

ISSUES IN IMPLEMENTING AFFIRMATIVE ACTION IN MALAYSIA

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Abstract: *Equality is equity. In other words, equality can be associated with being equal in status, rights or opportunities. Article 8 (1) and (2) of the Malaysian Federal Constitution address the concept of equality in Malaysia. However, the equality provision in Article 8(1) is not absolute. This can be seen, for example, under Article 136 of the Federal Constitution which requires all federal employees shall be treated impartially regardless of their races. However, it is important to note that Article 153 of the Federal Constitution did provide special privileges, quotas and reservations for Malays and the natives of Sabah and Sarawak, and this provision has been challenged legally and politically. The late Tun Suffian managed to reduce the gap between Articles 136 and 153 by introducing the concept of 'affirmative action' whereby the reservations and quotas are permissible under the Federal Constitution. The objective of this paper is to identify the issues in implementing affirmative action in Malaysia. Doctrinal legal research methodology has been used to achieve the objective. It was found that there are many issues have been posed on the implementation of affirmative action and the sustainability of the concept is another challenge yet to be determined.*

Keywords: *Affirmative Action, Equality, Constitution, Malaysia, Article 8.*

Introduction

The concept of equality is well recognized and becomes the most fundamental idea that appears in all conventions on human rights. This concept has been largely acknowledged in most constitution of the democratic countries. The principle of equality is the most

fundamental human rights and has been described as "the starting point of all liberties" (Baderin, 2003). In Malaysia, this idea is acknowledged through Article 8 of the Federal Constitution that forbids discrimination on five grounds namely religion, race, descent, place of birth or gender. This concept nevertheless has been established as not absolute but qualified; qualified in the sense that the existing legal framework, particularly Article 153 of the Federal Constitution, allows preferential treatment and special privileges that commonly known as "affirmative action". Affirmative action has its own arguments and poses certain social and political issues such as racial discrimination that claimed to be resulted from a scheme of preferential treatment for Malays. The aim of this conceptual paper is to identify the issues in implementing the concept of affirmative action in Malaysia.

Problem Statement

Affirmative action is a term used in the United States while in the United Kingdom it is called 'positive discrimination' or 'equal opportunity' (Collin, 1988). Affirmative action is explained as 'policy of avoiding discrimination against groups in society who have a disadvantage (such as handicapped people etc.)' while positive discrimination has been explained as 'giving more favourable treatment to a minority to help them to be more equal' (Collin, 1988). Affirmative action is essentially a "race or gender solution" to a "race or gender problem". Hence, affirmative action is a public policy which has been designed to compensate the victims who have been treated unjustly. It's been used to encourage favourable treatment of socially disadvantaged groups. Practically, affirmative action means a program to compensate disadvantaged groups who have been discriminate for a long period of time. For example, those who historically suffered because been excluded or given limited access to societal rewards; they could now be given an opportunity to catch up through the concept of affirmative action. However, it is equally important to note that affirmative actions are often seen as the antithesis of equality. Article 8(1) has been decided by the Federal Court in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155) as not absolute. It is qualified, specifically when discrimination is permitted in Article 8(5). Article 8(5), however, does not explicitly spell out the concept of affirmative action.

Research Methodology

This study applies doctrinal legal research or library-based study which means that the materials will be gathered from libraries, archives and other databases. The basic aim is to discover, explain, examine, analyse and present, in a systematic form, facts, principles, provisions, concepts, theories or the working of certain laws or legal institutions (Anwarul Yaqin, 2007). Therefore, the theory of equality itself is examined. Moreover, the background and context of Malaysia itself will be looked into particularly in terms of its history, social and political matters in order to find and determine the concept of equality as it is applied in Malaysia. In determining this, the legal framework that govern the operation of affirmative action in Malaysia will be scrutinized which all these require for analytical method of analysis.

Findings

The principle of equality is one of the fundamental human rights that is recognized and embedded in most constitution of the democratic countries. For Malaysia, the concept of equality contains in Article 8 of the Federal Constitution. Article 8(1) declares that "all persons are equal before the law and entitled to the equal protection of the law." In order to strengthen this idea of equality before the law, Article 8(2) forbids discrimination on five enumerated grounds namely religion, race, descent, place of birth or gender. Black's Law

Dictionary (2014) defines equality as the condition of possessing the same rights, privileges, and immunities, and being liable to the same duties. Equality is equity. In other words, equality is the state of being equal, especially in status, rights, or opportunities. For example, 'equality before the law' is a basic human right in the most of the constitutions of democratic countries, and its content appears in all conventions on human rights.

Article 153 of the Federal Constitution provides a scheme of preferential treatment for Malays and the natives of Sabah and Sarawak in a number of specified areas. A 'Malay' is defined under Article 160(2) of the Federal Constitution as a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and: (a) was before *Merdeka Day* born in the Federation or in Singapore or born of parents one of whom was in the Federation or in Singapore, or is on that day domiciled in the Federation or Singapore; or (b) is the issue of such person. A native of Sabah is defined under Article 161A (6) (b) as a citizen who is the child or grandchild of a person of an indigenous race and was born in Sabah or to a father domiciled in Sabah. On the other hand, a native of Sarawak is defined under Article 161A (6)(a) & (7) as a citizen who belongs to a race specified as indigenous or is of mixed the meaning of the phrase 'natives of Sabah and Sarawak' in the context of this study. The provision on special privileges, quotas and reservations for Malays and the natives of Sabah and Sarawak have been challenged legally and politically. These permissible reservations and quotas are acknowledged by the term of "affirmative action" with its provisions that formed as legal framework under the Federal Constitution.

Harding (1996) argued that the concept of equality has been limited in its application in Malaysia. According to Harding, not only have 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, Kevin YL Tan and Theo 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 authors 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.

Critics of affirmative action programs argue that they promote reverse discrimination, as opportunities provided for people are not based solely on qualifications but rather their belonging to a particular race or group. According to World Bank study in 2011, about 1 million Malaysians had left the country because Malaysia's Chinese and Indian citizens chafe at being second-class citizens, and many were highly educated. Some 60% of skilled emigrants cited 'social injustice' as an important reason for leaving Malaysia (The Economist, 27 April 2013).

Critics also point out that while the National Economic Plan (NEP) managed to lift a significant portion of our population out of the poverty trap and create a sizable and urbane Malay middle class, it has over the years also been used and abused not only to enrich a small elite class of Malay capitalists, but also as a tool of patronage. On this point, some says that a reorientation of the policy may be workable to ensure positive discrimination are not being abused in favour of certain race, instead in favour of those who truly require support and assistance. Most importantly, any kind of affirmative action must be implemented in a transparent and accountable manner (Zairil Khir Johari, 2013). Therefore, in the context of

this article what is important is to address the issue of whether the operation of affirmative action in Malaysia reflects the concept of equality under the Federal Constitution.

Affirmative action programs have been litigated both in the United States and India. However in Malaysia, such litigation never had occurred, and the courts have thus never had to pronounce on the scope and meaning of Art 153, as well as the concepts of 'special position' and 'legitimate interest'. The nearest thing to such litigation is the famous case namely Merdeka University [1982] 2 MLJ 243, which concerned principally the question of the national language and the education system under Art 152, and did not deal with Article 153. On the evidence of that case, it seems that the court has carefully interpreted Art 153 and legitimating the special privileges, in a manner consistent with the requirements of Malaysian society (Harding, 1996). Apart from the Merdeka University case, perhaps it is also important to make reference to the case of Ghazali v Public Prosecutor [1964] MLJ 156, an administrative law case which involved the direction made by the minister that alluded to the government policy to help the Malays. To that extent the absence of litigation is unfortunate: it perpetuates the notion that special privileges are somehow above or outside the law, which is clearly not the case.

Apart from that, affirmative action is also claimed as reducing the element of competitiveness. By virtue of Article 153 that provides a scheme of preferential treatment for Malays and the natives of Sabah and Sarawak in a number of specified areas, affirmative action was condemned as violating the liberty of jobs, education, employment, business, etc. To the critics, the government should not interfere with the rights and liberties to run a business/education institution. This violation of liberty could lead to unqualified candidates being selected. Giving the example of NEP's affirmative action, Celestine (2009) suggested that in order to safeguard Malaysia's economy, Malaysians have to pragmatically phase out certain practices. Hence critics, including a growing number of Malays say the affirmative action policy reduces the competitiveness of Southeast Asia's third largest economy and is abused by the elites to benefit themselves.

Huang Thio Su Mien (1964) examined the rationale of this particular provision (i.e. 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.

Apart from Art 153, it is also vital to make reference to Art 89 while addressing the concept of affirmative action under the Federal Constitution. Art 89 of the Federal Constitution provides for Malay reserve land. Such land cannot be de-reserved except by a state law that has been approved by special majorities in both the State Assembly and the Federal Parliament.

Another concern is the operation of affirmative action, whether should be in a temporary or permanent basis. It is generally understood that the basis of affirmative action is only temporary. It would thus suffice to note that once the objectives of affirmative action are met, there is no reason for the continuation of the policy. In other words, if the whole purpose of affirmative action is to correct past inequality, it thus becomes vital for such a policy to come to an end the moment the purpose is achieved or the past inequality is remedied. Having such kind of understanding, it is irrefutable that the time-span for its operation has been criticized. Hill et al (2012) as referred to by Wilson (2013) remarked that this over 40 years of practice, Malaysia's affirmative action programme is currently the longest-running in the world. Hence, it is important to note that the Reid Commission undoubtedly accepted the affirmative action provision as it was in 1957. However, the Commission also recommended that the provisions should be reviewed by Parliament every fifteen years, implying that they were a constitutional anomaly, which might not need any security in the future. But instead, Article 159(5) perpetuates these special privileges by giving the Conference of Rulers the power to veto any attempt to abolish them. Therefore a solid stand on this matter is necessary having regards to the social and political backgrounds of the country. Datuk Seri Abdullah Badawi (now Tun) once said: "When the objectives are met there is no reason for the continuation of the policy because it's anchored on the objectives and the faster we get to the objective, the faster we'll be able to throw away the crutch". A survey in 2008 found that 71% of Malaysians agreed that 'race-based affirmative action' was 'obsolete' and should be replaced with a 'merit-based policy' (The Economist, 27 April 2013). Hence, could this affirmative action be phased out upon certain time and all Malaysians are equally given economic opportunities? It is the contention of the writers that, perhaps in the context of this study, a better idea and understanding of the concept of equality so as to make it in line with the true intended spirit of the Federal Constitution is vital.

Conclusions

It has to be noted that to some affirmative actions may be seen as a threat to the notion of equality before the law, which is one of the fundamental human rights. However, it is also important to note that in a world of inherent a great difference between the rich and the poor, the educated and the illiterate, the privileged and the powerless, and the grant of formal equality does not secure the state of being equal (Faruqi, 2008). According to him, one must remember that the declaration of formal, legal equality becomes has no meaning in massive economic, social and educational disparities. In order to address these great differences or inequalities, affirmative action comes as a form of fairness. But perhaps what is important is for the Government or the policy makers to look into the issue of whether affirmative action can or should be sustained permanently, since to John Rawls (1971, 1999) the basis of preferential treatment is only temporary. The Government faces an intimidating task in deciding how to deal with this issue. Hence, it is the contention of the authors that perhaps this article will provide a foundation or a starting point of further extensive discussion on the concept of equality and the operation of affirmative action under the Federal Constitution.

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