

## **EQUALITY VIS-À-VIS AFFIRMATIVE ACTION FROM DIFFERENT PERSPECTIVES**

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**Abstract:** *With regard to the position of the Malays, the rationale behind their preferential treatment is more complex. The justification generally is their need for protective discrimination based on the ground that the Malays form an economically depressed community, and that if positive steps are not taken to advance their economic status, it may result in communal strife. The Government faces a daunting task in deciding how to deal with this issue: both continuity and reform carry great dangers, and no solution will gain complete acceptance. This article applies doctrinal legal research and interview where the theory of equality and affirmative action were intensely examined. This article provides an insight to the concept of equality and the operation of affirmative action as provided under the Federal Constitution from different perspectives.*

**Keywords:** *Equality, Affirmative action, SUHAKAM, historian, Federal Constitution*

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### **Introduction**

Equality is the state of being equal especially in status, rights or opportunities. The principle of equality as the most fundamental human right appears in all conventions on human rights. This principle has eventually been recognised and embedded in most constitution of the democratic countries. Equality is the condition of possessing the same rights, privileges, and immunities, and being liable to the same duties (Black's Law Dictionary, 2014). Equality is equity. For example, 'equality before the law' is a basic right in the constitutions of democratic countries.

As an antithesis to discrimination, equality is a noble concept aims for the attainment of social justice through which imbalances, disparities and inequities in society can be ideally

diminished. Hence, equality means people of different identities being given similar treatment, equal opportunities and respect regardless of their sex, age, race, ethnics, cultures, historical backgrounds, etc. Each and every one should be given the same opportunities and aids that result in positive growth and development, thus enabling them to discover their true potential and increasing their competency and versatility. According to Equality and Human Rights Commission of Britain, equality is about ensuring that every individual has an equal opportunity to make the most of their lives and talents, and believing that no one should have poorer life chances because of where, what or whom they were born, what they believe, or whether they have a disability (Equality and Human Rights Commission, 2016). Promoting equality should remove discrimination in all of the aforementioned areas.

Although equality before the law is the greatest constitutional ideal, inherent disparities for example between the rich and the poor, and the privileged and the powerless, has questioned the functional parity of formal equality (Faruqi, 2017). Therefore, the Equality and Human Rights Commission of the United Kingdom agreed that equality recognises that historically, certain groups of people with particular characteristics e.g. race, disability, sex and sexuality, have experienced discrimination. As understood by many, in the face of social, economic or educational disparities, the scheme of preferential treatment comes in with the idea to elevate the status of some communities or sections of society like women, children, aborigines, minorities, or other marginalised group. This scheme of preferential treatment is called as affirmative action, positive discrimination and sometimes, reverse discrimination. Generally, affirmative action refers to the regulations of the allocations of scarce position in education, employment or business contracting so as to increase the representations in those positions of persons belonging to certain population subgroups (Fryer & Loury, 2005).

In Malaysia, the starting point in addressing the concept of equality is by way of making reference to the Article 8 of the Federal Constitution that enshrines the general idea of equality before the law and declares that “*all persons are equal before the law and entitled to the equal protection of the law.*” This great ideal, according to Faruqi (2008), consists a number of related aspects – equal treatment, equal protection and prohibition against discrimination.

This paper intends to recapture the precept of equality within the framework of affirmative action as contained in the Federal Constitution. In the first place, the concept of equality from the perspectives of the Human Rights Commission of Malaysia (SUHAKAM) is obtained. It is important to associate the idea of that preserved under the Federal Constitution with the function of the agency that dealing with fundamental rights in Malaysia. The discussion would further look at the issue of affirmative action. Furthermore, since the idea of equality has long been rooted in the Federal Constitution, the viewpoint of an historian seemed noteworthy. Both perspectives were then compared and analysed which further directing towards an understanding of the equality concept within the frame of Malaysia that well suited with the Malaysian background.

## **Methodology**

Applying a doctrinal legal study, the materials were gathered from libraries, achieves and other databases. All the materials and their contents are analytically analysed with the aim to gain the understanding, to discuss and present new knowledge and ideas as well as to suggest changes (Yaqin, 2007), if any. For this study, the concept of equality itself had been intensely

examined. As the focus is on Malaysia, it is the equality right contained under Article 8 of the Federal Constitution that became the main point of discussion. This idea of equality is examined taking into account the legal, historical and social backgrounds of the nation. Therefore, in determining this, the related provision i.e. Article 153 that govern the operation of affirmative action in Malaysia, was scrutinised.

Other than analytical, comparative method was also used to look at the opinions of SUHAKAM and the historian. The intention is to give some understandings to the idea of equality that applies in the context of Malaysia whether it follows the pursuit of equality as understood by majority or should remain and unique as it is. For this purpose, other than referring to the secondary sources, interviews had been conducted with SUHAKAM and the historian whom are considered as the experts to the subject matter of discussion.

### ***Equality and the International Instruments***

The global community generally agree to promote equality as a fundamental rule. Some have supported this by ratifying international instruments while some incorporated the idea of equality in their Constitutions with the common terms used are “equality before the law” and “equal protection of the law” where this very concept is agreed as against any form of discrimination. The principle of equality is well recognised and accorded protection by various international human rights instruments such as the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966. The principle of equality is the most fundamental human rights that has been described as "the starting point of all liberties" (Baderin, 2003). The Charter of the United Nations of 1945 (the Charter) and the Declaration of Human Rights of 1948 (the Declaration 1948) have set forth the idea to the international community through their Articles 1 and 7, respectively, where they proclaim:

- (1) All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
- (2) All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Despite being a divine theory where like should be treated alike, equality is almost unachievable in practice. To see that equality is executed well is to promote equality in its substance because equality is not only meant in its theoretical aspect but much more emphasised on its practicality as the law should be equally applied to equal people so as to produce the equal result (Fredman, 2002). To assure equality of results, special measures are required; this generally described as affirmative action that could be defined as treating a sub-class or a group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion of certain goods (Faundez, 1994). From the social justice point of view, although this special treatment runs counter to the notion of equality, its action is justified for the purpose of restructuring the society.

### ***Equality Concept in Malaysia***

The starting point in addressing the concept of equality in Malaysia is by way of making reference to Article 8(1) and (2) of the Federal Constitution. Article 8(1) enshrines the general idea of equality before the law and declares that “*all persons are equal before the law and*

*entitled to the equal protection of the law.*” This great ideal consists of a number of related aspects – equal treatment, equal protection and prohibition against discrimination (Faruqi, 2008).

Turning to Article 8(2), and in order to strengthen the ideal of equality before the law, it forbids discrimination on five enumerated grounds in some specified areas of life. Article 8(2) reads:

“Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”

With this clause (2), equality provision in Article 8(1) is not absolute. In the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155, the Federal Court mentioned that “the equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. The equality provision is qualified. Specifically, discrimination is permitted within clause 5 of Article 8. The courts in *Malaysian Bar v Government of Malaysia* [1986] 2 MLJ 225 and *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166 have evolved the doctrine of due classification and applied it to the equality provisions. In other words, Faruqi (2008) states that a law can apply to a class of persons provided that the classification is founded on “intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia has a rational to the objects of the statute”.

The ban on discrimination is reinforced by a number of other clauses in the Constitution that forbid partiality. For example, Article 136 requires that all federal employees of whatever race shall be treated impartially. Having stated this however, Article 153 that acknowledging affirmative action policy and understood as awarding special rights and privileges to Malays and natives of Sabah and Sarawak (*bumiputeras*), deemed to run counter to the equality principle. It is important to note that reconciling the laudatory provision of Article 136 with Article 153’s special privileges, quotas and reservations for Malays and the natives of Sabah and Sarawak poses many legal and political challenges. The late Tun Suffian was able to straddle the gap between Articles 136 and 153 by suggesting that at entry point, reservations and quotas are permissible under the affirmative action provisions of the Constitution. However, once in service, all public servants of whatever race should be treated impartially. With regards to the grounds on which discrimination is forbidden by the Constitution, Faruqi (2008) submitted that the overall scheme of the basic charter is that all discrimination is unconstitutional except in two circumstances: first, if it is explicitly permitted by a clause of the Constitution; second, if the courts have adjudged the differentiation to be based on a “reasonable classification”.

Harding (1996) argued that the concept of equality has been limited in its application in Malaysia, not only because the constitutional provisions introduced express limitations on the principle but the courts have interpreted the right to equality in a very limited way. In a related work, Tan and Li-Ann (1997) argued that the commitment to equality is an aspect of the rule of law in its assertion that no one should be above the law and that the law should be

'blind' in treating all parties equally. However, they pointed out that equal treatment under the like does not imply that all people should be treated alike. With due respect to Harding's view, the researchers would like to reiterate that no legal rule can be absolute and unbending. In a living legal system, many departures have to be permitted to cater to the exigencies of a complex social and political life.

### ***Affirmative Action: Its Understanding***

Affirmative action is practised everywhere. In the United States, affirmative action policies had incorporated racial and ethnic minority group where scholarship and employment are reserved for minorities, mostly African-Americans; and there are land reserves for Native Americans. In India, the reservations, quotas, and preferences are meant to ameliorate the plight of 'scheduled castes and tribes'. For example, there are employment and university quotas for the Dalits, the lowest caste in India. In Norway, there are quotas for the female gender in Parliament. A number of programmes including quotas, preferential hiring and scholarship are those categorised under this controversial policy (Wasson, 2004) when affirmative action functions as a remedial measure to detach the effects of past discrimination.

It is worth noting that affirmative action policies in most nations are meant for minority groups, as compared to Malaysia that operates to cover both minority and majority groups. As Faruqi (2017) mentioned, affirmative action policies in Malaysia protects the minorities like the aborigines and natives of Sabah and Sarawak; and also the majority, namely Malays. Yet, it is still consistent with the principle when the idea of preferential treatment is not merely to protect the minority; it is to ensure protection to the marginalised or disadvantaged group thus functioning as a remedial measure.

Affirmative action has diverse meaning according to persons, place, circumstances and disciplines (Crosby, Iyer & Sincharoen, 2006). Although being used interchangeably with positive discrimination, Collin and Collin (1988) gave different explanation to both terms: affirmative action is explained as a policy of avoiding discrimination against groups in society who have a disadvantage such as handicapped people etc. while positive discrimination as giving more favourable treatment to a minority to help them to be more equal. Affirmative action is essentially a "race/gender solution" to a "race/gender problem. As Wasson (p. 4, 2004) sees it as a programmes that "serve to rectify the effects of purportedly past societal discrimination by allocating jobs and opportunities to minorities and women". Hence, affirmative action is public policy designed to compensate the victims of injustice. In other words, affirmative action refers to social policies encouraging favourable treatment of socially disadvantaged groups. In practical terms, affirmative action means compensatory programmes to correct a long history of blatant discrimination. For example, those who suffered historically i.e. had been excluded or given limited access to societal rewards, could now be given an opportunity to catch up through the concept of affirmative action. This has been a practice in Malaysia as far as Malays and other *Bumiputras* is concerned.

The enforcement of affirmative action cuts across the employment and educational circles etc. (Garrison-Wade & Lewis, 2004) with the objectives towards creating opportunity and raising enrollment for minorities in schools and training institutions as well as employment circles (Garrison-Wade & Lewis, 2004; Holzer & Neumark, 2000).

Affirmative action is a sensitive, controversial and a highly misunderstood concept (Crosby, Iyer & Sincharoen, 2006; Garrison-Wade & Lewis, 2004; Wasson, 2004; Skrentny,

1996). It is often opposed by public opinion (Skrentny, 1996). In fact, Hochschild (1999) and Haley and Sidanius (2006) argued that the actual meaning and practical workings of affirmative action is not comprehensively understood by many. While some see it as a positive idea, others see it from the negative point of view. Wasson (2004) concluded that although seemingly has better intentions earlier in its history, affirmative action has outlived its purpose when it promotes significant negative consequences with minimal benefits.

The Malaysian circumstances are, although might be considered as a departure from the above minority focus as the target is the majority, still practical when ones look at the economically backward Malays and the natives of Sabah and Sarawak, thus fulfilling the “most disadvantaged” group. Therefore, although Skrentny opinion may hold correct in respect of some jurisdictions, it is not so in the context of Malaysia. Reasons being that although affirmative action targets the Malays and the natives of Sabah and Sarawak, the Malays “are the politically dominant but economically depressed majority” (Faruqi, 2017). The group of scholars who view affirmative action as a negative policy (Sidanius, Singh, Hettis & Federico, 2000; Sniderman & Piazza, 1993) considers it a violation of principles of equity, fairness and accepted norms that encourage individual efforts.

### ***Affirmative Action in Malaysia***

Affirmative action, in the writers’ opinion is to uplift the under-represented class, be it those who are under-represented economically or politically. A fair share of representation is what it seeks to implement. Historically, affirmative action policies are there to remedy the socio-economic imbalances that exists (due to the British colonialists’ policy of divide and rule) between the three major ethnic groups: The Malays, Chinese, and Indians. The British considered the Malays as idlers, and hence reduced them to the village, and had no initiative to improve the Malays’ quality of life. So, the Malaysian-Chinese dominated the economy of Malaya until today, as they were more industrious and business-oriented.

Hence, affirmative action policy in Malaysia is measured as remedial attempt to remedy the effects of past discrimination. As affirmed by Bari (2011), affirmative action may be a legitimate means to correct past wrongs or injustices. In practical terms, affirmative action means compensatory programme to correct a long history of blatant discrimination. Article 153(1) of the Federal Constitution has to be understood as a continuation of previous laws devised by the British to protect the indigenous Malay populace from being outnumbered and overruled by Chinese and Indian immigrant workers who had been granted permission to settle in Malaya to assist the British Government in the tin mines and plantations (Maidin & Ali, 2012). Consequently, the article has the effect of singling out certain groups for positive discrimination, thus considered as one of the most controversial provisions when the critics claimed its policy implementation as solely benefited the Malays who constitute the majority of the population. Article 153 explicitly says:

It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

Looking at the provision, though it has always been criticised as operating one-sided, the expressions “*legitimate interests of other communities*” should be well-understood. In other words, the special positions of the Malays (as it is constantly argued), emanates together

with safeguarding the interest of other communities. This is again a reassertion to the equality principle.

Under the Federal Constitution, affirmative action policies operate at three levels (Faruqi, 2017): Firstly, they protect minorities like the indigenous people and the natives of Sabah and Sarawak; secondly, at the territorial level they give to the regions of Sabah and Sarawak special privileges in relation to the other States of the Federation; and thirdly, and most importantly, they mandate special privileges for the politically dominant but economically depressed Malay majority. It should be noted that the Constitution does not allow simply any kind of discrimination in favour of *Bumiputra* and Malays. It is not a blank cheque, but merely confers limited powers on the Government and Parliament, pursuant to Article 153, to derogate from the principle of equal protection of the law enshrined in Article 8. It is this principle that is invariably used to question the legitimacy of affirmative action (Faruqi, 2017).

Although affirmative action programmes have been litigated both in the United States and in India, no such litigation has occurred in Malaysia, and the courts have thus never had to pronounce on the scope and meaning of Art 153 and the concepts of ‘special position’ and ‘legitimate interest’. On the evidence of *Merdeka University* case however, it would seem that judicial interpretation of Art 153 would be useful in defining carefully, and legitimating, the special privileges, in a manner consistent with the requirements of Malaysian society (Harding, 1996).

Huang-Thio (1964) examined the rationale of Article 153 under the Federal Constitution by posing some few questions. In case of the Federation of Malaysia, what is the rationale behind the conferment of special privileges on (a) the aboriginal peoples and (b) the Malays? What is the justification for creating the Orwellian situation that ‘all persons are equal, but some are more equal than others’? In case of the former, Harding (1996) stated that the justification for empowering the State to take ameliorative measures in their favour is based on the notion of protective discrimination. The aborigines are the indigenous people of Malaysia and are extremely backward. It is therefore necessary that the government should not be precluded from taking discriminatory measures to elevate them from their submerged status and hence the exception to the general prohibition against discrimination.

In addressing the operation affirmative action/special privileges under the Federal Constitution, it is also vital to make reference to the issue of whether its operation should be temporary or permanent in nature. The Reid Commission unequivocally accepted the situation with regard to special privileges as it was in 1957. However, it also recommended that the special privileges should be reviewed by Parliament every fifteen years, implying that they were a constitutional anomaly, the need for which would disappear in time. But instead, Article 159(5) perpetuates these special privileges by giving the Conference of Rulers the power to veto any attempt to abolish them. This departs significantly from the proposal of the Reid Commission that these privileges should be reviewed by Parliament every fifteen years with a view to their eventual abolition. Having said that, it is the contention of the researchers that perhaps in the context of this study what is important is to pay attention to the issue of implementation of these special privileges in line with the true intended spirit of Article 153 of the Federal Constitution.

It has to be admitted wholeheartedly that true to some affirmative action may be seen as a threat to the notion of equality before the law, which is one of the constitutional ideals. However, it is equally important to note that in a world of inherent disparities between the rich and the poor, the educated and the illiterate, the privileged and the powerless, the conferment of formal equality does not secure functional parity (Faruqi, 2017). According to him, the declaration of formal, legal equality becomes an empty legal formula in the face of massive economic, social and educational disparities. In order to address these disparities or inequalities, affirmative action comes into play which again is a form of viewing justice as fairness. Perhaps what is important is for the Government or the policy formulators to look into the issue of whether affirmative action can or should be sustained permanently since according to John Rawls (2009), the basis of preferential treatment is only temporary i.e. moving away from non-ideal to ideal conditions.

### ***SUHAKAM Viewpoints***

From the interview held, the perspectives of SUHAKAM relating to the concept of equality and affirmative action can be divided into few aspects as listed and discussed below.

#### ***Concept of Equality***

The concept of equality is applicable to all but it is not absolute. According to Section 4 of the Human Rights Commission of Malaysia Act 1999, the Deed of Human Rights under the United Nation's Declaration of Human Rights (UDHR) is applicable as long as the principle does not contradict with the existing laws in the country.

“...in which every individual must understand that this is the concept of equality for all, but it is not an absolute. There are some limitations in whatever we did since 1999. So to understand the concept of equality itself, first of all we have to agree that the institution of human rights in Malaysia is a body that moves in line with the principles of the UDHR (Universal Declaration of Human Rights)”. “....But to some extent, the principle shall not violate or conflict with the constitutional system existing national and this has been clearly stated in the deed of the human rights of Malaysia Act 1999 section 4 stating UDHR can be used as long as it is consistent in the context of the law state and does not conflict at all with what has been enshrined in the national constitution.”

Hence, it has almost unanimously agreed that equality as a principle must be applicable to all but should not be made absolute in its application. Even, to some extent, it should not violate and in conflict with the national constitution. Therefore, the theoretical and practical aspects are two different things. Even though Human Rights idea is part of the Constitution, there is a need to balance and monitor such rights:

“...there were existing provisions in Part II of the Constitution but there were many challenges as what theoretically contained in the documents and what happens in reality is different...”

#### ***Concept of Affirmative Action***

Admitting that the framework of affirmative action in Malaysia falls under Article 153 of the Federal Constitution, the idea however is very controversial. It deals with the special rights of the Malays, the indigenous rights, in term of education, economy and other relevant aspects. Commenting on this idea of affirmative action, SUHAKAM pointed that the situation in Malaysia is incomparable with other nations as each country is unique by its own:

“This falls under article 153. This article is very controversial. However, in my view all the parties have understood it. This article deals with the special rights of the Malays, the indigenous rights, education, the importance of the economy and so on. We at SUHAKAM also raised the issue”. “...where we cannot equate every country is the same with other countries.”

SUHAKAM believed that affirmative action as practiced in Malaysia, though very controversial, has long been understood where every country is different and unique on its own. The situation in Malaysia is surely different when compared to other nations. Despite being assured with this rights under the Constitution, SUHAKAM observed that the rights are now being opened and offered equally to other needy regardless of races, instead of focusing on the Malays and *bumiputras*. In other words, this special right is seemingly but slowly begun to change and eradicate. Example given is in the aspect of education where typical provisions that set for the *bumiputras* has been diminished for matriculation and higher learning institutions. The justification was that due to poverty rates among the Malays and *Bumiputras* are declining as compared to 10-15 years ago.

“But in my observations, we find that this right began to erode. Such as education, typical provisions set for bumiputera already abolished in matriculation and Higher Learning institutions, where the equality already given to other races. This occurs due to the level of economic development in Malaysia in the past 10 years in which the gap between the nation's economies is starting to improve. The poverty rate in the community has begun to decline. Not only the indigenous group has been able to hold the highest office everywhere and also there are the indigenous elite”. “Now we are seeing the privileges of the already eroded and I believe the time has passed when these provisions will start to disappear in 10-15 years to come where there is TPPA, FTA, and so on.”

### ***Affirmative Action and the Concept of Equality***

As mentioned by SUHAKAM, when relates the concept of equality with affirmative action, it shows that equality is not an absolute idea. The same applies to the Federal Constitution where Article 8 is not absolute because it has few other exceptions. Even under the UDHR principles, it recognises the rights of other disadvantaged group i.e. the indigenous people.

“As noted, article 8 was not absolute and in terms of the rights associated with the UDHR if it is called on disadvantaged groups, which one of it is indigenous groups”. “...As I interpret, on the outside it appears contradictory but in fact it is not. It is still within the scope of the principles enshrined in the UDHR, which gives recognition to disadvantaged groups including indigenous peoples. And this group in the UN itself has been recognized in terms of their rights and protection. So the two articles complement each other and in fact cannot be questioned.”

### ***Affirmative Action Applicability: Permanent or Temporary?***

It has been the understanding that affirmative action should be treated as temporary in nature since its applicability and function is for remedial purpose. Once past discrimination has been unfasten and released, or the minority group has been equated, preferential treatment should be forsaken. On this point, whether the application of affirmative action should be treated as permanent or temporary, SUHAKAM opined that both have their implications. In order to respect the existence of races in Malaysia, affirmative action should survive unless if there is a potential that it would affect the peace of the nation where it should then be abolished.

“It [affirmative action] can be both [permanent and temporary] or only one [permanent or temporary]. Logically... it can survive but it should be noted there are implications. In terms of respect for the families of this country, I think it should be there. If it is removed, we have to be prepared from a variety of angles, because they will always be parties that agree and disagree”.

In elaborating this, SUHAKAM believed that the problems lie not on the affirmative action itself but on the understanding of the people with regards to the benefits and rationales of having this scheme of preferential treatment. This means that there will be no controversial and propagated issues if people can really understand and appreciate this idea. Having said this, the needs for the scheme of preferential treatment should be educated all along.

“What is more important is what we need to do as a nation to solve these issues. This is because people do not understand the needs of his existing acts or privilege that. It needs to be resolved because as youths are uninformed regarding these issues.”

This points may imply that the provision and application of affirmative action in the country whether to be operative as permanent or temporary should rely not merely on its function as remedial of past discrimination. Instead, actual understanding to its idea is the paramount so that people would accept and value its rationale without questioning much of its subsistence.

### ***Historian Viewpoint***

Since affirmative action has always been associated with the history of past discrimination as far as Malaysia is concerned, it is conceivably worthwhile to contemplate the thought of the historian.

### ***Concept of Equality***

According to the historian, it is not right to interpret equality on its own because the concept of equality in Malaysia should be associated with the Federal Constitution and the history of the country.

“...you cannot talk about equality just like that. You must look back at what the constitution said because the constitution is the supreme law of the country. Any other law, this is legal situation, since 1957, even the rulers as to what the constitution said they are equal but there is a clause of 153.”

Here, the understanding to the concept of equality in Malaysia started with the Federal Constitution where the relevant provisions must be read together with Article 153, the affirmative action provision that provides special privileges of the Malays and *Bumiputras*. The historian even added that:

“Yes it must be based on the federal constitution. Whatever that is allowed by the federal constitution that is what considered as law”.

This indicated that since Federal Constitution is the supreme law of the land, all its content must be followed through. Consequently, the concept of equality as provided under the Federal Constitution is not absolute. Although the principle of equality has been guaranteed constitutionally, there are still some exceptions to be pondered particularly when preferential treatment through the form of affirmative action becomes the framework of the ideal concept of equality.

### ***Concept of Affirmative Action***

As far as Malaysia is concerned, the concept of affirmative action is actually based on Article 153 of the Constitution.

“Well affirmative action is actually based on the clause of 153, so long as there is a Malay majority in the parliament. Whatever the law it is, it must consist of 2/3 of majority and of course with the consent of the Yang Dipertuan Agong and the prime minister. Only in a very specific situation, the ruling party will be given the hearing of the Ruler.”

In general, the historian also concurred with majority opinion that affirmative action is a preferential treatment that needs to be practised in order to achieve the substantive equality. The response indicated that the historian believed the provisions of the Constitution must be abided, and although intricate, can still be challenged and amended. Hence, the concept of affirmative action must be respected so long as it is preserved under the realm of the Constitution.

### ***Affirmative Action and the Concept of Equality***

Affirmative action and equality are interconnected principles. In general, Article 153 being the scheme of affirmative action, is the exception to Article 8, the equality provision, of the Constitution. Therefore in order to apply the true idea of equality, it must be read together with Article 153 of the Constitution.

“That is the special position of the Malays. The law says if you want to amend the constitution, you must have 2/3 majority. And in the case of interest of the Malays, you must have the consent of the Rulers Council. Now if the Malays, because they are the majority in the parliament, agree and the Rulers have given their consent that means it is possible to do any amendment. Otherwise, it is not possible.”

### ***Affirmative Action Applicability (Permanent or Temporary)***

According to the historian, the answer whether the applicability of affirmative action should be made permanent or temporary is very much depends on the Malays (and *bumiputras*) themselves. This is not even a simple answer of either yes or no but in general, to look at the reality of life of the Malays. Even though there are Malays who are well educated and live in modern cities, still majority of them are considered as backward society who are living in the rural areas and not well verse in certain issues. This reality makes affirmative action relevant from the onset up to now. To quote his sayings:

“If the Malay themselves feel the affirmative action is not needed, then we need to make sure that the Malays are properly educated so that they are on path with everybody. You see Malay society is still a backward society as compared to the non-Malays. The education of the people is still not quite modern. There is a lot of them still don’t know. Of course they own cars and come to the city, but still they are some who less educated in certain issue. So unless they are properly educated and understand everything, you cannot change it.”

### **Discussion**

Based on the interviews, it is understood that both are basically agree that equality is the essential concept that leads to impartiality and equity within a society. Despite this understanding, the equality itself entails a system of preferential treatment. Either named as positive discrimination or affirmative action, it appears to be valid and judicious in order to attain a substantive equality. This understanding has been rooted in Malaysia particularly when the Federal Constitution confers special privileges to the Malays and *bumiputras*, thus breaking the equality concept away from its absolute application. Table 1 below compares the two perspectives on equality and affirmative action.

**Table 1: Different Perspectives on Equality and Affirmative Action**

NO.	TOPIC	SUHAKAM	HISTORIAN
1	<b>Concept of equality</b>	Applicable to all but it is not absolute. According to Section 4 of the Human Rights Commission of Malaysia Act 1999, the Deed of Human Rights under the UDHR is applicable as long as the principle shall not contradict with the existing laws in the country.	For Malaysia, to understand the concept of equality, it must be read together with the Federal Constitution where Article 153 is applicable.
2	<b>Concept of affirmative action</b>	Can be found under Article 153 where it deals with special rights of the Malays, the indigenous, in term of education, economy and other relevant aspects.  The policy of affirmative action is slowly began to change and abolished due to the poverty rates among the Malays and <i>bumiputeras</i> are decreasing as compared to 10-15 years ago.	It is based on Article 153 of the Constitution.  Whether the affirmative action should stay or not is depending on the Malays themselves whether to remain as backward society or not.
3	<b>Equality and federal constitution</b>	The theoretical and the practical aspects can be different. For example, provisions on Freedom or Human Rights, that are part of the Constitution, but at the same time, needs to be balanced and monitored.	It is not right to interpret equality on its own without attempting to relate it with the Federal Constitution and the history of the country.
4	<b>Affirmative action and the concept of equality</b>	Article 8 (equality) is not absolute. Even under the UDHR principles, it recognizes the rights of disadvantaged groups particularly focusing on the indigenous people.	Article 153 can be the exception to Article 8 of the Constitution. In order to apply the concept of equality, it must be read together with Article 153 of the Constitution.
5	<b>Affirmative action – should be permanent or temporary?</b>	Affirmative action can be permanent or temporary but both have its implications.  However, in order to respect the existence of races in Malaysia, affirmative action should exist unless if there is a potential that it would affect the peace of the nation.  The problem lies not on the affirmative action itself but on the understanding of the people with regards to the benefits of having the policy. This should be educated all along.	Whether should be permanent or not very much depends on the Malay society themselves.  Therefore, the Malay community must do something, for example in terms of understanding, so as to ensure that affirmative action may not be needed in the future.

There are differences of opinions between historian and SUHAKAM. With reference to the concepts of equality and affirmative action; equality and Federal Constitution; and affirmative action and equality, the historian stressed on the needs to refer these concepts in line with the historical background of Malaysia and the Federal Constitution. However SUHAKAM is more open to adopt international principles in balancing the human rights.

Nevertheless, both agreed that equality is not an absolute concept but may change and be modified where the historical and cultural backgrounds of the country would be the determining factors. The situation in Malaysia is dissimilar to other nations when the foundation for instituting affirmative action policy, as far as Article 153 is concerned, is to remedy the effects of past discrimination when there were socio-economic imbalances due to the British colonialists' policy of divide and rule between the three major ethnic groups, the Malays, Chinese, and Indians.

Since the idea of having affirmative action is, among others, to give protection to the disadvantaged group and remedy past discrimination, the question whether it should be treated as temporary or permanent is another concern. Therefore, on the question whether the affirmative action should remain or not, historian believed that it depends on the Malay society themselves, and they must do something so as to ensure that affirmative action may not be needed in the future. On the contrary, SUHAKAM viewed that in order to respect the existence of races in Malaysia, affirmative action should exist unless if there is a potential that it would affect the peace of the nation. In general however, both viewpoints seemed to agree on either answers, because each one has its own implications. On this point, the authors opined that the affirmative action will be ever seen as temporary in nature because of the aim to correct and remedy the effects of past discrimination. This means that it may be abolished from the constitutional framework when the position of Malays are remedied and the Malays themselves have successfully reached the expected level although the time is unpredictable and has yet to come.

### **Conclusion**

Article 153 is considered as one of the most controversial provisions in the Federal Constitution when critics argued the implementation of affirmative action policy was to be solely benefited the Malays who constitute the majority of the population. Considering the historical basis and its objective, the support for it is still maintained. Initially, the authors would like to reiterate that while a constitutional provision may uphold equality and proscribe discrimination, it may also prescribe positive discrimination and affirmative action policy with the goal to ensure not only formal equality but the subsistence of its substance. The judgment of positive discrimination and affirmative action is to treat the disadvantaged preferentially so that they can be brought up to the par with the rest of society so that equality is meaningfully enjoyed. Though the operation of affirmative action appears to be running counter to the notions of equality, the authors would like to point out that the contention has often overlooked the fact that equality is not just an ideal; it also stands for a system and this is where affirmative action may be a legitimate means to correct past wrongs or injustices.

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