONSÉQUENCES IMPRÉVUES

Les programmes d'accès à l'égalité du Québec et la politique des sièges réservés en Inde sont deux approches proactives pour combattre la discrimination dans le domaine de l'emploi. Malgré le fait qu'elles partagent l'objectif d'assurer une plus grande égalité pour les membres de groupes désavantagés, des différences significatives existent entre elles. La plupart des états possèdent un cadre juridique interdisant la discrimination, ainsi que les traitements préférentiels ou l'exclusion, dans les milieux de travail. Le refus d'embaucher et d'accorder une promotion, ou le licenciement en fonction d'un motif illicite de discrimination, seraient illégal. Les victimes de discrimination pourraient donc porter plainte. Suite à une enquête afin de déterminer si la plainte est fondée, la personne discriminée pourrait obtenir réparation de l'employeur. Cette approche complexe et coûteuse correspond au modèle réactif. À l'opposé, l'approche proactive n'exige pas de prouver au préalable la culpabilité d'un employeur; tous doivent mettre en œuvre les moyens nécessaires afin d'augmenter et de maintenir la représentation des groupes-cibles sous-représentés dans leurs effectifs. La plupart des modèles proactifs s'inspirent de l'exemple américain qui, à partir des années 60, a permis d'augmenter la représentation des Noirs dans les organisations assujetties. L'approche proactive a été adoptée au Québec en 1985. À l'origine, trois types de programmes étaient prévus: 1) les programmes recommandés par la Commission des droits de la personne et des droits de la jeunesse ou imposés par un Tribunal; 2) les programmes pour le personnel de la fonction publique; et 3) les programmes volontaires. Deux autres types ont été ajoutés: 1) les programmes de l'obligation contractuelle pour les entreprises qui obtiennent une subvention ou un contrat du gouvernement d'une valeur minimum de 100 000$ et qui ont 100 salariés ou plus; et 2) les programmes dans les organismes publics. Des différences importantes existent entre ces programmes. Compte tenu de ces différences et des problèmes d'accessibilité des données, il est complexe d'évaluer les impacts de cette politique. Cette situation combinée à un manque de sensibilisation du public à la discrimination contribuent à entretenir la confusion au Québec et crée un terrain fertile à l'expression de préjugés, comme: 1) la discrimination à rebours: les programmes obligent à faire preuve de favoritisme; 2) l'obligation d'embauche d'un quota arbitraire de membres des groupes cibles; et 3) une remise en question du mérite. Le faible niveau d'engagement des employeurs et du gouvernement à l'endroit de l'accès à l'égalité constitue un obstacle majeur supplémentaire. La politique des sièges réservés en Inde est basée sur des quotas, relativement fixes, afin de permettre aux membres de groupes historiquement discriminés, nommément les membres des castes et tribus inférieures, ainsi que les autres classes défavorisées, un accès facilité à l'éducation, l'emploi et la représentation politique. Cette politique existait dès l'époque coloniale et, au moment de l'indépendance, elle a été inscrite dans la Constitution. Le système des castes existe depuis 2500 ans et bien qu'il ait subi de nombreuses transformations, son impact est toujours ressenti. À l'origine, la société était divisée en quatre classes: 1) *Brahmin* (les instruits); 2) *Kshatriya* (les guerriers); 3) *Vaishya* (les marchants et artisans); et 4) *Sudra* (les paysans, cordonniers et serviteurs). La rigidité des classes sociales a donné naissance au système des castes; la caste étant déterminée par la naissance. Malgré d'importants débats sur les droits des minorités religieuses, notamment les musulmans et les chrétiens, la politique actuelle ne leur réserve aucun siège. L'objectif principal de la politique est d'affaiblir la rigidité de la structure des castes puisque les membres des castes inférieures continuent d'être désavantagés aux niveaux social, économique et éducatif. Ces derniers sont désignés comme les « opprimés »

ou *Dalits*. L'État réserve aussi des sièges pour les membres des communautés tribales, les *Adivasis*, qui ne sont pas intégrés dans le système des castes, mais qui vivent une situation désavantageuse. Comme cette politique est inscrite dans la Constitution, elle est rarement remise en question ; par contre, il ne faut pas sous-estimer les difficultés de sa mise en œuvre. De plus, la création de nouveaux groupes cibles comme les « autres classes défavorisés » dont le statut est controversé, ainsi que les *Mahadalits* (les très opprimés), ajoute à la complexité. En ce moment, plusieurs souhaitent que les femmes deviennent un groupe cible ; cependant, cette proposition ne fait pas l'unanimité. Les principales critiques s'articulent autour du fait que le système des castes n'est pas le principal indicateur des désavantages, aussi la politique devrait se baser sur la classe sociale, d'autant plus que celle-ci légitimise le système de castes. D'autres critiques affirment que les individus qui profitent le plus de la politique sont les élites des groupes défavorisés qui n'auraient probablement pas besoin de cette intervention de l'État. Malgré tout, il est généralement admis que cette politique a permis l'émergence d'une classe moyenne dans les groupes historiquement défavorisés. L'importance de combattre la discrimination justifie l'intervention de l'État. Cependant, il est nécessaire de pouvoir démontrer l'impact réel des politiques sur les groupes aidés, tout en nous assurant que le groupe majoritaire ne subit pas un préjudice déraisonnable lors de la mise en œuvre de la politique.

Bien que différentes, les politiques québécoise et indienne nous amènent à réfléchir à certaines dimensions cruciales de la construction des politiques proactives: 1) devons-nous instaurer des quotas fixes ou favoriser des objectifs plus flexibles ; 2) faut-il se concentrer sur un nombre limité de groupes dont la situation est particulièrement désavantageuse ou adopter une perspective élargie et prendre en considération les réalités de nombreux groupes qui rencontrent des difficultés plus ou moins prononcées sur le marché du travail ; et 3) est-ce que ces mesures de discriminations positives sont suffisantes pour éliminer les inégalités ou doivent-elles être considérées comme l'une des dimensions d'un agenda social plus important. Depuis son introduction, la discrimination positive a toujours été l'objet de controverses. Malgré tout, considérant l'importance de l'enjeu, il est essentiel d'agir puisque les coûts potentiels de l'inaction sont trop importants pour accepter le statu quo.