

MARGARET LINDA YOUNG

**AFFIRMATIVE ACTION OR RACIAL
DISCRIMINATION?: THE THEORY OF
AFFIRMATIVE ACTION, INTERNATIONAL LAW
AND THE CASE OF HIGHER EDUCATION IN
MALAYSIA.**

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YOUNG, M.L.
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I INTRODUCTION

II AFFIRMATIVE ACTION

The term "affirmative action" evokes images and emotions for many people, both advocates and opponents. It raises contentious concepts such as discrimination, justice, equality and racism. In a New Zealand context, "special measures" or affirmative action are infrequently debated notions due in part to the minimal political power ethnic minorities and women possess and the facade that many New Zealanders hold of "equality" in our society. When the deep and extensive inequalities in a society become transparent, the issue of affirmative action becomes an explosive one, especially in an ethnically diverse and divided society such as Malaysia.

Malaysia provides the focal point of this issue because it is a country where "extreme" affirmative action measures have been enacted. Policies and programmes carried out under the rubric of "special measures" can have the power to remove, create or perpetuate inequalities. The boundary between justified affirmative action and discrimination can be a fine one. International law may provide us with some guidance as to this boundary however, ultimately each country will decide whether these norms are truly "universal" and/or appropriate to their individual circumstances.

In this paper I will begin with an examination of some of the theoretical issues involved in the concept of affirmative action, specifically the notion of equality and some of the justifications for affirmative action. I will then examine the "norms" or standards established at international law, in particular the International Covenant on the Elimination of All forms of Racial Discrimination. This discussion will extend briefly into the implementation of this covenant into domestic law by New Zealand.

The focal point of the analysis of Malaysia is that of higher education which is part of the wider scheme of affirmative action aimed at a complete restructuring of society. The legal basis for affirmative action in respect of the indigenous peoples of Malaysia is merely one dimension to this complex and multi-faceted issue. This research paper will examine not only the legal foundations for affirmative action in higher education but also the justification for these policies. To understand affirmative action in Malaysia, it is necessary to provide the reader with a background of the ramifications of British colonialism. I will also outline the implementation of these policies and ultimately analyse the overall success and/or failure of such a scheme in respect of higher education. Malaysia's affirmative action policies in higher education are also analysed from the perspective of international law and furthermore whether international law provides an appropriate norm for affirmative action in light of Malaysia's unique ethnic situation.

¹ K. Greenleaf, *Discrimination and Reverse Discrimination* (Oxford A. Clarendon Press, New York, 1983) 17.
² M. Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (Yale University Press, New Haven, 1991) 47.
³ *ibid.* 1, 44.
⁴ *ibid.* 1, 44.
⁵ Q. Tan, "Reverse Discrimination Justified" in B. Hopple and E.M. Fagan (eds) *Discrimination: The Limits of Law* (Macmillan Publishing Limited, London, 1992) 281, 282.

II AFFIRMATIVE ACTION

A *The Nature of Affirmative Action*

This first section briefly examines the concept of "affirmative action" and some of the theoretical contentions surrounding it. Greenawalt, an American academic, has defined "affirmative action" rather elastically.¹

"Affirmative action" is a phrase that refers to attempts to bring members of underrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial program. Some affirmative action efforts include preferential treatment; others do not.

"Preferential treatment" connotes the granting of a preference to one or several persons among a group of competitors. This preference could be *because of* someone's ethnicity, race or gender (for example, purely because they are black) or the granting of a preference could be related to the fact that the person is a member of an underrepresented group or of a group that has experienced discrimination in the past.² The former situation seems to imply "reverse discrimination" (being black for example could be part of the job requirement) while the latter refers to situations where the preference is grounded on any other reason that is not strictly related to academic or job qualifications.³

One term associated with affirmative action is "reverse discrimination." Discrimination consists of placing, for example, blacks at a disadvantage because they are black. Reverse discrimination, as the term implies, involves placing whites at a disadvantage because they are white.⁴ Because of the moral objectionability of this, it is a term that some advocates of affirmative action avoid using.

Greenawalt is not alone in defining affirmative action rather flexibly, Pitt, a British writer, has defined it as:⁵

Referring to programmes designed to eliminate invisible as well as visible discrimination and to encourage underrepresented groups to reach a situation where they are more likely to be the best candidate for a post or place.

¹K Greenawalt *Discrimination and Reverse Discrimination* (Alfred A. Knopf Inc., New York, 1983) 17.

²M Rosenfeld *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (Yale University Press, New Haven, 1991), 43.

³Above n 2, 44.

⁴Above n 2, 44.

⁵G Pitt "Reverse Discrimination Justified" in B Hepple and EM Syszczak (eds) *Discrimination: The Limits of Law* (Mansell Publishing Limited, London, 1992) 281, 282.

As with Greenawalt's definition, this definition of affirmative action is wide enough to include the use of preferential treatment. Pitt's definition of affirmative action however seems to emphasise equality of opportunity, that is, giving underrepresented candidates "special treatment" to enable them to compete and possibly becoming the best candidate for a post or place. Both these definitions are very wide and perhaps do not really help us distinguish between policies which are justified as affirmative action and those which are not.

Collier, an American writer, has defined affirmative action as "meaning equality of opportunity as opposed to equality of outcome."⁶ Affirmative action according to Collier should be concerned only with the process of selection rather than the end result of the selection.⁷ Collier maintains that many current affirmative action policies create a type of "informal discrimination" which affects "innocent victims."⁸ Underlying all definitions and versions of affirmative action is the concept of equality, or rather the varying meanings of equality.

Both advocates and opponents of affirmative action postulate equality as the ideal, however, there are differing models or types of equality. It is common to identify four types. The first is ontological equality or the fundamental equality of persons.⁹ This is common in religious and moral traditions, for example, in Christianity "all people are equal before God."¹⁰ Increasing secularisation has led to the "decline of natural law as a framework for the debate on human nature" and therefore this kind of equality is seldom argued in modern times.¹¹

The second type of equality is equality of opportunity, in principle this means that "access to important social institutions should be open to all on universalistic grounds, especially by achievement and talent."¹² Underlying this notion of equality of opportunity is the concept of "meritocracy," that is, all positions in society should be filled on the basis of personal merit rather than sex, wealth or ethnicity.¹³

Equality of opportunity is closely related to the third type of equality, that of equality of condition. Advocates of this form of equality contend that for equality of opportunity to have any real meaning, equality of condition is needed, that is, "all competitors in the race should start at the same point."¹⁴ In order to compensate for social disadvantages that many competitors face, affirmative action policies would be implemented.

⁶CW Collier "The New Logic of Affirmative Action" (1995) 45 Duke L. J. 559, 563.

⁷Above n 6, 563.

⁸Above n 6, 563. The issue of the "innocent" victim (often portrayed as the white male) is a constant theme in affirmative action debates. See the discussion below under the Compensatory justification for affirmative action, see text at n 58.

⁹BS Turner *Equality* (Ellis Horwood Limited, Sussex, 1986) 34.

¹⁰N Abercrombie et. al. *The Penguin Dictionary of Sociology* (2 ed Penguin Group, London, 1988) 88.

¹¹Above n 9, 35.

¹²Above n 9, 35.

¹³Above n 9, 35.

¹⁴Above n 9, 36.

These theories of equality of opportunity and equality of condition, are often expressed in affirmative action literature as formal equality and substantive equality of opportunity.¹⁵ Formal equality has its foundations in liberal theory which views society as "an aggregate or self-interested individuals for whom freedom to pursue individual life projects is a fundamental value."¹⁶ Formal equality theorists argue that once, the "legal and informal barriers which formerly prevented some individuals from pursuing their goals have been removed, then equality has been reached."¹⁷ This liberal theory of equality therefore advocates "strict identical treatment"¹⁸ which could be achieved by anti-discrimination legislation to ensure everyone is treated the same. Some proponents of formal equality would allow affirmative action if it was purely as compensation for individuals who can *prove* they are the victims of direct discrimination.¹⁹ Formal equality however, fails to acknowledge the widespread systemic discrimination and subordination of various groups inherent in many societies²⁰ and the continuing social and economic inequalities.²¹

Substantive equality of opportunity advocates point to the flaws of this formal view of equality and contend that in order to achieve meaningful equality, "all individuals should have equal means for pursuing life projects."²² They contend that differences in "wealth, education and talent and stereotyped assumptions all act to limit the opportunities of some individuals," therefore affirmative action should be enacted to resolve these difficulties.²³ Substantive equality of opportunity can incorporate both "backward looking compensatory justice" and "forward looking distributive justice."²⁴ The idea of "forward looking distributive justice may be difficult to reconcile with a liberal view of equality because of its focus on "groups" as opposed to individuals.

Substantive equality of opportunity advocates would allow a range of affirmative action measures as compared to a very restrictive formal equality model. The term affirmative action is often associated with the terms "goals" and "quotas." Both goals and quotas relate to the relative proportions of the members of different groups in particular jobs or educational programmes. To set a goal is to aim for the future advancement of some ration of blacks to whites, or women to men, in a given workforce or university

¹⁵Many writers refer to "former equality" as "formal equality of opportunity" because of its origins in liberal political theory. The language of "equality of opportunity" however was utilised in the 1960s and 1970s by Canadian and American proponents of affirmative action policies and has developed into a more "substantive" idea of equality. See LA Jacobs "Equal Opportunity and Gender Disadvantage" (1994) 7(1) Can. J. L. & Juris. 62, 63-65.

¹⁶CM Koggel "Feminist view of Equality and its Implications for Affirmative Action" (1994) 7(1) Can. J. L. & Juris. 43, 44

¹⁷Above n 16, 44.

¹⁸E Sheehy *Background Paper: 'Personal Autonomy and the Criminal Law: Emerging Issues for Women'* (Canadian Advisory Council on the Status of Women, 1987) 41.

¹⁹Above n 16, 45.

²⁰LE Trakman "Substantive Equality in Constitutional Jurisprudence: Meaning within Meaning" (1994) 7(1) Can J. L. & Juris. 27, 32.

²¹Above n 18, 41.

²²Above n 16, 46.

²³Above n 16, 46.

²⁴AM Johnson "Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties" [1992] U. Ill. L. Rev. 1043, 1067.

programme.²⁵ Other measures would also include the use of training programmes that “emphasise providing minorities and women with opportunities, skills and experience to perform in given jobs,” recruitment programmes, and targeted advertising campaigns.²⁶ Affirmative action measures can also involve changing the selection criteria to include more women and minorities within the pool of persons from which selections are made.²⁷

“Quotas relate to a particular allocation of goods or resources made on some basis other than, or in addition to, related job or educational qualifications.”²⁸ A quota may involve the allocation of a fixed number or a percentage of goods to which it applies to the members of a given group. For example, a quota may require that ten places or ten percent of places in the entering class at a law school be set aside for an ethnic minority.²⁹

The defence of the use of quotas is often related to the fourth type of equality; equality of outcome or result, proponents would contend that “discrimination involves a failure to eliminate conditions of subordination.”³⁰ And the most effective way to eliminate subordination is through focussing on the group and more specifically group or proportional representation.³¹

There are however diverging opinions as to what equality of outcome entails. Rosenfeld has identified “subject regarding” and “lot regarding” equality of result.³² Subject regarding equality aims for having all people satisfied in the “achievement of their life plans” and because we all have different life plans, we require different lots to achieve this.³³ Lot regarding equality of result on the other hand is achieved when each member of society ends up with equal lots of the goods being allocated.³⁴ Both are obviously difficult to achieve, however the advantage with lot regarding equality is that it is more simple to monitor, although obviously not necessarily more “fair” or “just.”

B Justification for Affirmative Action

Affirmative action from its inception has necessarily involved justification, and there is certainly a great deal of political, philosophical and legal discussion in this respect. Below I will analyse some of the major justifications for affirmative action and some of the critical issues involved. Justifications for affirmative action can be placed into three categories; social utility, compensatory justice and distributive justice.

²⁵ Above n 2, 45.

²⁶ Above n 2, 47.

²⁷ RL Jones “Affirmative Action: Should we or shouldn’t we?” (1996) 23 (2) So. U. L. Rev. 133, 134.

²⁸ Above n 24, 1057.

²⁹ Above n 2, 47.

³⁰ Above n 24, 1066.

³¹ Above n 24, 1067.

³² Above n 2, 23.

³³ Above n 2, 23.

³⁴ Above n 2, 23.

1 Social utility

This justification of social utility emphasises the benefits gained by society and individuals by including previously excluded or underrepresented groups. The basic premise on utilitarian grounds is that the overall benefits to society outweigh the overall costs (usually to individuals).³⁵ Social utility can fall under either a substantive forward looking notion of equality of opportunity or an equality of outcome theory depending on the point at which affirmative action will end.

One way to approach this issue is to recognise race, gender or *ethnicity as a qualification*, it could be part of the selection criteria for a job or admission to universities.³⁶ However, we must acknowledge that once we legitimise the use of race, ethnicity or gender as a qualification, then there is no guarantee that this will always favour the hiring of minorities or women.³⁷ The danger in using race as a qualification is that it merely perpetuates a form of racism but with different intended beneficiaries, the "white male" becomes merely replaced with an ethnic minority or a woman. However it is of course pertinent to remember that affirmative action is a temporary measure enacted until such time that equality is reached.

A variation of the ethnicity as a qualification model is changing the selection criteria to include skills which an ethnic minority are more likely to possess such as language or cultural skills.³⁸ However this may not aid members of an ethnic minority who still suffer from systemic or other forms of discrimination yet are assimilated to the point where they do not possess the above attributes.³⁹ Some commentators advance the idea that people of colour possess "double consciousness," that is, they can see society in terms of two perspectives.⁴⁰ They can see the world from the "eyes of the oppressor" and the "eyes of the oppressed."⁴¹

³⁵RK Fullinwider *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Rowman and Littlefield, New Jersey, 1980) 70.

³⁶Above n 35, 82.

³⁷Above n 35, 83.

³⁸Above n 35, 78.

³⁹See DA Farber "The Outmoded Debate Over Affirmative Action (1994) 82 C. L. Rev. 893. Farber discusses the recent development of Critical Race Theory (CRT) and its effect on affirmative action. Many CRT theorist advocate that "societal standards are skewed" and that the entire criteria for job selection and education admissions should be overhauled because these standards are structured preferences. These preferences are those created and maintained by white males for the benefit of white males. See DA Farber 893, 910.

⁴⁰CJ Nan "Adding Salt to the Wound: Affirmative Action and Critical Race Theory" (1994) 12(2) *Law & Ineq.* 553, 566-567.

⁴¹Above n 40, 566. Nan gives the example of a "black professor who can alleviate the racism of his whites students and inspire learning and hope in his black students is a better teacher for that." Above n 40, 567. Other commentators also refer to the advantages minorities may have in terms of their ability to understand a client's perception of the problem and to establish a greater rapport with members of their own race/ethnicity. See RA Rossum *Reverse Discrimination: The Constitutional Debate* (Marcel Denker Inc., New York, 1980) 31-32. The difficulty with this *assumption* is that it overlooks gender and class differences within ethnic groups which will influence how people perceive a problem and how they interact with each other.

One of the possible cost involved in affirmative action policies is the creation of resentment and hostility in groups adversely affected by these policies and thereby fuelling racism.⁴² A further cost often cited by opponents of affirmative action, especially in respect of preferential hiring and admissions is the reduced efficiency in industry, business, education and government caused by the lowering of qualification standards.⁴³ This argument, however suffers from simplicity. It assumes that present selection procedures used in employment and education are effective in choosing the person who will perform best in the given task; this is of course a highly contentious proposition. It also overlooks the fact that affirmative action does not necessarily mean giving people tasks that are beyond their abilities, rather it involves choosing from a pool of candidates who have the minimum requisite qualifications.⁴⁴

Efficiency, or rather the supposed loss of it is merely *one* of the factors to examine in the theory of social utility. Social utility, it has to be remembered involves the weighing up of aggregate welfare and if the loss of efficiency does indeed occur then it may not outweigh the benefits of affirmative action.⁴⁵

Social utilitarians point to several benefits that may arise from affirmative action, one of which is the notion of diversity. Academics in the United States have alluded to the shift in recent years from a "temporary compensatory notion of affirmative action to a vision of a more permanent race consciousness based on diversity."⁴⁶ Advocates of this theory contend that the ideal of a colour blind society (one of the original aims of advocates of affirmative action in the United States) was wrong all along, and that race does matter and always will.⁴⁷ Therefore diversity recognises the differences between people and that these differences justify differential treatment.⁴⁸ This has links with the "race as a qualification" concept, so that for example, in education having a rich diversity of students should enhance the learning experience, and the institution.⁴⁹

⁴² Above n 35, 70.

⁴³ Above n 5, 289.

⁴⁴ Above n 5, 289.

⁴⁵ Above n 5, 289.

⁴⁶ RD Kahlenberg *The Remedy: Class, Race and Affirmative Action* (Basic Books, New York, 1996) 26.

⁴⁷ Above n 46, 27. And see above n 40, 570, where the author examines the consequences of this desire for a color blind society whereby the white community increases its power and control by absorbing the black leadership and co-opting its interest.

⁴⁸ Above n 46, 27.

⁴⁹ Above n 46, 34-35. The United States Supreme Court has arguably left open the question of whether the goal of diversity would meet the "strict scrutiny" requirements established by the courts. The court in *City of Richmond v J.A. Croson Co.* 109 Sct 706 [1989] decided that State affirmative action policies had to be both narrowly tailored to deal with specifically discriminatory practices (meet a compelling interest) and had to be used as a last resort. Justice Brennan in the later case of *Metro Broadcasting, Inc. v FCC* 497 U.S. 547 (1990) accepted diversity as a justification for Federal affirmative action policies. That case was decided under an "immediate scrutiny" standard (a lower test than "strict scrutiny"). The most authoritative recent case from the Supreme Court is *Adarand Constructors, Inc. v Pena* 115 S. Ct. 2097 [1995] where the court extended the strict scrutiny test established in *Croson* to Federal as well as State affirmative action policies. The majority therefore overruled *Metro* but as Justice Stevens (dissenting) argued, only to the extent that it was inconsistent with the one standard for both Federal and State affirmative action policies. The Supreme Court in *Pena* did not specifically rule

In terms of occupation, diversity advocates also contend that because minorities are different, they can be valuable to an employer; they can better serve minority constituents and/or provide role models. This rests partly on the assumption that minorities and women will have more empathy with their peers and that role models would encourage the next generation and help breakdown stereotyped assumptions that tend to relegate women and minorities to lower positions in professions and institutions.⁵⁰ However, it is arguable that this is merely replacing one stereotype with another. The new stereotype being that ethnic minorities and women cannot "make it" without affirmative action and those who do are merely "token minorities."

Utilitarianism also cites the reduction of racism as a benefit of affirmative action, in that the increased number of minorities and women in all realms of society will lead to greater integration and reduced racial tension.⁵¹ Ethnic minorities and women will become viewed as "individuals" rather than merely as a "group" through daily contact. However measuring "racism" is a difficult task to say the least and indeed affirmative action may in fact increase racial tension when those not favoured by affirmative action feel resentful and victimised. This may especially be true when extensive quotas are implemented.

A variation of this argument is the contention that affirmative action serves as a symbolic denunciation of racism especially if affirmative action is based on compensation for past discrimination.⁵² Some commentators however view this argument as flawed because its foundation is grounded in the belief that two wrongs make a right.⁵³ Indeed it may legitimise racism because it sends the signal that racial discrimination is not wrong per se, it is wrong only if it is directed against minorities.⁵⁴ This view disregards the current systemic racism and discrimination which traditionally benefits white males.

The strongest fundamental objection to social utilitarianism is that it offends a sense of liberal individualism in which individual rights cannot be outweighed by the benefits for the group.⁵⁵ Social utility arguments fail to impress many in the Western world because

out diversity as a "compelling interest" however the majority decision and the dissenters (apart from Stevens) did reiterate that the purpose of affirmative action should be to remedy past discrimination. The later case of *Johnson v Miller* 115 S. Ct. 2475 (1995) concerned a Georgia electoral district based primarily on race, the Supreme Court used strict scrutiny to declare it unconstitutional and emphasised that remedial goals will provide a compelling interest. See KB Dietrich "Federal Affirmative Action After *Adarand Constructors, Inc. v Pena*" (1996) 74(4) N. C. L. Rev. 1259 and D Beschile "You've got to be carefully taught: Justifying Affirmative Action After *Croson* and *Adarand*" (1996) 74(4) N. C. L. Rev. 1141.

⁵⁰Above n 5, 288. See also CJ Nan "Adding Salt to the Wound: Affirmative Action and Critical Race Theory" (1994) 12(2) Law & Ineq. 553, 566 where the writer cites the "burdens" that the role model theory imposes on ethnic minorities. "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... conform into behaviour that will encourage the community of color to adopt majoritarian social mores and lie to your community about how they too can achieve the 'American Dream...'"

⁵¹Above n 46, 64-74.

⁵²RA Rossum *Reverse Discrimination: The Constitutional Debate* (Marcel Denker Inc, New York, 1980) 25.

⁵³Above n 52, 25.

⁵⁴Above n 52, 26.

⁵⁵BTA Love "Justifying Affirmative Action" (1993) 7(2) Auck. U.L. Rev. 491, 494.

it seeks more than individualistic notions of equality of opportunity. However, in a society such as Malaysia where individual rights are subservient to "group rights," the objections posed by individualism inevitably fails.

2 Compensatory justice

A popular justification for affirmative action is that it is intended to make up for past systemic discrimination against women or ethnic minorities.⁵⁶ It is therefore a remedy for past deprivation of opportunity. Advocates of compensatory justice may contend that the present generations continue to face disadvantage because of past discrimination and that the successors of the original discriminators are still enjoying their wrongful benefits. However the difficulty in historical compensatory justice is in proving the links; that is proving the person is a victim of past discrimination. Many advocates of compensatory justice contend that this is unnecessary and all that is required is showing that you are a member of a previously discriminated against group. Critics of this form of justification also contend that an individual should not be held accountable for receiving benefits from actions of past generations.⁵⁷ This proposition fails to take account of those who are neither the successors of the original discriminators nor those discriminated against, for example, recent immigrants.⁵⁸

Compensation however need not always be historical, it is argued by some that the institutional framework of society continues to discriminate against minorities and women.⁵⁹ Affirmative action therefore acts as a counter balancing measure to compensate for the inherent bias in the system.⁶⁰ However, it is interesting to note that the Supreme Court of the United States has rejected this kind of societal discrimination as a proper justification for affirmative action programmes.⁶¹

⁵⁶Above n 5, 284.

⁵⁷Above n 5, 284-285. Justice Scalia in *Adarand* went further than the majority in the case and concluded that the government can "never have a compelling interest in discriminating on the basis of race in order to 'make up' for past discrimination in the opposite direction... [U]nder our Constitution there can be no such thing as either a creditor or debtor race." *Adarand*, 115 S. Ct. at 2118-2119. This ideal of a color blind Constitution however, deprives the government and the judiciary of the ability to remedy racial discrimination and enact affirmative action to achieve substantive equality. "A color blind Constitution would force our government to trust a nation with a history of racial discrimination to treat all races equally." See BS Delgadillo "CIVIL RIGHTS - Do 'Scepticism,' 'Consistency,' and 'Congruence' foreshadow a color-blind future? *Adarand Constructors, Inc. v Pena* 115 S. Ct. 2097 (1995)" (1996) 69 Temp. L. Rev. 1521.

⁵⁸Immigrants for example, may claim to be "innocent" victims in the affirmative action debate however people who continue to benefit from societal discrimination could hardly be said to be "innocent." Some commentators also contend that the cultural belief system in the United States is racist, and that since everyone is influenced by that belief system, everyone is subconsciously racist therefore there is no truly "innocent victim." See T Ross "Innocence and Affirmative Action" (1990) 43(2) Vand. L. Rev. 297, 310-311.

⁵⁹Above n 5, 286.

⁶⁰Above n 5, 286.

⁶¹The Court in *Adarand* quoted the case of *Wygant v Jackson Board of Education* 476 U.S. 267 (1986) to the effect that a showing of 'societal discrimination' is an insufficient compelling interest for affirmative action. See also D Beschile above n 49, 1156. It is interesting to note that the United States recently ratified both the International Convention for the Elimination of all Forms of Racial Discrimination (in 1994) and the International Covenant on Civil and Political Rights (in 1992). CERD

Compensatory justice raises rudimentary questions about who should be held "responsible" for discrimination, both past and present, and it raises difficult issues of "proof" and "causation."

3 Distributive justice

Distributive justice is concerned with whether all people have a fair share of benefits and burdens. If not, then affirmative action is justified as a method of achieving a society in which benefits and burdens are more equitably distributed.⁶² Underlying this justification is the assumption or acceptance that society *should* be committed to creating a more just distribution of benefits and burdens.

Distributive justice therefore is concerned with equality of opportunity; that is, everyone should have equal rights and opportunities to develop his or her talents and that there should be equal rewards (of opportunities) for equal performance.⁶³

Distributive justice however is not only concerned with equality of opportunity but also outcome. It focuses on redistribution, not competition, it recognises that inequality of present shares of benefits and burdens is caused by not merely past discrimination but also current systemic and self-perpetuating discrimination.⁶⁴ Distributive justice therefore is concerned with a proportional view of equality of result. Distributive justice is often used to justify policies of affirmative action in ethnically divided societies. By equalising life chances and representation in sectors of the government, the economy and so forth, advocates contend that social harmony will be enhanced because of the perception of the creation of a certain model of equality.⁶⁵ The difficulty with the "group" orientated approach of this theory is that it may disregard intra-group inequalities.

What programmes and policies fall into the category of affirmative action depends on the definition of the concept and the underlying form of equality. Or rather a particular vision of equality and justice. There are various justifications for affirmative action which again relate to the concept of equality, and each individual's perception of how society should view equality. One does not necessarily have to *choose* between utilitarianism, compensatory and distributive theories of justice, as will be illustrated in the case of Malaysia.

recognises a non-remedial basis for affirmative action and indeed one commentator has argued that compliance with its international obligations could in fact constitute a "compelling interest" under strict scrutiny. See C de la Vega "Civil Rights during the 1990s: New Treaty Law Could Help Immensely" (1997) 65 *Univ. of Cincinnati L. Rev.* 423, 468.

⁶² Above n 55, 492.

⁶³ Above n 55, 492.

⁶⁴ Above n 55, 495-496.

⁶⁵ T Sowell *Preferential Policy: An International Perspective* (William Morrow and Company Inc., New York, 1990) 153.

III AFFIRMATIVE ACTION AND INTERNATIONAL LAW

This section examines the concept of affirmative action at international law; international law, and its implementation at a domestic level provide us with an interesting insight into varying interpretations of what "affirmative action" means in a legal context. Malaysia is not a party to any international human rights treaties or conventions therefore this paper does not investigate the issues of illegality and enforcement of international law.

International law recognises affirmative action in a number of contexts, both expressly and implicitly. The International Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") provides a definition of discrimination under Article 1 and allows a "special measures" provision under Article 4.⁶⁶

The International Covenant on Civil and Political Rights does not provide an express provision for affirmative action, however the Human Rights Committee; an authoritative interpreter of the ICCPR has specifically recognised affirmative action as possible under the Covenant.⁶⁷

The United Nations International Covenant on the Elimination of All Forms of Racial Discrimination ("CERD") is a key human rights treaty in respect of equality and discrimination. Discrimination is defined in Article 1:⁶⁸

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

A major qualification on this definition is made in Article 1 paragraph 4 which allows for special measures under certain circumstances.⁶⁹ In fact Article 2 paragraph 2 requires a State to take special measures if the circumstances so warrant.⁷⁰

⁶⁶Article 4: "Adoption by State Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." See United Nations *Discrimination Against Women: The Convention and the Committee* (Center for Human Rights, Geneva, 1994) 47, 50.

⁶⁷The Committee has noted: "The principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination prohibited by the Covenant." C Romany "Black women and gender equality in a new South Africa: Human Rights law and the intersection of race and gender" (1996) 21(3) *Brook. J. Int'l L.* 857, 884.

⁶⁸N Lerner *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1989) 48.

⁶⁹CERD is reproduced in Centre for Human Rights *Human Rights: The Committee on the Elimination of Racial Discrimination* (Center for Human Rights, Geneva, 1991) 12, 14.

⁷⁰Above n 69, 15. For the full text on Article 1(4) and Article 2(2) see Appendix E.

I will focus on CERD because it is the first general international covenant in which the taking of "special measures" was made mandatory on parties. It is also one of the few conventions involving "special measures" which has an active monitoring body in the Committee on the Elimination of Racism (The Committee).⁷¹

To fulfil the criteria established by Article 1(4), affirmative action is allowed if:⁷²

- It is taken for the *sole* purpose of securing adequate advancement
- of groups or individuals requiring such protection
- to ensure equal enjoyment or exercise of human rights and fundamental freedoms.
- These measures cannot lead to a maintenance of separate rights for different racial groups
- and they shall not be continued after the objectives have been achieved.

CERD therefore is not limited to remedying past discrimination, in fact, the group or individual does not need to be a victim of past or present intentional discrimination. Rather they would need to demonstrate a *need* for protection in order to gain the equal enjoyment or exercise of human rights and fundamental freedoms.

CERD therefore allows differential measures depending on the *purpose* and *effect* of those measures.⁷³ Indeed, it demands "special measures" as "not an exception to discrimination but rather as a corollary to it to achieve equality."⁷⁴ Affirmative action will not be discrimination unless or until the measures lead to the maintenance of separate rights for different racial groups. This concept of separate rights is probably akin to the idea of Apartheid which was one of the key influential factors behind the development of CERD.⁷⁵

The aim of CERD is "equality" through the elimination of racial discrimination. Article 1(4) refers to the "equal enjoyment or exercise of human rights and fundamental freedoms." Ascertaining the exact meaning of this phrase will assist us in determining what practices and policies fall into the ambit of special measures and which fall outside it into the realm of discrimination. CERD passed through several committees and commissions prior to it reaching the General Assembly in its final draft form. Members

⁷¹W McKean *Equality and Discrimination Under International Law* (Oxford University Press, Oxford, 1983) 165.

⁷²Above n 71, 164.

⁷³V Van Dyke *Human Rights, Ethnicity and Discrimination* (Greenwood Press, Westport, 1985) 5

⁷⁴Above n 71, 159. International law recognises a difference between "distinctions, exclusions, restrictions and preferences" which constitute discrimination and justified "differential treatment" which aims at equality. See above n 71, 94-97.

⁷⁵United Nations *The United Nations and Human Rights 1994-1995* (United Nations Department of Public Information, New York, 1995) 165. Another significant factor which provided the impetus for the development of CERD were the Nazi atrocities during World War II.

of these committees and commissions have referred to "equal development for all citizens"⁷⁶ or "equal footing with other groups."⁷⁷

The Committee on the Elimination of Racial Discrimination (The Committee) has frequently referred to the notion of "de facto", "real" or "substantive equality"⁷⁸ as opposed to formal or mathematical notions of equality. However this does not resolve the issue of whether CERD requires equality of opportunity or equality of result. The preamble to CERD refers to "equal before the law" and "equal protection of the law."⁷⁹

The Committee in a major policy statement has said that:⁸⁰

[b]oth of these obligations (the obligation regulating the behaviour of the state and public authorities... and the prohibition of discriminatory conduct by any person or group against another) aim at guaranteeing the right of everyone to equality before the law in the enjoyment of fundamental human rights, without distinction as to race, color, descent or national or ethnic origin, and at ensuring that that equality is *actually enjoyed in practice*.

One writer has interpreted this statement as authority for the proposition that CERD's principle objective is equality of result rather than equality of opportunity.⁸¹ However the reference to the phrase "equality is actually enjoyed in practice" should be interpreted in light of the emphasis by the Committee on "de facto" equality as opposed to formal equality. The Committee in examining several State periodic reports has consistently requested more information from Parties other than the implementation of legislative anti-discrimination laws. For example, socio-economic indicators such as statistical information on employment, health, education and so forth.⁸²

It may also be pertinent to refer to some other international covenants to assist us in determining how CERD should be interpreted. CEDAW sets the objective of special measures as "equality of opportunity and treatment" in Article 4.⁸³ The ILO Convention on Discrimination in Respect of Employment and Occupation defines discrimination to include "any distinction, exclusion or preference... which has the effect of nullifying or impairing *equality of opportunity or treatment* in employment or occupation."⁸⁴ The Convention Against Discrimination in Education also refers to the "promotion of equality of opportunity and of treatment."⁸⁵

⁷⁶Statement of Mr. Krishnaswami (India), E/CN.4/Sub.2/SR.416 p. 12.

⁷⁷Statement of Mr. Hakim (Lebanon), E/CN.4/SR.785 p. 5.

⁷⁸CERD GA 18 A/37/18 p. 113.

⁷⁹Above n 69, 12-13.

⁸⁰33 UN GAOR Supp. (No. 18) at 108, 110, UN Doc. A/33/18 (1978) (emphasis added).

⁸¹T Meron "The Meaning and Reach of the International Convention the Elimination of all forms of Racial Discrimination" (1985) 79 Am. J. Int'l L. 283, 287.

⁸²CERD GA 18 A/48/18 Suggestions and Recommendations to Hungary in its treatment of the Gypsy populations in its country.

⁸³United Nations *Discrimination Against Women: The Convention and the Committee* (Center for Human Rights, Geneva, 1994) 447, 50.

⁸⁴United Nations *Human Rights: A compilation of International Instruments* (United Nations, New York, 1994) 96 (emphasis added).

⁸⁵Above n 84, 101.

International law therefore seems to specify equality of opportunity, specifically *substantive* equality of opportunity. That in itself lies at the roots of "special measures" at international law; the idea that people, regardless of their ethnicity or gender have a fundamental right to the equal enjoyment of human rights.

New Zealand's interpretation and application of affirmative action is based on the concept of "special measures" in CERD. Section 73 of the Human Rights Act provides a defence to a breach of the Act and is specifically concerned with "special measures."⁸⁶

To qualify for a defence under Section 73, the burden of proof lies with the defendant who has to establish:⁸⁷

- (i) That the thing done was in good faith;
- (ii) The thing was done for the purpose of assisting or advancing persons or groups of persons of a particular race; and
- (iii) That those persons or groups of persons need, or may reasonably be supposed to need, assistance or advancement in order to achieve an equal place in the community.

Amaltal Fishing Co v Nelson Polytechnic is the only case where section 73 has been the direct issue. It concerned the Nelson Polytechnic who ran a fishing cadet course with public money, and reserved all 14 places in 1994 for Maori and Pacific Island students. Amaltal, a fishing company, objected on behalf of some ineligible students.⁸⁸ The court established that the Polytechnic needed to turn its mind to its obligations under the Human Rights Act. The Complaints Review Tribunal in obiter statements referred to the need to look at the aspirations of the "appropriately qualified (in this case) young Maori and Pacific Islanders who aspired to either (a) undertake the fishing cadet course or (b) make careers in the fishing industry."⁸⁹ "It could then be determined on the balance of probabilities, whether those persons need or might reasonably be supposed to need, assistance or advancement in order to achieve an equal place with other members of the community with similar aspirations."⁹⁰

The requirements from *Amaltal* are therefore not particularly burdensome, the decision maker needs to consider whether or not the target group *needs* assistance. This could be achieved through statistical information demonstrating the under-representation of the target group in the particular field or course.

The Human Rights Act does not require *proof* of past discrimination, in this respect it conforms to Article 1(4) of CERD. However the Act does not expressly prohibit the creation of "separate rights" nor does it require the measures to discontinue after they have met their objectives. Although as to the latter point, the section is phrased in such a way and *Amaltal* has interpreted it as such, that special measures have to be needed, so

⁸⁶For the full text of section 73 see Appendix F.

⁸⁷*Amaltal Fishing Co Ltd v Nelson Polytechnic (No 2)* (1996) 2 HRNZ 225, 245.

⁸⁸Above n 87, 245 When the case came to a hearing stage at the Complaints Review Tribunal, the Polytechnic simply did not submit evidence as to the requirements of section 73. Hence it lost the case on evidential grounds, it was not as some commentators argued, the end of affirmative action in New Zealand.

⁸⁹Above n 87, 246.

⁹⁰Above n 87, 246.

when they are no longer needed and equality has been achieved, they are no longer allowed. New Zealand's section on "special measures" and its judicial interpretation of the provision stress the same standards as international legal definitions of affirmative action. However the actual implementation of affirmative action in New Zealand is still an area of concern.⁹¹

The Bill of Rights also allows some form of affirmative action under s. 19(2)⁹² which sets stricter requirements than the Human Rights Act because there has to be past discrimination and a causal link between the disadvantage and the discrimination. The criteria established in the Bill of Rights Act certainly creates a higher threshold than that required by CERD.

It is yet to be determined how these Acts actually relate to each other, because *Amaltal* was argued simply on the Human Rights Act. It is interesting to note however, that New Zealand's Human Rights Act in regard to "special measures" are very broad, however it is highly doubtful that the courts would interpret these Acts to give the kind of scope which is allowed and indeed enforced in Malaysia.

International law therefore allows, or rather mandates "special measures" in order to achieve the equal enjoyment of human rights and fundamental freedoms. These special measures are to be undertaken to meet the objective of substantive equality of opportunity. New Zealand is one signatory to CERD which has specifically implemented laws to incorporate the international covenant into domestic law.

⁹¹CERD GA 18 A/50/18 p. 70. The Committee in its final report on New Zealand's 11th Periodic Report to the Committee (CERD/C/239/Add. 3) noted that "While the policy and special programmes to improve the situation of Maori, Pacific Island and other ethnic minorities are commended, the existing social and economic disparities between the Maori and Pacific Islanders on the one hand and the Pakeha in New Zealand continue to be a *matter of concern*." (emphasis added).

⁹²The New Zealand Bill of Rights Act 1990 s. 19(2). Under this section, the court has to examine (i) whether the group is disadvantaged; (ii) whether there has been past discrimination against the group, and (iii) whether the disadvantage was produced as a result of this discrimination. See PT Rishworth "Human Rights and the Bill of Rights" (1996) 3 NZLR 298, 322.

IV MALAYSIA - THE BACKGROUND

This section on Malaysia is divided into three sections. The first examines the situation at Independence and its effect on the affirmative action policies which followed. The second examines the background to the Constitution of 1957 and the third examines the change brought about by the 1969 Riots; a turning point in Malaysian history.

A The Colonial Legacy

Through most of the seventeenth and eighteenth centuries the native states of the Malay Peninsula had remained disunited and marred by inter state hostilities. It was only towards the end of the eighteenth century that the British attempted to establish a foothold in the Peninsula.⁹³ The British assumed effective and complete control over the entire country but for the sake of appearance, they maintained a separate but powerless Malay administration.⁹⁴

The legacy of colonialism which had a direct influence on affirmative action in Malaysia can be summarised by several key points:

- The British upon assuming control of Malaysia, immediately imported large quantities of Chinese and Indian labour to help exploit the resources of the country.⁹⁵ In effect, the British *created* a plural society and through its policies of separation maintained an unintegrated and intensely ethnically divided country.⁹⁶
- The British attempted to pacify any resistance to their colonisation by “protecting” the Malays. This protection was in the form of allocating the Malays a “special position” or a form of preferential treatment. This special treatment was based on the idea that the Malays were *Bumiputra* or Sons of the Soil and that Malaysia was the Land of the Malays or *Tenah Melayu*.⁹⁷ This special position involved granting the Malays:⁹⁸
 1. Special reservation of land
 2. Quotas for admission to the public services.
 3. Quotas in respect of the issuing of permits or licenses for the operation of certain businesses.

⁹³R Vasil *Politics in Bi-racial Societies: The Third World Experience* (Vikas Publishing House Limited, New Delhi, 1984) 28-33.

⁹⁴Above n 93, 32.

⁹⁵S Schlossstein *Asia's New Little Dragons: The Dynamic Emergence of Indonesia, Thailand and Malaysia* (Contemporary Book Inc., Chicago, 1991) 224. By 1900, Chinese made up nearly a third of the total population while Tamils accounted for ten percent of the population.

⁹⁶The British policy of “divide and rule” extended to the physical separation of the ethnic groups through laws which prevented Non Malays from securing land in Malay villages through purchase or lease. See above n 93, 51.

⁹⁷RK Vasil *Ethnic Politics in Malaysia* (Radiant Publishers, New Delhi, 1980) 8.

⁹⁸Above n 97, 42

4. Preferential treatment of certain classes of scholarships, bursaries and other forms of aid for educational purposes.

- The British also “protected” the majority of Malays by encouraging them to maintain their subsistence existence and therefore failed to equip them with the skills to deal with urbanisation and industrialisation.⁹⁹ This protection resulted in massive ethnic disparities between the Non-Malays and Malays. For example, as regards aggregate individual incomes for the year 1957, the average annual income per head in Malaysian dollars for the Malays was 359 dollars, for Chinese 868 dollars and for Indians 691 dollars.¹⁰⁰ These disparities were further evident in the compartmentalisation of occupation on ethnic terms.¹⁰¹
- Another key outcome of British colonialism was the mass underdevelopment of the infrastructure and industry outside the areas of resource exploitation such as tin and rubber.¹⁰² This underdevelopment extended to human related resources as well, in terms of education and specifically rural development. There was considerable rural and by implication Malay poverty. Many areas remained inaccessible by roads, without electricity, water supplies and modern health facilities.¹⁰³
- Education was not an area the British emphasised except for the benefit of the Malay elites. There were therefore minimal facilities at the urban level and even fewer at the rural level.¹⁰⁴ At the time of Independence there was only one university, in which in 1965-1966, 25 percent of students were Malay, 59 percent Chinese, 14 percent Indian and Ceylonese and 2 percent others. Chinese students dominated in all courses apart from Arts.¹⁰⁵

The effect of British colonisation on Malaysia by Independence in 1957 was immense. The country was not only facing underdevelopment and mass poverty but also what could be termed ethnic segregation.¹⁰⁶ This segregation proved to be problematic for the long term stability of the country because of the clear ethnic disparities and inequalities between Malays and Non-Malays. Affirmative action then has its roots in this British concept of “protection” for Malays, and it was the policies and ramifications of colonialism which propelled the continuance and indeed the entrenchment of affirmative action in Malaysia.

⁹⁹Above n 93, 191.

¹⁰⁰Above n 97, 8. (Refer Appendix A for the full details).

¹⁰¹Refer Appendix B for full details.

¹⁰²J Faaland *Growth and Ethnic Inequality: Malaysia's New Economic Policy* (C. Hurst and Co. Publishers Limited, London, 1990) 41

¹⁰³Above n 102, 42.

¹⁰⁴JE Jayasuriya *Dynamics of Nation Building in Malaysia* (Associated Educational Publishers, Colombo, 1983) 77.

¹⁰⁵Above n 104, 79.

¹⁰⁶Above n 93, 51

B The 1957 Constitution - The Background

The Malaysian Constitution is important for several respects, first, it is the supreme law of the country and secondly, the special position and its related provisions in the Constitution provide the symbolic, if not the legal power for the affirmative action policies which eventuated. This section provides a brief background to the Constitution, in order to understand the *context* in which the Constitution developed and how the affirmative action provisions came to fruition.

The constitutional arrangement that developed in Malaysia was part of a "quid pro quo" agreement, or what was to become known in Malaysian politics as "the Bargain" between the three main ethnic parties.¹⁰⁷ These political parties included the United Malay National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC).¹⁰⁸ By 1954, the Ethnic parties had united under the banner of "the Alliance," however because of the greater number of Malay voters, it was UMNO dominated.¹⁰⁹

Non-Malays gained through this "bargain" more flexible laws relating to citizenship,¹¹⁰ and although not explicit in the Constitution, a guarantee that they could continue to play a dominant role in the economy without state interference.¹¹¹ The Malays in turn gained political paramountcy, the designation of Islam as the official religion and Malay as the official language as well as the "special position" provisions.¹¹² This agreement was designed to facilitate short term political stability, while the long term goal remained *equality* in all spheres of life.

To a significant extent, in respect of form, the "special position" provisions were a continuation of the British policy, however they were reproduced in the Constitution not because of the indigeneness of the Malays but rather because of the extent of Malay underdevelopment.¹¹³ Malay underdevelopment and the resulting ethnic disparities were considered a barrier to long term stability and unity, therefore these *transitional* measures were needed to bring the Malays to a level of *parity* with the other ethnic groups.¹¹⁴ The difficulty though, was that the Malay leaders *sold* the Constitution to the Malay people on the basis of paramountcy and indeed on the face of it Article 153 was evidence of this.¹¹⁵

¹⁰⁷RS Milne and D Mauzy *Politics and Government in Malaysia* (Federal Publications Limited, Singapore, 1978) 38

¹⁰⁸Above n 107, 38.

¹⁰⁹Above n 107, 39.

¹¹⁰See RK Vasil *Ethnic Politics in Malaysia* (Radiant Publishers, New Delhi, 1980) 34-38 for a full discussion on the change in citizenship laws.

¹¹¹Above n 110, 47.

¹¹²Above n 107, 39.

¹¹³K Tan *Constitutional Law in Malaysia and Singapore* (Butterworths Legal Publishers, Singapore, 1991) 624.

¹¹⁴Above n 110, 47.

¹¹⁵Above n 93, 19.

C *The 1969 Riots And Its Aftermath*

1 *The 1969 Riots*

The period between 1957 and 1969 was marked by moderation in respect of politics and affirmative action.¹¹⁶ However the 1969 General Elections proved to be a significant watershed mark for Malaysia's future. The results of the 1969 election gave the impression that Malay political power was under threat - the Alliance declined from 60 percent to less than 50 percent of the national vote and eventually collapsed when MCA withdrew its support.¹¹⁷ There was an indication that many of the Malays and Chinese were feeling disillusioned with the lack of fulfilment in terms of the "bargain" and voted for opposition parties.¹¹⁸ Mostly Chinese opposition parties held victory rallies in Kuala Lumpur to celebrate; many Malays felt this was unnecessary agitation. Racial taunts intensified from both sides and heavy communal violence erupted. Hundreds were killed in the worst violence since Independence.¹¹⁹

The cause of the Riots are of course multi-faceted and it would be simplistic to attempt to reduce the roots of the cause to one factor. However the Malay leaders focussed on: (a) the failure of the "bargain" which led to extensive resentment on all sides, and (b) the widespread economic problems of the Malays.¹²⁰

The 1969 Riots marked a change for Malaysia as a whole and for affirmative action. 1969 signalled the end of what, in the context that followed, could be considered "moderate" politics and "moderate" affirmative action. The post-1969 period increasingly exhibited signs of decreased democracy, the entrenchment of Malay political paramountcy and intensifying affirmative action policies aimed not at parity but at domination.¹²¹

2 *The constitutional changes*

The 1971 Constitutional Amendment Act was based on two broad objectives: (1) to remove sensitive issues from the realm of public discussion and (2) to correct racial

¹¹⁶MH Lim "Affirmative Action, Ethnicity and Integration: the case of Malaysia" (1985) 8(2) *Ethnic and Racial Studies* 250, 257. Affirmative action during this period was fairly restrictive. The government concentrated on the use of quotas in public service employment. In respect of education, there was liberal use of scholarships and the beginnings of Malay only institutions however the University of Malaya remained Non-Malay dominated. Private industry proved to be a difficult area for the government, and many of the measures at this time consisted of the state (as opposed to private Malays) playing an active role in acquiring ownership of companies and businesses. The granting of business licences in preference for Malays allowed in Article 153 proved to be ineffective because the Malay licensee would often resell the licence to a non-Malay and continue to be a "front" for the business.

¹¹⁷Above n 95, 226.

¹¹⁸Above n 95, 227.

¹¹⁹Above n 110, 190.

¹²⁰Above n 110, 190-191.

¹²¹M Ong "Malaysia: Communalism and the Political System" (1990) 31(2) *Pacific Viewpoint* 73, 78.

imbalances in certain sectors of the nation's life.¹²² The Amendments sought specifically: (1) to empower Parliament to pass laws prohibiting the questioning of the constitutional provisions relating to the National Language, Special Position of Malays, sovereignty and status of the Malay Rulers, and citizenship; (2) to remove immunity from judicial proceedings enjoyed by members of Parliament and state assemblies with regard to what they said in the legislatures, and (3) to vest the Yang Dipertuan Agong with the power to direct any university or college or post-secondary national institution to reserve for Malays and other natives certain proportion of places in selected courses of study.¹²³

The Constitutional Amendment meant that the "principle" of the Special position of the Malays could not be questioned while its implementation could be. This difference however may be relegated to semantics considering the strong position of the Malay leaders and the powers they have available to silence any critics; for example the Sedition Act 1948 and the Internal Security Act 1960.¹²⁴

3 New Economic Policy

To resolve the economic problems which the Malays faced, the Government developed a long term plan known as the New Economic Policy (NEP). The NEP had two main objectives:¹²⁵

(1) The eradication of poverty regardless of race, although the Malays would be most affected by this objective;

(2) To correct the ethnic imbalances in society. One such express target would be to achieve a 30 percent Malay share in publicly listed companies by 1990. Eventually the stated aim would be to eliminate the identification of ethnicity with occupation or socio-economic status leading to national unity.

The NEP was not limited to economic restructuring alone; it was aimed at restructuring society and therefore had a substantial impact on education as will be illustrated in the next section.

¹²²TM Suffian *The Constitutional of Malaysia: It's Development 1957-1977* (Oxford University Press, Kuala Lumpur, 1978) 379.

¹²³Above n 122, 379-380.

¹²⁴Above n 122, 380.

¹²⁵Above n 102, 12.

V THE LAWS IN RESPECT OF AFFIRMATIVE ACTION IN MALAYSIA

The original provisions of the Constitution regarding the "special position" of the Malays was partly based on the idea of compensation; compensation for colonial neglect and discrimination.¹²⁶ However with the Riots came a change in emphasis; the NEP and the affirmative action programmes that followed in education, stressed the belief that ethnic conflict resided in economic disparities. This mindset held that conflict was a product of ethnic differences and harmony would occur once there was established proportional representation of groups in all levels in society.¹²⁷ Therefore, the Malay leaders rested their affirmative action policies on a distributive theory of society, whereby all benefits and burdens should be shared equally emphasising "group" rather than individual rights. This vision of equality was believed to be appropriate for Malaysia where everything is communal or interpreted as such.¹²⁸

The Malay leaders also found justification for their actions in the social utility theory in that the greater social good would be harmony and unity. The cost would be a temporary burden on the Non-Malays whereby they would have to accommodate "forced" Malay incorporation into the business, educational and corporate sectors. While these justifications may fail to live up to closer scrutiny it was these stated objectives which led to the introduction of Article 153(8A). From the implementation of their affirmative action style policies, it is questionable whether these aims were not submerged under an ulterior motive; that of the creation of *Tenah Melayu* where Non-Malays, would cease to possess any genuine political or economic power.

This section examines the legal foundation for the affirmative action policies in Malaysia, specifically those relating to higher education. Higher education in Malaysia is governed by the Universities and University College Act 1971 however it is the Constitution which is the key.¹²⁹

¹²⁶PL Ong "Ethnic Quotas in Malaysia: Affirmative Action or Indigenous Rights?" (1990) 18(4) Asian Profile 325, 326.

¹²⁷DL Horowitz *Ethnic Groups in Conflict* (University of California Press, Berkeley, 1985), 659. The idea of compensation was underplayed probably because it directly alluded to the fact that Non-Malays would be "compensating" Malays for the actions of the British. Whereas a distributive and social utility theory emphasised the overall benefits to society as a whole.

¹²⁸See RLM Lee "Symbols of Separatism: Ethnicity and Status Politics in Contemporary Malaysia" in RLM Lee (ed) *Ethnicity and Ethnic Relations in Malaysia* (Center for Southeast Asian Studies, Illinois, 1986, 28. Lee contends that there has been a shift in recent years from ethnic power issues to ethnic status issues. The questioning of the "Special Rights" of the Malays was effectively ended by the Riots of 1969, therefore the debate has been moved by the Malay and Non-Malay elites into status issues which do not threaten their respective positions of power.

¹²⁹The Universities and University Colleges Act section eight requires the constitution of a university to contain the provisions set out in the First Schedule of the Act. Section five of the First Schedule makes membership to the university open to all persons regardless of sex, race, and so forth however that is "subject to Article 153 of the Federal Constitution."

Article 153 under the General and Miscellaneous section allows the Yang Dipertuan (head of state) to:¹³⁰

[r]eserve for Malays (and other indigenous peoples)

any proportions that he deems reasonable of

(a) positions in the public service,

(b) scholarships, exhibitions and other similar educational or training privileges,

(c) permits or licences for the operation of trade or business.

This provision is very wide in the discretionary power it grants to the Yang Dipertuan Agong; it is whatever he/she deems "reasonable."¹³¹ The scope of Article 153 is fairly narrow in that it is restricted to certain spheres of activity, and in respect of education it only applies to scholarships, exhibitions and similar training facilities. However the Constitutional Amendment of 1971 added Article 153 (8A), which expressly allows the use of quotas in higher education.¹³² Article 153 (8A) allows the Yang Dipertuan Agong to reserve any quotas as he/she deems reasonable in institutions of higher education for Malays and other indigenous people.¹³³

Under fundamental liberties, equality is guaranteed in Article 8 (1) "All persons are equal before the law and entitled to the equal protection of the law." And under article 8(2) "Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the grounds only of religion, race, descent or place of birth..."¹³⁴ However both Article 153(2) and Article 153(8A) make Article 8 expressly subject to its provisions by the phrase "Notwithstanding Anything in this Constitution" which prefaces the two provisions.¹³⁵

Article 153(8A) legitimises the use of quotas in higher education however it should be read in conjunction with Article 12 of the Constitution which prohibits discrimination in the administration of any educational institution.¹³⁶ The interesting issue arises therefore of how to reconcile these two articles in the Constitution. Article 153 (8A) may state "Notwithstanding anything in this Constitution," however it is against the provisions of Article 12 to actually refuse admission to any student of a particular race. Article 153 (8A) allows a proportion of places to be reserved for Malays to help them gain places in specific courses where Malay numbers were small.¹³⁷ In the case of

¹³⁰LA Sheridan and HE Groves *The Constitution of Malaysia* (Malayan Law Journal Pte. Limited, Singapore, 87), 407. See Appendix D for the full text of Article 153.

¹³¹Above n 130, 407. Article 153 is entrenched and there is no mechanism apart from the Courts to challenge it.

¹³²See Appendix D for the full text of Article 153(8A).

¹³³Above n 130, 409-410.

¹³⁴Above n 130, 56.

¹³⁵Above n 130, 409-410.

¹³⁶Above n 130, 76.

¹³⁷Dato V Sinnadurai "Rights in Respect of Education under the Malaysian Constitution" in FA

Malaysia, when the quotas are set at very high levels, it could be said the real difference becomes one of semantics. A university may not be refusing to grant admission to a student because they are Non-Bumiputra, however because of the setting of such high quotas for the majority of the courses, the *effect* is that many Non-Bumiputras are in fact excluded from the university.

The domestic laws in Malaysia in respect of higher education certainly allow for affirmative action and indeed according to the Constitution it is for an indefinite period of time. There seems to be little legal limitation to this power, however it is important to remember the spirit of the Constitution and Article 153; that it was a transitional agreement designed to achieve *parity*. The Spirit of a Constitution on its own however cannot be upheld in a court of law against such widely formulated Constitutional laws.

In the 1970s, the government placed significance emphasis on the lack of graduates in science, engineering, agriculture and medicine. As part of implementing the quota system, the government lowered the academic admission standards for certain courses for Bumiputras.¹³⁹ The effect was that in 1977, 74.9 percent of new students accepted into the five local universities were Bumiputras, 19.9 percent were Chinese and 5.2 percent Indian and others.¹⁴⁰

The target share in the 1970s for new entrants into universities was set at 75 percent Bumiputra, it was adjusted in theory at an annual rate until it was stabilized at 55 percent since 1980s. (This would roughly reflect the population composition). However it was not clear, to what extent quotas refer to total student population or only to enrolment at institutions which admit all types of students.¹⁴¹ The official statistics for the 1985 enrolment show that 49 percent of students were Bumiputras, 41 percent Chinese and 10 percent others.¹⁴² However, these statistics are misleading because they in fact relate to the total student population in higher education institutions, both public and private, both home and abroad. That is, they include all those excluded from the domestic education system due to affirmative action. They include the thousands of Chinese students who have sought education from overseas institutions. At public institutions in Malaysia, in total, 79 percent of those enrolled were Bumiputras, and at the diploma level alone - 98 percent in 1985 were Bumiputras.¹⁴³

Unfortunately, there is no evidence of any recent research in respect of quotas, officially the government is still operating a 55-45 ratio, Bumiputra to Non-Bumiputra.¹⁴⁴ Yet

¹³⁹ P. J. P. "Student Selection and Admission to Higher Education: Policies and Practices in the Asian Region" (1994) 27 Higher Education 315, 325.

¹⁴⁰ H. C. "Government and Society in Malaysia" (Cornell University Press, Ithaca, 1996) 163. For example, the cut off score in 1978 for Bumiputras in Arts was 76 compared with 44 for Non-Bumiputras. In the Sciences, Non-Bumiputras scored 51, while Bumiputras with a marginal plus were accepted.

¹⁴¹ *Ibid.* 164.

¹⁴² *Ibid.* 164.

¹⁴³ T. "Transition to a Racially Diverse Faculty: Discrimination in Higher Education in Malaysia: Has it reduced inequality and a step towards equality?" (1991) 11(3) International Journal of Educational Development

Trindade and HP Lee (eds) *The Constitution of Malaysia: Further Perspective's and Development* (Oxford University Press, Singapore, 1986) 46, 50

VI HIGHER EDUCATION

Higher education was, and still is, only one element in the New Economic Policy, however it is an area which, inherently assumes importance in respect of upward mobility and is continually emphasised as vital by the Government. Higher education in Malaysia consists of various universities, vocational schools, teachers training colleges, polytechnic and other institutions of both a private and public nature.¹³⁸

A Forms of Affirmative Action in Higher Education

1. Quotas

In the 1970s, the government placed significance emphasis on the lack of graduates in science, engineering, agriculture and medicine. As part of implementing the quota system, the government lowered the academic admission standards for certain courses for Bumiputras.¹³⁹ The effect was that in 1977, 74.9 percent of new students accepted into the five local universities were Bumiputras, 19.9 percent were Chinese and 5.2 percent Indian and others.¹⁴⁰

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Unfortunately, there is no evidence of any recent research in respect of quotas, officially the government is still operating a 55 : 45 ratio; Bumiputra to Non-Bumiputra.¹⁴⁴ Yet

¹³⁸G Harman "Student Selection and Admissions to Higher Education: Policies and Practices in the Asian Region" (1994) 27 Higher Education 313, 325.

¹³⁹H Crouch *Government and Society in Malaysia* (Cornell University Press, Ithaca, 1996) 163. For example, the cut off score in 1978 for Bumiputras in Arts was 36 compared with 44 for Non-Bumiputras. In the Sciences, Non-Bumiputras needed 54, while Bumiputras with a minimal pass were accepted.

¹⁴⁰Above n 139, 163.

¹⁴¹Above n 139, 164.

¹⁴²Z Tzannatos "Reverse Racial Discrimination in Higher Education in Malaysia: Has it reduced inequality and at what cost to the poor?" (1991) 11(3) International Journal of Educational Development 177, 183-184.

¹⁴³Above n 142, 183-184. See Appendix G for the full details.

¹⁴⁴Above n 142, 184.

there is little reason to suspect that the affirmative action quotas have abated since the mid 1980s.

2. Bumiputra only educational facilities

The New Economic Policy, specifically in respect of education, has witnessed increased spending by the government in expanding universities and in the development of Bumiputra only facilities. The MARA Institutes of Technology (MIT) are exclusive to Bumiputra at tertiary level; the courses in these institutes range from certificates and diplomas to degrees and doctorates. Also as part of the drive for an improvement in science, the government established several MARA Junior colleges of Science which provide at a secondary school level, preparation for higher education in science. These colleges are also open to Bumiputra only.¹⁴⁵

It is certainly arguable as to whether these institutions violate the right to education (free from discrimination in terms of admission) under Article 12 of the Constitution or the right to equality under Article 8. Article 153 only allows for the reservation of places in courses, it does not allow for the discrimination in respect to admission on the grounds of race. It certainly does not allow for the establishment of institutions solely for one ethnic group. This has yet to be challenged in the courts in Malaysia and it is highly unlikely that this would occur considering the extent and reality of Malay political power. If these educational establishments had been challenged, the government could either open them up to the extent that public universities are open to Non-Malays or alternatively amend the Constitution. Indeed the Constitution has been amended so many times that Mahathir himself has called it a "useless scrap of paper."¹⁴⁶

3 Scholarships, awards and bursaries

Article 153 refers specifically to the granting of a proportion of scholarships, exhibitions and other similar educational or training privileges as the Yang Dipertuan Agong deems reasonable.¹⁴⁷ The Malaysian government in this regard has embarked on a massive programme of awarding and spending. Government agencies are involved in the awarding of scholarships, grants fellowships and low or zero interest loans especially for Bumiputra students studying overseas.¹⁴⁸ In 1983, it was estimated that 17,000 Malaysian students, the majority being Bumiputra, were studying abroad through government sponsorship (contrasted with many Chinese students who study abroad at their own expense).¹⁴⁹

¹⁴⁵Above n. 142, 182.

¹⁴⁶Above n 121, 84.

¹⁴⁷Section 47 of the Universities Constitution states that students who have been awarded these federal scholarships and grants shall not be refused admittance into a university. See V Selvaratnam "Ethnicity, Inequality and Higher Education in Malaysia" [1988] *Comparative Education Review* 173, 177.

¹⁴⁸Above n 147, 187.

¹⁴⁹Above n 147, 187.

4. Language issues and alternatives for non Bumiputras

The enforcement of Bahasa Malaysia as the only medium of instruction for state schools and institutions and the large scale use of quotas and other affirmative action policies led to many non Bumiputra seeking out alternatives to the state-funded education system.¹⁵⁰ This trend in the 1970s has led to the revival of independent Chinese high schools and to sending children overseas for tertiary education. These avenues however are privately funded, and therefore not open to many Non-Bumiputra students who fail to gain access to state funded education especially at the higher education level. In the late 1980s, this preference for overseas education led to a proliferation of English medium private colleges preparing mainly Chinese students for entrance examinations to foreign universities.¹⁵¹

The Constitution provides that Malay is the official language of Malaysia, however no provision in the Constitution or in any legislation provides that the language in educational institutions should be Malay. Yet the National Educational Policy has from the 1970s enforced all public schools and universities to make the transition to Malay as the medium of instruction.¹⁵²

The establishment of a private Chinese Merdeka University was first presented in 1967, however it lay dormant for several years until the late 1970s when increasing controversy surrounding higher education quotas was prominent.¹⁵³ Many Chinese and Non-Bumiputra were unable to gain admission to the state universities because of the high proportion of applicants compared to places and because of the heavy quota system in many courses. The government refused to grant approval for the establishment of the university which was to use Chinese as the medium of instruction. The government rested its decision on the basis that the establishment of this university would offend the National Education Policy.¹⁵⁴ The sponsors of the university challenged the government decision by bringing the case to court in *Merdeka University Berhad v Government of Malaysia*.¹⁵⁵ The High Court examined Article 152 - the "National language provision; (a) no person shall be prohibited or prevented from using (otherwise than for official purposes) or from teaching or learning another language."¹⁵⁶

The High Court found that, first, an official purpose would include the medium of instruction in a university, therefore only Malay could be used as the medium of instruction, and secondly, that such a university (Merdeka) would be against the National Education Policy of the country.¹⁵⁷ These findings are highly questionable however, the Constitution defines "official purposes" to include the conduct of the government or public authorities, however teaching, writing and so forth in the context of a university

¹⁵⁰ Above n 139, 162.

¹⁵¹ Above n 139, 162.

¹⁵² Above n 137, 54.

¹⁵³ LK Wah "The Socio-economic basis of ethnic consciousness: The Chinese in the 1970s" in H Ali (ed) *Ethnicity, Class and Development in Malaysia* (Persatuan Sains Sosial Malaysia, Kuala Lumpur, 1984) 93, 97-98.

¹⁵⁴ Above n 130, 400.

¹⁵⁵ [1982] 2 M.L.J. 243.

¹⁵⁶ Above n 130, 400.

¹⁵⁷ Above n 155, 254.

(public or otherwise) should not really be considered "official."¹⁵⁸ Secondly, the National Educational Policy, is only a policy, it is not the law of the country. The Court seemed to believe that the policy had been implemented in legislation,¹⁵⁹ however the Education Act of 1961 does not provide that Malay shall be the medium of instruction in universities.¹⁶⁰

The High Court in the *Merdeka* applied Article 152 very restrictively, and in doing so prevented yet another attempt by Non-Malays to gain access to higher education in Malaysia where quotas, scholarships and Malay only institutions had resulted in Malay *paramountcy* rather than parity in publicly funded higher education.¹⁶¹

B An Assessment of the Government policies in Higher Education

It is evident that the combination of government practices and policies at higher education greatly favoured Bumiputra over Non-Bumiputra. As a consequence Bumiputra participation at the higher level has increased since 1957. Statistically speaking, the relative success of educational policies are reflected in the increasing proportions of Bumiputra in the professions.¹⁶² Higher education has provided many Bumiputra with the vehicle to succeed and with the opportunities to reduce the ethnic disparities between the groups and the identification of vocation with ethnicity.

Social Utilitarian justifications of affirmative action theories contend that the advantages of affirmative action lie in the concepts of diversity and role models. There is indeed greater diversity because of the increased number of Bumiputra students in higher education. Another positive outcome postulated by advocates of affirmative action in Malaysia is the relative political stability of the country. Yet this political stability has in many ways come at considerable cost.

One major cost of these affirmative action policies is the continued reproduction and maintenance of intra-ethnic socio-economic disparities. Suet Ling Pong conducted an examination on the effects of Malaysia's preferential education by using data collected from the 1988/89 Malaysian Family Life Survey. In respect of post secondary education, the author found that the gap between white collar Malay children and Malay

¹⁵⁸Above n 137, 55.

¹⁵⁹Above n 155, 249.

¹⁶⁰Above n 137, 56.

¹⁶¹See WK Hastings *The Right to an Education in Maori: The case from International Law* (The Institute of Policy Studies, Wellington, 1988). Hastings discusses the obligations imposed on States by international covenants such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) in terms of minority protection. Specifically, he contends that international law provides a "collective right to use a minority language" (in the context of Malaysia- Chinese) and as a minimum, a state must allow "privately funded schools where the instruction is in the minority language provided such instruction meets national standards." See Hastings, 38 and the CESCR article 13(4).

¹⁶²Above n 139, 188. From 1970 - 1990, the proportion of Bumiputra among doctors increased from 4 to 28 percent, in dentistry from 3 to 24 percent, in architects from 4 to 24 percent, engineers 7 - 35 percent and accountants 7 to 11 percent

children from other social class backgrounds persisted over time.¹⁶³ This class and urban bias was further reflected in a sample of scholarship and bursary awards by the government. For every chance that the poor Bumiputra household has for an award, the rich Bumiputra household has 21 chances.¹⁶⁴ Intra ethnic disparities for Bumiputra in education have remained if not exacerbated since the 1970s.

Another criticism of these preferential policies has been the cost in terms of student performance. One commentator has cited a sample of students from technical high schools and found that in the Lower Certificate of Education, 91.7 percent of Non Malays scored 3.4 or better (the highest being 1.0) while only 34.3 percent of Malays scored that same grade.¹⁶⁵ While this is only one sample in one high school, the supposed cost in student performance has also been linked to cost in respect of lowering the educational quality of institutions.¹⁶⁶ However one can only speculate in this regard. These arguments of "lowered standards" are often advanced by opponents of affirmative action, however in the context of social utilitarian justifications, this is only one factor to considered.

Some commentators have cited the economic cost of these preferential policies in education. The increased enrolment abroad has led to the massive outflow of foreign exchange paid by the government, its agencies or families of students.¹⁶⁷ And it has also encouraged the emigration of students, especially Non-Malays, who study abroad. The growth of government expenditure in overseas education may mean less of a commitment to domestic education; resulting in declining staff student ratios, declining investment in education and declines in the quality of education again.¹⁶⁸

Another possible consequence of the kind of large scale affirmative action policies in higher education that Malaysia has implemented (especially in light of the Merdeka University controversy) may be the increase in ethnic tension, alienation and resentment felt by the Non-Bumiputra. There is certainly little "integration" or ethnic understanding being created in the context of a segregated education system.¹⁶⁹ However, many Non-Bumiputra from higher and middle class backgrounds have managed to find an alternative route to higher education which may have offset some of the ethnic tensions and costs to the government and society. However, those who gain the least (as is often the case) are the Non-Bumiputra from low socio economic backgrounds who may not

¹⁶³ SL Pong "Access to Education in Peninsula Malaysia: ethnicity, social class and gender" (1995) 25(3) Compare 239, 246-247. MARA junior science classes were established with the aim of assisting students from low socio economic and rural backgrounds for eventual enrolment at higher education. It is interesting to note that 63 percent who were enrolled in 1988 were from a widening circle of middle and professional classes and that there was in fact an urban bias in selection.

¹⁶⁴ Above n 147, 192.

¹⁶⁵ Above n 127, 662.

¹⁶⁶ Above n 127, 662.

¹⁶⁷ KS Jomo *U - Turn? Malaysian Economic Development Policies After 1990* (James Cook University of North Queensland, Brisbane, 1994) 12

¹⁶⁸ Above n 167, 13.

¹⁶⁹ See above n 126, 331. Ong conducted a survey of 121 Malaysian students (59 being Malay and 69 Chinese) who were studying in Britain in the late 1980s. He found that 98 percent of Chinese students and 67 percent of Malay students believed that "special rights" were the most important cause of ethnic tension in Malaysia.

gain access to higher education because of preferential policies and who cannot afford the alternative - private education.

Some commentators in examining the overall New Economic Policy have referred to a "rent seeking" or "dependency" mentality developing amongst Bumiputra. It is a concern that these affirmative action policies in all areas of society have become a "crutch" for many Bumiputra. These policies may in fact lead to under development and under achievement because Bumiputra *expect* preferences and special treatment therefore the desire to succeed on merits alone may diminish.¹⁷⁰

In respect of higher education, it is evident that there are costs involved, as there are in any affirmative action schemes. However it is also evident that there has been success, though it may be relative. It is important to remember that higher education was merely one element in an overall scheme to resolve the complex problems facing a ethnically diverse and divided society.¹⁷¹ One of the justifications for affirmative action in Malaysia was the creation of a united and harmonious society, yet it is evident, that this is far from the current reality. There may now be outward political stability however its existence is dependent on the subjugation of some groups in society at the hands of others. The "distributive theory" of equality in terms of higher education is merely an illusion created by statisticians who rely on public and private institutions of higher learning both in Malaysia and overseas. And indeed a "distributive theory of equality" perhaps does not fully address the issue of intra-group inequalities.

In recent years, it is evident that Mahathir has relaxed his stance in respect of quotas and greater affirmative action. Many political commentators have noticed a more liberal and pragmatic approach by the Malay leaders to the role of Non-Bumiputra in the country.¹⁷² The New Development Policy which replaced the New Economic Policy in 1990, still maintains the use of affirmative action however the emphasis is very much on economic growth and the establishment of a free standing Malay economy.¹⁷³ This is linked with Mahathir's "Vision 2020," this programme aims for Malaysia attaining the status of a fully industrialised country by the year 2020. Linked to Vision 2020 is the aim of a true *Bangsa Malaysia* or Malaysian nation. (As opposed to Tanah Melayu or the Land of the Malays).¹⁷⁴

¹⁷⁰ R Ramasamy "Racial Inequality and Social Reconstruction in Malaysia" (1993) 28 (3-4) Journal of Asian and African Studies 217, 226.

¹⁷¹ See Above n 167, 16. The New Economic Policy has been heralded a conditional success by many commentators and a complete failure by many others. In terms of poverty reduction, there is considerable dispute over the figures, however it is evident there has been considerable poverty reduction. It declined to 17 percent by 1989. In terms of business, Bumiputra share in publicly listed companies stood at 20.6 percent in 1995. See Above n 127, 666-671. A great deal of the impact of affirmative action policies in the business and corporate sector has been offset by the ability of many non Bumiputra to accommodate Bumiputra interest and the continuing expanding Malaysian economy. And many of the preferences in employment have been implemented in a more "relaxed" and less rigid way, although this should not diminish the considerable impact they have had on Malaysia and especially the non Bumiputra.

¹⁷² S Jayasankaran "Unwritten Rule" (1996) March Far Eastern Economic Review 20, 21.

¹⁷³ Economist Intelligence Unit *Country Profile of Malaysia 1996-97* (Economist Intelligence Unit, London, 1997) 4.

¹⁷⁴ TN Harper "New Malays, New Malaysians" [1996] Southeast Asian Affairs, 238, 242-243.

VII MALAYSIA AND INTERNATIONAL LAW

A The Application of International Law Standards

This next section analyses the extent to which Malaysia's affirmative action policies and laws in respect of higher education conform to international standards or definitions of affirmative action.

I would contend that the implementation of extensive quotas, scholarships and Bumiputra only facilities fail at first instance because the *sole* purpose of these policies as I have postulated involved the establishment not of "equal enjoyment" but paramouncy. Indeed it could well be substantiated that these measures have led to the maintenance of separate rights for the Bumiputra based on their "indigenoussness" certainly in respect of higher education. Many commentators contend that indigenoussness in Malaysia has been used as a platform to stake, not an equal, but rather priority claim to the country.¹⁷⁵ The Bumiputra in Malaysia are granted special rights in respect of higher education, the corporate sector and in employment, perhaps it is the combination of these special rights which constitute a form of "separate rights" prohibited at international law.

CERD affirms the temporary nature of "special measures," in Malaysia however the special measures are for an indefinite period of time and are not subjected to regular review by the government. These factors reinforce the idea that the "special position" of the Malays is a consequence of their standing as the indigenous people of the country. International law may recognise indigenous and ethnic rights, however this recognition is based on the idea of "protection" in order to achieve equality not paramouncy.¹⁷⁶

Leaving aside those strong contentions it is feasible to contend that the Bumiputra did indeed require measures to secure their advancement in respect of higher education at the time of Independence. However these measures must cease once substantive equality of opportunity has been achieved.

CERD has specifically sanctioned the use of quotas¹⁷⁷ however, not *all* quotas are sanctioned by the Committee. Sri Lanka is a country which is faced with a difficult "ethnic" situation. In terms of employment at a recruitment level in the public sector it has enacted a *proportional* method in respect of the various ethnic minorities in the population. For example, the proportion for the Sinhalese community is to be 75

¹⁷⁵Above n 126, 328.

¹⁷⁶A Addid "Individualism, Communitarianism, and the Rights of Ethnic Minorities" (1991) 67 Notre Dame L. Rev. 615. Specifically Article 2 of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) requires the State to take action to ensure that these people benefit on an 'equal footing' from the rights and opportunities... and assist peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members... See A Bloch "Minorities and Indigenous Peoples" in A Eide et. al. (eds) *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, Dordrecht, 1995) 309, 318.

¹⁷⁷Statement by Mr. Shahi CERD/CR/SR.796, p 257 "Statutes providing for equal opportunities in employment in the public services were not enough to overcome existing inequalities, and that it was sometimes necessary to take positive action, for example, by earmarking seats or jobs for specific categories of citizens."

percent of the total number of vacancies being 75 percent of the population of Sri Lanka.¹⁷⁸ However in the case of *Ramuppillai v AG* (1991 1 SLR 11), the Supreme Court of Sri Lanka found that promotions based on ethnic quotas violated the non-discrimination provisions of the Constitution.¹⁷⁹ Ethnic quotas in respect of Sri Lanka therefore are allowed in recruitment but not in promotions. One member of the Committee seemed to concur with the Supreme Court on this point and contended this type of ethnic quota was not covered by Article 1(4).¹⁸⁰

India is another country which operates various forms of quotas for scheduled castes and scheduled tribes. The constitution specifically allows for the reservation of places for the backward classes in the public service under Article 16 and the reservation of seats in the Lok Sabha and state legislatures for scheduled caste and tribes.¹⁸¹ India in effect has very wide discretionary laws in its Constitution similar to Malaysia. It is not however the laws themselves which are problematic but rather the use or perhaps misuse of those laws which create difficulties. The Committee in its report to the General Assembly noted that (in respect of India's Report), although social and educational policies had been adopted for the scheduled caste and tribes, it "regretted that certain communities do not enjoy representation in proportion to their size."¹⁸²

The use of ethnic quotas to achieve proportional representation, at least in respect of entrance, seems to be accepted. These quotas however, seem to be used to advance "ethnic minorities" who need protection, not an ethnic majority, and certainly does not sanction the continued maintenance of 80-90 percent entrance quotas for Malays in institutions of higher education considering they make up just over 50 percent of the population. Under CERD, these "special measures" must cease once the objectives for which they were created are met. If the stated objective is "equality" in Malaysia then the government should comply with these international law standards.

The reliance on proportionality by the Committee seems to point to a distributive theory of special measures and a particular vision of equality which postulates equality of outcome. Alternatively, proportionality may provide a means by which the Committee *measures* equality of opportunity having no other alternative to determine the extent of it in various state parties.

The UNESCO Convention against Discrimination in Education defines discrimination as any "distinction, exclusion, limitation or preference which... has the purpose of nullifying or impairing equality of treatment in education..."¹⁸³ Under this definition of discrimination, separate educational institutions are allowed if they meet the specific criteria established under Article 2.¹⁸⁴ However Malaysia's Bumiputra only facilities

¹⁷⁸CERD/C/234/Add.1 p. 6.

¹⁷⁹Above n 177, 6.

¹⁸⁰Statement by Mr. Chisovera CERD/C/SR.1079, 11-12.

¹⁸¹CERD/C/149/Add.11, 4-5.

¹⁸²CERD GA 18 A/51/18, 53-54.

¹⁸³Above n 84, 101.

¹⁸⁴Above n 84, 102. Article 2(a) allows for the maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education... 2(b) The establishment or maintenance, for religious or linguistic reasons of separate educational systems or insitituions offering an education... if attendance is optional and if the education..

do not fulfil the criteria of either being for separate sexes, for religious or linguistic reasons nor are they private institutions.¹⁸⁵ Malaysia could contend that these facilities are necessary for "religious or linguistic" reasons however the "medium of instruction" for all public education, as was established in *Merdeka*, is Malay. The religious argument also fails because Bumiputra include not only Muslim Malays but also indigenous Ibans and Kadazans who are either Christian or pagan.¹⁸⁶

In Part III, I examined the implementation of CERD in New Zealand domestic law under the Human Rights Act. The standards established by the Court in *Amatal* reiterate the idea that there has to be a *need* for the special measures to fall outside discrimination. That need arguably no longer exists in Malaysia. However without regular reviews and statistical evidence to show that inequalities still exist in higher education, Malaysia continues to unjustifiably enforce affirmative action policies.

The Committee has demonstrated that it will interpret the "special measures" provisions in CERD to incorporate ideas of proportionality in respect of "group" rights. It may be somewhat vague as to what crosses the boundary between discrimination and affirmative action however, I would postulate that Malaysia's current higher education policies which are indefinite, non-reviewable and utilise extensive quotas and Bumiputra only institutions would certainly transcend that boundary.

B Universalism and Cultural Relativity

Underlying the discussion on human rights and a states's possible breach of "international" human rights norms is the tension between the concepts of universalism and cultural relativism.

This section is concerned with Malaysia's defence of affirmative action policies rather than the theoretical discourse surrounding the various models and definitions of cultural relativism and universalism.¹⁸⁷ Cultural relativism can, for the sake of expediency, be defined in its simplest form as "the theory that there is indefinite cultural diversity and all cultures are equally valid."¹⁸⁸ There are therefore "no absolutes to judge one practice against another because the principles we use to judge behaviour are relative to the culture in which we are raised."¹⁸⁹ Universalist however contend otherwise, and

conforms to... standards... 2(c) The establishment or maintenance of private educational institutions, if the objective of the institutions is not to secure the exclusion of any group... "

¹⁸⁵Above n 84, 102.

¹⁸⁶JA Javan *The Ethnic Factor in Modern Politics: The Case of Sarawak* (Center for Southeast Asian Studies, Hull, 1991)47.

¹⁸⁷For a good discussion of the various types of cultural relativism and universalism, see J Donnelly "Cultural Relativism and Human Rights" (1984) 6(4) Hum. Rts. Q. and A Dundes Renteln *International Human Rights: Universalism Versus Relativism* (Sage Publications Inc., California, 1990).

¹⁸⁸K Brennan "The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study" (1989) 7 Law & Ineq. 367, 370.

¹⁸⁹Above n 188, 370.

believe that there are some standards which all cultures share.¹⁹⁰ And to a large extent, the covenants and instruments on human rights *reflect* these standards.¹⁹¹

In recent years, the issue of "Asian Values" and human rights has come to the forefront of the international stage. Some commentators have contended that to speak of "Asian Values" is ridiculous because the region is so diverse, however in the context of Southeast Asia, it is possible to identify some shared values.¹⁹² One key shared value is Communitarianism, "the concept that responsibilities to the family and the community take precedence over the rights of individuals."¹⁹³

Many members of ASEAN also speak of a common position on human rights. The Kuala Lumpur Declaration of Human Rights recognise human rights *but*:¹⁹⁴

accept that they exist in a dynamic and evolving context and that each country has inherent historical experiences and changing economic, social and cultural realities and value systems which should be taken into account.

This is of course a highly *relative* concept of human rights.¹⁹⁵ Advocates of universalism point to the lack of "fundamental freedoms" and authoritarianism in many Asian states. However Asian states in turn, contend that primacy should be given to economic development and political stability at whatever cost. At the foundation of the Asian values debate is perhaps, the concept of "good government" and what constitutes good government, how to strike a balance between freedom and stability and between individual rights and community rights.¹⁹⁶

Malaysia is not a party to any international human rights covenants although recently Mahathir has proposed to review the Universal Declaration of Human Rights and other key United Nations documents.¹⁹⁷ Underlying Malaysia's refusal to conform to these "international norms" is the belief that these norms were established by western imperialist and only represent a certain view of human rights which fail to take into account the uniqueness of each country.¹⁹⁸ Malaysia justifies its restrictions on political freedom on the grounds that western notions of democracy and freedom would undermine political stability and hence economic development.¹⁹⁹ Specifically, in the context of affirmative action, Mahathir would contend that widespread affirmative action

¹⁹⁰J Donnelly "Cultural Relativism and Human Rights" (1984) 6(4) Hum. Rts. Q. 400, 414.

¹⁹¹Above n 188, 370.

¹⁹²DK Mauzy "The human rights and 'Asian values' debate in Southeast Asia: trying to clarify the key issues." (1997) 10(2) The Pacific Review 210, 215.

¹⁹³Above n 192, 215.

¹⁹⁴GM Wilner "Reflections on Regional Human Rights Law" (1995) 25 Ga. J. Int'l & Comp. L. 407, 422.

¹⁹⁵The communitarian nature of "Asian Values" is evident in another one of the preambular statements: "The peoples of ASEAN recognise that human rights have two mutually balancing aspects; those with respect to rights and freedoms of the individual and those which stipulate obligations of the individuals to society and state." See above n 194, 422.

¹⁹⁶Above n 192, 229.

¹⁹⁷See "Asean and West Clash on Human Rights" The Dominion, Wellington, New Zealand, 30 July 1997, 4.

¹⁹⁸Above n 197, 4.

¹⁹⁹Above n 192, 218.

for the Malays was *necessary* to achieve political stability and harmony. The Malay leaders would contend that Western ideas of human rights fail to take into account the difficulty of managing issues of ethnicity in an under-developed country. The postulate of equality and democracy would have no real meaning without being able to *enjoy* socio and economic rights. However, it may be pertinent to differentiate between Mahathir's stated aims in launching full scale affirmative action which was *parity* and his ulterior motive, that of *paramountcy*.

Malaysia's arguments may have some validity in respect of restricting political freedoms in a volatile ethnic environment however the central issue of this paper is the human right of equality. The difficulties that developing countries would face in securing the "full enjoyment of human rights and fundamental freedoms" was acknowledged by the Commission of Human Rights in discussing the drafting of CERD.²⁰⁰ Members recognised that these countries would devote all their resources to economic development over the next two or three decades.²⁰¹ However the objective of CERD was not only full but also "equal enjoyment" of such rights,²⁰² including the one to education.

According to cultural relativist arguments, Malay paramountcy within Malaysia is a cultural value which is valid as any other. However the implementation of Malay paramountcy in practice means that Malays are in effect imposing their values on other groups, thereby undermining the concept of cultural relativism itself which rest on the idea of there being no cultural absolutes. Some cultural relativists advance the concept of cross cultural universals as a resolution to the conflict between universalism and cultural relativism.²⁰³ However without empirical research it could not be determined whether "equality" falls into this category.

As I have contended Malaysia does not conform to "international law norms" in respect of affirmative action policies in higher education. However it has no desire to do so. And indeed from a culturally relativist point of view, a tenable argument could be maintained that "international human rights" norms are not necessarily appropriate to a country such as Malaysia, especially at the time of Independence. However, when these policies create not equality of opportunity or result but rather Malay paramountcy for no purpose other than the concept of indigenous rights, the assertions of cultural relativist fail to persuade me.

²⁰⁰E/CN.4/SR.787 p. 5.

²⁰¹Statement of Mr. Hakim (Lebanon) Above n 200, 5.

²⁰²See Article 2(2) of CERD in Appendix E.

²⁰³A Dundes Renteln *International Human Rights: Universalism Versus Relativism* (Sage Publications Inc., California, 1990) 78. Cross Cultural values are those values which all cultures share.

VIII CONCLUSION

Malaysia's justifications for affirmative action in higher education has its foundations in the theories of social utility; a harmonious and united society and distributive justice; proportional ethnic equality of outcome. However it is evident from the implementation of these policies that it is paramountcy rather than parity which is or rather became the desired goal. International law mandates affirmative action or special measures; this mandate is dependent on the following of a certain criteria based on need and substantive equality. These special measures cross the line between racial discrimination and affirmative action when they lead to the creation of "separate rights" and when they continue after equality has been achieved.

Malaysia is not a Western liberal democracy, some would contend, it did not have that luxury, rather Malaysia was an intensely ethnically divided and explosive country which the Post Independence leaders inherited. I would contend that Malaysia has crossed that line between justified affirmative action and racial discrimination in higher education. Their policies are both non-reviewable and indefinite, in that respect they contradict the underlying affirmative action tenet of temporariness. Malaysia may contend that the norms of international law are not appropriate to their society, and that they have achieved both political stability and economic growth. However, there must surely be something inherently unjust about the attainment of both these objectives by the continued and unnecessary subjugation of almost half the population. The Malay leaders continue to defend this broad concept of Bumiputra rights on the basis of ethnic disparities and the need for political stability however, this "blanket" approach does not adequately deal with the issue. In respect of higher education, the distributive model of equality which does not address non-ethnic socio-economic inequalities has played its role. Without constant monitoring, affirmative action in higher education has evolved into racial discrimination.

The relative success of affirmative action *may*, if one was to be optimistic, in the near future result in the establishment of Mahathir's *Bangsa Malaysia*, however, one re-occurring issue is the entrenchment of the special position of the Malays as an indigenous right in not only domestic law but the human psyche. The belief that Malays should give up this paramountcy from this "outsiders" point of view may be an invalid cultural value, however it is a value that many Non-Malays in Malaysia share. It is perhaps time that Malaysia change from the rhetoric of "political stability" to the substantive objective of equality and social harmony.

IX APPENDICES

APPENDIX A

Approximate Aggregate Individual Incomes by Ethnicity, 1957

	Malays	Chinese	Indians	Total*
Aggregate Individual Incomes (millions)	1125	1975	475	3675
Percentage of	30	54	13	100
Average annual income per head	359	848	691	585
Average annual income per adult male	1433	3264	2013	2128

* Includes Europeans and others.

Household Budget Survey, Report of the Inland Revenue Department, 1958.

Cited in R. K. Vasil *Ethnic Politics in Malaysia* (Radiant Publishers, New Delhi, 1980), 8.

Source: *Malaya, Federation of, 1957 Census*, Table 14.

Malaysia (1961), Fourth Malaysian Plan, p. 39.

Note: (1) For 1957, the percentages add up to a total less than 100%.

M = Malays, C = Chinese, I = Indians and others.

Quoted: M. H. Lee "Affirmative Action, ethnicity and integration: the case of Malaysia" (1985) 8(2) *Ethnic and Racial Studies*, 250, 255.

APPENDIX B

Distribution of Occupation by Ethnicity 1957 and 1970 (in percentages)

by ethnic groups, 1963/66

	1957			1970		
	M	C	I&O	M	C	I&O
Professional and technical	2.6	2.2	3.7	4.3	5.2	5.6
Administrative and managerial	0.4	2	1.3	0.5	1.8	1.2
Clerical and related workers	1.6	3.7	4.4	6.3	8.1	7.7
Sales and related workers	2.8	15.6	8.9	4.7	15.3	9.1
Service workers	4.7	7.9	13.4	6.8	8.6	11
Agricultural workers	72.8	37.7	44.4	62.3	21.2	41.6
Production, transport, and other	10.4	27.8	21.7	18	41.6	23.4
Percentage	100	100	100	100	100	100
N=	1023.7	771.1	369.2	1477.6	1043.6	329.1

Sources: Malaya, Federation of, 1957 Census, Table 14, Malaysia (1981), Fourth Malaysian Plan, p. 59.

Note: (1) for 1957, the percentages add up to a little less than 100%

M = Malays; C = Chinese; I&O = Indians and others.

Quoted: MH Lim "Affirmative Action, ethnicity and integration: the case of Malaysia" (1985) 8(2) Ethnic and Racial Studies, 250, 255

APPENDIX C

University of Malaya Percentage distribution of students in courses of study by ethnic groups, 1965/66

Course	Malays	Chinese	Indians and Ceylonese	Others	Total
Agricultural	22.1	66.2	10.4	1.3	100
Arts	40.5	41.4	15.9	2.2	100
Engineering	1.1	89	9.2	0.7	100
Science	4.9	83.1	10.6	1.4	100
Medicine	12.4	78.5	8.6	0.5	100
Education	18	52.7	26	3.3	100
Total	25.4	58.9	13.9	1.8	100

Quoted: JE Jayasuriya *Dynamics of Nation Building in Malaysia* (Associated Educational Publishers, Colombo, 1983) 79.

APPENDIX D

Reservation of quotas in respect of services, permits, etc. for Malays and natives of Sabah or Sarawak contained in the Malaysian Constitution 1957.

153 (1) 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.

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40, and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

(4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This Article does not derogate from the provisions of Article 136.

(6) Where by existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for

the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purposes of ensuring such a reservation -

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

(8A) Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education of its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of the States of Sabah and Sarawak.

(9A) In this Article the expression "natives" in relation to the State of Sabah or Sarawak shall have the meaning assigned to it in Article 161A.

(10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.

Source: LA Sheridan and HE Groves *The Constitution of Malaysia* (Malayan Law Journal Pte. Limited, Singapore, 1987) 407-410.

APPENDIX E

The International Covenant on the Elimination of All Forms of Racial Discrimination.

Article 1(4):

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2):

State parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Source: United Nations *The Committee on the Elimination of Racial Discrimination* (Center for Human Rights, Geneva, 1991) 12.

APPENDIX F

Enrolment at Local State Institutions of Higher Learning, 1980 and 1985

NEW ZEALAND HUMAN RIGHTS ACT 1993.

Level	1980	1985	Ratio
73. Measures to ensure equality - (1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of the Act shall not constitute such a breach if -			80%
(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this part of this Act; and			87%
(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.			79%

Source: Government of Malaysia (1980, Table 19.4), cited in Z. Fadzillah "Tensions: Racial Discrimination in Higher Education in Malaysia: Has it reduced inequality and at what cost to the poor?" (1991) 11(2) International Journal of Educational Development, 177-184

Source: P Harris and S Levine *The New Zealand Politics Source Book* (2 ed, The Dunmore Press Limited, Palmerston North, 1994)

Enrolment at Local Polytechnics and Universities, 1980 and 1985

Level	1980			1985		
	Bumiputra	Total	Ratio	Bumiputra	Total	Ratio
Polytechnics	1615	2219	72%	4604	5868	78%
Universities	1660	23616	7%	28581	40539	70%
Total	1876	25835	7%	33185	46407	71%

Source: Government of Malaysia (1980, Table 19.4), cited in Z. Fadzillah "Tensions: Racial Discrimination in Higher Education in Malaysia: Has it reduced inequality and at what cost to the poor?" (1991) 11(2) International Journal of Educational Development, 177-184

APPENDIX G

Enrolment at Local State Institutions of Higher Learning, 1980 and 1985

Level	1980			1985		
	Bumiputra	Total	Ratio	Bumiputra	Total	Ratio
Certificate	1590	2152	74%	4519	5656	80%
Diploma	11421	11850	96%	23560	24091	98%
Degree	13604	20192	67%	23838	35692	67%
All Levels	26615	34194	78%	51917	65439	79%

Source: Government of Malaysia (1986, Table 19.4), cited in Z Tzannatos "Reverse Racial Discrimination in Higher Education in Malaysia: Has it reduced inequality and at what cost to the poor?" (1991) 11(3) International Journal of Educational Development, 177,184.

Enrolment at Local Polytechnics and Universities, 1980 and 1985

Level	1980			1985		
	Bumiputra	Total	Ratio	Bumiputra	Total	Ratio
Polytechnics	1616	2239	72%	4604	5868	78%
Universities	16660	23616	71%	28581	40839	70%
Total	18276	25855	71%	33185	46707	71%

Source: Government of Malaysia (1986, Table 19.4), cited in Z Tzannatos "Reverse Racial Discrimination in Higher Education in Malaysia: Has it reduced inequality and at what cost to the poor?" (1991) 11(3) International Journal of Educational Development 177, 184.

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