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AFFIRMATIVE ACTION POLICIES AND THE CONSTITUTION

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INTRODUCTION

Equality before the law is one of the greatest of all constitutional ideals. But in a world of inherent disparities between the rich and the poor, the educated and the illiterate, the privileged and the powerless, the conferment of formal equality does not secure functional parity. Equality amongst unequals favours the strong over the weak and acts powerfully to maintain the status quo. In an untrammelled market economy, wealth, power and position tend to gravitate towards the privileged few. The declaration of formal, legal equality becomes an empty legal formula in the face of massive economic, social and educational disparities. A commentator once observed that there is no greater inequality than the equal treatment of unequals.

Affirmative action: Many Constitutions empower schemes of preferential treatment in order to elevate the status of economically, socially and culturally disadvantaged communities or sections of society like women, children, aborigines, 'untouchables', minorities or other marginalised groups. Obligations are placed on the State to take affirmative actions to ameliorate group disparities. Inherent in the philosophy of affirmative schemes is the belief that state paternalism is needed to promote the economic and social welfare of disadvantaged communities.[1] Such schemes are referred to by many names, among them, positive discrimination, affirmative action, reverse discrimination, special privileges, schemes of preferential treatment, ameliorative measures and constitutional discrimination. India, Cyprus, United States of America and Malaysia are prominent examples of countries with such schemes. The purposes of these schemes may vary. The purposes may

[1] See generally Tan, Kevin Y.L. and Li-ann, Thio, *Constitutional Law in Malaysia and Singapore,* 2nd ed., 1997, p. 769–772.

be to provide equal employment opportunities or to mandate quotas to undo the effects of past discrimination.

United States: In the USA, affirmative action policies were designed in the Kennedy era to incorporate racial and ethnic minority groups as well as women into a variety of political, social and economic institutions.[2] The initial thrust was to ensure recruitment of workers on a non-discriminatory basis through equal employment opportunities. In the seventies, administrative and judicial decisions transformed these policies from merely encouraging equal opportunity for all individuals to mandating quotas, equality of results and statistical parity among selected minority groups. Affirmative action became a compensating as well as a remedial measure to undo the effects of past discrimination.[3] Positive discrimination was seen as necessary because of the failure of neutral criteria to achieve minority representation in various sectors. But in the Reagan era, these policies suffered a sharp reversal.[4] American society today is deeply divided on the desirability of affirmative action and there are many currents and cross-currents. In May 2002, a US Appeals Court in Cincinnati, Ohio upheld the University of Michigan Law School's right to continue using an admissions policy that seeks to create racially-inclusive campuses by ensuring the admission of some Blacks, Hispanis and Native Americans.[5] The case of Barbara Grutter went on appeal to the Supreme Court and the University obtained a qualified victory.

Cyprus and India: In Cyprus, affirmative action policies are meant to give fair representation to Greek and Turkish sectors of the population in all national institutions. In India, the atrocities of the caste system had put the 'untouchables' beyond the pale of human society. The constitutional system of reservations, quotas and preferences are meant to ameliorate the plight of 'scheduled castes and tribes'. Article 17 abolishes untouchability. Imposition of disabilities arising out of untouchability is offences punishable under the Untouchability

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2 President Kennedy's Executive Order 10925.

3 *Regents of the University of California v Bakke* 438 U.S. 265 (1978) 208. *Fullilove v Klutznick* 448 US448 (1980).

4 *City of Richmond v J.A. Croson Company* 109 S.Ct 706 (1989) 315.

5 *The Star,* May 20, 2002, p. 40.

(Offences) Act 1955 and the Protection of Civil Rights Act 1955. Article 15(3) permits special provisions for women and children. Article 45 mandates free and compulsory education for children. Article 42 allows special maternity relief for women. Article 15(4) makes special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Article 16(4) empowers the State to make reservations for public service posts in favour of any backward class of citizens.

AFFIRMATIVE ACTION IN MALAYSIA

In Malaysia affirmative action policies operate at several levels. Firstly, they mandate special privileges for the politically dominant but economically depressed Malay majority. Secondly, they protect minorities like the *Orang Asli*. Thirdly, they seek to protect the many native communities of Sabah and Sarawak. Fourthly, at the geographical level they give to the under-developed regions of Sabah and Sarawak special privileges in relation to the other states of the federation. Fifthly, the federal and state electoral systems, by virtue of section 2(c) of the Thirteenth Schedule of the Federal Constitution, permit weightage for rural constituencies over urban electoral districts.[6] At its inception in 1957, this law was meant to give political weightage to rural Malay votes. With a high rate of Malay migration from villages to metropolitan areas, the efficacy of this rule is now in doubt.

History: In Malaysia, constitutional protection for Malay privileges was part of the ethnic bargaining and accommodation that preceded Merdeka. It was part of the social contract among the various communities. Non-Malays obtained rights of citizenship and cultural and linguistic protection. Malays were guaranteed a continuation of their special position. But Malay privileges were by no means a novelty of the 1957 Reid Commission Constitution. The various treaties between the British and the Malay Sultans and also clause 19(i) (d) of the Federation

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[6] The provision states: "The number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies; a measure of weightage for area ought to be given to such constituencies".

of Malaya Agreement 1948 required the British High Commissioner "to safeguard the special position of the Malays and the legitimate interests of the other communities".[7] Priority in admission to the Malayan Civil Service, the grant of educational scholarships and bursaries, business permits and licences and Malay reservation land were already part of the legal landscape at the time of Merdeka. Tun Salleh called these features "the traditional elements" of the Malaysian Constitution.[8]

Malay privileges: Article 153 provides a scheme of preferential treatment for Malays (and the natives of Sabah and Sarawak) in a number of specified areas.

1. The Yang di-Pertuan Agong may, in order to promote the purposes of Article 153, reserve such proportion as he deems reasonable of :

   - positions in the federal public service.

   - scholarships, educational and training privileges or facilities accorded by the Federal Government.

   - permits or licences for the operation of any trade or business, and places for Malays and natives of Sabah and Sarawak in institutions of higher learning providing education after MCE.[9] To ensure compliance with the above provisions, the Yang di-Pertuan Agong may give directions to any Commission or to any authority concerned and such Commission or authority is obliged to comply with the directions on reservations and quotas.

2. Article 89 provides for Malay reservation lands. Such lands cannot be de-reserved except by a state law that has been approved by special majorities in both the State Assembly and the Federal Parliament.

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7 Tan, Kevin Y.L. and Li-ann, Thio, (*supra*), p. 772.

8 Mohd Salleh bin Abas, "Traditional Elements of the Malaysian Constitution" in Trindade, F.A. and Lee, H.P., The *Constitution of Malaysia–Further Perspectives and Developments,* 1986, p. 1.

9 Corresponding provisions exist in all State Constitutions other than of Penang and Malacca.

3. Article 90 confers special protection on customary lands in Negeri Sembilan and Malacca and Malay holdings in Terengganu.

4. Under Article 8 it is permissible to restrict enlistment in the Malay Regiment to Malays.

5. Under the Constitution of all the States except Malacca, Penang, Sabah and Sarawak, the Menteri Besar of the State must be a Malay and a Muslim. Similar requirement applies to the State Secretary except in Malacca, Penang, Perak, Sabah and Sarawak.

Entrenchment: Malay privileges are entrenched against repeal in many ways. First, any Bill to abolish or curtail them may be caught by the law of sedition.[10] Second, under Article 159(5), any amendment to Article 153 will require a special two-thirds majority of the total membership of each House of Parliament plus the consent of the Conference of Rulers. Third, any change in policy affecting administrative action under Article 153 requires the government to consult with the Conference of Rulers.[11] Fourth, Article 10(4) of the Constitution permits Parliament to prohibit the questioning of any matter, right, status, position or privilege protected by Article 153.

Aborigines: Article 8(5) permits any provision for the protection, well-being or advancement of the aboriginal peoples of Malaya including the reservation of land or of a reasonable proportion of suitable positions in the public service.[12]

Natives of Sabah and Sarawak: Article 153 was extended to Sabah and Sarawak in 1971 by the Constitution (Amendment) Act 1971 (Act A30).

1. As of 10 March 1971, the natives of Sabah and Sarawak acquired the same special status as peninsular Malays for the purpose of reservations and quotas.

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[10] *Mark Koding v PP* [1983] I MLJ 111. Refer to the Sedition Act, 1948 (Act 15), section 3.

[11] Article 38(5).

[12] Refer to the Aboriginal Peoples Act 1954 (Act 134).

2. In addition, the Constitution is replete with provisions to confer special rights on Sabah and Sarawak in a host of areas. For example, under Article 161 use of English and of native languages for official purposes is allowed in the States of Sabah and Sarawak.

3. Article 161A(5) allows reservation of land for natives.

4. Article 161B restricts non-residents from practicing law in courts in Sabah and Sarawak.

5. Under Article 161E constitutional amendments affecting Sabah and Sarawak require the consent of the Governors of the States.

6. Under the Ninth Schedule which deals with legislative powers, Sabah and Sarawak Assemblies are privileged to have far wider powers than the legislatures of peninsular states. [13]

Possible limits on Article 153 protection: The scope and extent of Article 153 privileges has never been litigated. It is arguable that the subjective and political nature of the Yang di-Pertuan Agong's functions under Article 153 (e.g. that he may reserve "such proportion of seats as he deems reasonable") is such that courts are unlikely to substitute their views for the judgement of the King who acts on the advice of the Prime Minister under Article 4(1).

Nevertheless, Article 153 does not give a *carte blanche* (total freedom) to the executive to prefer Malays over non-Malays.

1. Affirmative action is allowed only in sectors, services and facilities explicitly mentioned in the Federal and State Constitutions. At the federal level, these areas are: positions in the federal public service; scholarships, educational and training privileges or facilities

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[13] Refer to Articles 76(2), 95B and Supplementary State List IIA for Sabah and Sarawak and List IIIA – Supplement to the Concurrent List for Sabah and Sarawak. See also Articles 161, 161A, 161B, 161E, Tenth Schedule (Part IV – Special Grants to Sabah and Sarawak) & Tenth Schedule (Part V – Additional Sources of Revenue for Sabah and Sarawak).

accorded by the Federal Government; permits or licences under federal law; places in institutions of higher learning; and the Malay Regiment.

If the ethnic factor is taken note of in other areas that may well be outside Article 153 and in violation of Article 8's promise of equality before the law. However, the reality is quite different. It is common administrative practice in the public sector to offer "10% discount for *Bumiputeras*" on houses built by State Development Corporations. In the case of *Ghazali v Public Prosecutor* [1964] MLJ 156 the Licensing Board, under section 118(5) of the Road Transport Ordinance 1958, was required to "give preference to an application from a Malay". The Board, in approving an application from a Malay went on to attach a condition to the licence that only a Malay driver shall be employed to ply the vehicle. Unfortunately, the issue of constitutionality – whether such a condition was beyond the terms of Article 153 – was not raised in court. The case proceeded under the administrative law principle of ultra vires. The High Court held that the condition imposed by the Board was ultra vires its powers under the Ordinance. The law was subsequently amended to permit the imposition of such a condition. However, in a country with a supreme Constitution, a limited Parliament, and an equally clause in Article 8, the issue of legislative or administrative discrimination poses a legal challenge. It must be reiterated that Article 153 does not grant a *carte blanche* for affirmative action in all spheres of life but only in areas explicitly mentioned in the basic charter.

2. Article 153(1) enjoins the King to safeguard "the legitimate interests of other communities". One area in which this has been done admirably is the area of vernacular schools. The educational landscape in this country has, since colonial days, been dotted with vernacular schools conducting instruction in Malay, Chinese or Tamil languages. Whether vernacular schools are part of our rich cultural mosaic or a hindrance to national unity are open questions. What is important is that though not provided for in the Constitution, they are recognised by the Education Act 1996. The Act in section 28 allows "national type" schools to exist and to conduct instruction in a language other than the national language. The Act also allows

private educational institutions to exist under section 73 and gives them considerable autonomy.

In contrast with private schools, private universities have not fared so well. Section 6 of Universities and University Colleges Act 1971 confers exclusive power on the Yang di-Pertuan Agong to establish a University. In 1981, the application of Merdeka University Berhad was rejected by the government on many grounds amongst them that the University would use Chinese as the medium of instruction and that would be a violation of Article 152 which requires the use of Bahasa Melayu for all official purposes. A further factor that weighed heavily with the Minister was that the setting up of a university by the private sector would be contrary to national policy. A challenge to the government's decision failed in the courts. Fortunately the decision in *Merdeka University v Government* [1981] 2 MLJ 116 has been overtaken by events. Private universities are now allowed by the Private Higher Education Institutions Act 1996.

3. Article 153 clauses (4), (7) and (8) expressly state that in safeguarding the special position of Malays and natives, no person can be deprived of any public office, scholarship, educational or training privilege, special facility or of any right, privilege, permit or licence (including the renewal of permit or licence) that was already held by him/her. However, it was held in *Station Hotels Bhd v Malayan Railway Administration* [1977] 1 MLJ 112 at 117 (Federal Constitution), that Article 153 does not apply to cases of contractual rights. Therefore, the revocation of or refusal to renew the lease and the relevant permits to operate a hotel and its ancillary facilities does not offend Article 153 clauses (7) and (8). The Federal Court, in affirming the High Court's decision held that 'What a licence does is to regulate a business and what a permit does is to provide for something without which a business can never be started. The permits and licences to operate the hotel must be attached to the tenure of the premises, so that where the defendant had lost its right to a lease of the premises, it could not call for the issue of inoperational and inoperative licences or permits'.[14]

[14] The Annotated Statutes of Malaysia, Vol. 3 (2000 Issue), p. 164.

4. The heirs, successors or assigns of a licencee or permit holder cannot be refused renewal if the renewal might reasonably be expected in the ordinary course of events: Article 153(7). Clearly, Article 153 envisages the expanding of the economic cake and the setting up of quotas. But no one can be deprived of what he/she already has and what has already accrued to or enjoyed by him/her: Article 153(8).

5. Nothing in Article 153 permits Parliament to restrict business or trade solely to Malays or natives: Article 153(9).

6. Article 153(5) states that this Article does not override Article 136. Article 136 requires that all persons of whatever race in the same grade in the service of the Federation shall, subject to the terms and conditions of their employment, be treated impartially". Tun Suffian believes that quotas and reservations are permitted by Article 153 at entry point. But in the post-entry milieu ethnicity must give way to merit because of the requirement of Article 136.[15]

7. Article 89(2) requires that when any land is reserved for Malays, an equal area shall be made available for general alienation.

8. Article 89(4) forbids non-Malay held land from being declared a Malay reserve. Clearly, ameliorative measures for Malays and natives are not meant to extinguish vested rights and interests of the non-Malays.

9. Except in the area of education [Article 153(8A)], the reservations and quotas permitted by the Constitution are directed primarily at public sector activities. In actual practice, however, the agencies of the state use their licensing powers to pressurise private sector enterprises to observe ethnic quotas. This may be unconstitutional.

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[15] Tun Suffian Hashim, *An Introduction to the Constitution of Malaysia*, 2nd ed., 1976, p. 140. However, some have argued that "entry point" need not mean the initial entry point at the time of joining service but may also refer to entry points at all promotional levels. On this basis, reservations and quotas may be constructed at all rungs of the ladder. Such an interpretation denies Article 136 of all meaning.

Legislative provisions and administrative directives that go beyond constitutionally permissible exceptions can be challenged in a court of law[16].

10. Affirmative action policies are permissible within the agencies of the federal and state governments. The Constitution has a lacuna in that statutory bodies, quangos and local authorities have not been expressly authorised to participate in such policies. In actual practice, statutory bodies including universities, public corporations, government-owned companies and municipal corporations enforce *Bumiputera* policies vigorously. What legal basis they have for their practices has not yet been questioned in a court of law.

11. Article 12(1) provides that there shall be no discrimination against any citizen on the ground only of religion, race, descent or place of birth in the administration of any educational institution maintained by a public authority or in the admission of pupils or in the payment of fees. The Article also forbids discrimination on the above grounds in providing out the funds of a public authority, financial aid for students in any institution – whether maintained by a public authority or private entity.

    In a similar vein, Regulation 5 of the First Schedule of the Universities and University Colleges Act 1971 (UUCA) requires that, subject to Article 153, membership of the universities, whether as an officer, teacher or student shall be open to all persons irrespective of sex, race, religion, nationality or class.

12. Education has a direct bearing on economic development and social progress. As ethnic disparities in educational attainment were widespread till the seventies, the Constitution was amended in 1971 by inserting a clause (8A) to Article 153 to provide that it shall be lawful for the Yang di-Pertuan Agong to give such directions to any University or College or institution providing education after MCE to ensure the reservation of such proportion of places for Malays and the natives of Sabah and Sarawak as the King may deem reasonable. In addition, Article 8(5) permits any provision for the protection,

[16] *Ghazali v PP* [1964] MLJ 156.

well-being or advancement of the aboriginal people of the Malay Peninsula.

Several engaging issues of law and politics gallop around the outskirts of Articles 153 and 8(5). First, what proportion of places can be allocated on an ethnic basis? Specifically, can a programme[17] or an institution[18] cater exclusively for one ethnic group? In India where reservations and quotas are also permitted by the Constitution, the courts have ruled that no reservation should exceed 50% and that the reasonableness of the quota is reviewable by the courts: *Devadason v Union* AIR 1964 SC 179. In Malaysia, the language of Article 153(8A) – "such proportion as the Yang di-Pertuan Agong may deem reasonable" – allows greater subjectivity and discretion. Differences over quotas have always been resolved outside the courts in behind-the-scenes negotiations and compromises among the Barisan Nasional (BN) component parties. Courts of law are unlikely to substitute their views on what is a reasonable quota over the views of the Yang di-Pertuan Agong.

A second contentious issue is whether the reservation should be directed to facts at the micro or macro level? Should quotas apply to specific courses of study in which imbalances exist[19] or to the University or Universities as a whole?

Third, can the massive ethnic disparities in private centres of learning and in the citadels of education abroad be used to determine what is a reasonable quota for local public universities? In sum, can the public education system be used to remedy the heavy non-Malay weightage in private sector and overseas education?

Fourth, must all universities be subjected to the same ratio of Malays, Natives, Chinese, Indians and others or can these ratios be tailored to suit the university's location, the demography of the area,

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[17] Visu Sinnadurai, "Rights in Respect of Education Under the Malaysian Constitution" in *The Constitution of Malaysia – Further Perspectives & Developments,* edited by Trindade, F.A. and Lee, H.P., 1986, p. 46–58 at 49–50.

[18] See Universiti Teknologi MARA Act 1976 (Act 173) section 1A.

[19] Visu Sinnadurai, op.cit. p. 49.

and ethnic disparities within the professions so that different courses and different universities may have varying ethnic ratios but the overall, total intake in public sector universities observes the prescribed ethnic quotas determined by the Yang di-Pertuan Agong?

Unique features of Article 153: Malaysia's scheme of affirmative action has a number of unique features. Firstly, privileges are meant for the protection of the politically dominant majority and not for the benefit of a marginalised minority. This is unusual but not morally objectionable. If the purpose of affirmative action is to assist an underprivileged sector to catch up with the others, then numbers should not matter. The amelioration of the majority is no less justifiable than the amelioration of minorities. For example, in some societies women may be in a majority and yet in a position of disadvantage.

Secondly, Article 153 privileges are not subject to any time limit as was recommended by the Reid Commission.[20]

Thirdly, though the constitutional privileges are primarily inspired by compelling evidence of Malay and native backwardness, especially in rural areas, on economic, educational and social indices[21], economic considerations were not the only motivation. There was also a desire to give historical continuity to the pre-Merdeka recognition by the British of the special position of the Malays. This has come to mean that in the allocation of loans, grants, preferential shares, scholarships, places in universities, employment opportunities, promotions, tenders and business opportunities, state assistance is given to both the poor and the rich and the disadvantaged and the privileged "*Bumiputera* candidates". They are given preference over non-*Bumiputeras* in order to increase *Bumiputera* representation in all facets of life.

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[20] The Reid Commission recommended a review after 15 years of the system of special rights and privileges: Report of the Federation of Malaya Constitutional Commission 1957, Government Press, 1957, pp. 165–167. This recommendation was not accepted for incorporation into the Merdeka Constitution.

[21] For a view of the situation in the first decade refer to Tun Suffian. *An Introduction to the Constitution of Malaysia,* 2nd edition, 1976, p. 295– 321.

Fourthly, what appear to be policies of racial preference and racial quotas are not entirely so. The ethnic factor is mitigated by a broad-based and non-ethnic definition of who is a Malay and a native!

BUMIPUTERA STATUS AND ITS IMPORTANCE

Article 153(1) of the Federal Constitution enjoins affirmative action in favour of 'Malays' and the 'natives of Sabah and Sarawak'. It states that "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...".

Many economic, social and educational programmes since Merdeka, and especially since 1971, are structured along ethnic lines. The status of a 'Malay' or 'native' is the key to innumerable doors of opportunities both in the public and private sectors. Posts in the public sector, promotions, licences, scholarships, loans, places in institutions of higher learning and allocation of many privileges are influenced by the "*Bumiputera* factor". It is, therefore, necessary that the legal concept of a 'Malay' and 'native' be subjected to a thorough analysis.

DO FEDERAL DEFINITION OF A 'MALAY'

Under Article 160(2) of the Federal Constitution, the term 'Malay' refers to persons who meet the following four criteria: First, the person must profess the religion of Islam. The Federal Constitution does not specify which sect of Islam the Muslim must belong to. This is in contrast with some state *syariah* enactments that identify Islam with the Shafie school of Sunni Islam.

Second, the person must habitually speak the Malay language.

Third, the person must conform to Malay custom.

Fourth, the person must have roots in the country by way of birth or descent in Peninsular Malaysia or Singapore in one of the following four ways:

- he was before August 31, 1957 born in the Federation (of Malaya) or in Singapore; or
- born of parents one of whom was born in the Federation (of Malaya) or in Singapore[22]; or
- was on August 31, 1957 domiciled[23] in the Federation (of Malaya) or in Singapore[24]; or
- is the issue of any of the above persons.

It is noteworthy that the interpretation clause, Article 160(2) uses the term "the Federation". The term 'Federation' refers to the Federation established under the Federation of Malaya Agreement 1957. As Sabah and Sarawak were not part of the Federation of Malaya, it follows that under Article 160(2) a Malay is defined by reference to Peninsular Malaysia only. Persons born in Sabah and Sarawak or having descent from persons in the East Malaysian states are not included in the federal concept of Malay! From the strict legal point of view, Sabah and Sarawak Malays are 'natives' of their states.

Non-ethnic definition: A remarkable aspect of the constitutional definition of a Malay is that an essentially ethnic category is defined in a liberal, broad and non-ethnic way! Nowhere is it prescribed that a Malay must be of Malay ethnic stock! A person is a Malay if he is a Muslim, speaks the Malay language habitually, observes Malay *adat,* and has links with the soil through birth or descent. The concept of a Malay is a combination of ancestral roots, Islamic religion, *adat* and language. Tun Suffian puts it succinctly. "To be a Malay for the purpose of the Constitution you need not be of Malay ethnic origin. An Indian is a Malay if he professes the Muslim religion, habitually speaks Malay and conforms to Malay custom. Conversely even a genuine Malay is not a Malay... if he does not profess the Muslim religion".[25]

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[22] The definition of a Malay in Article 160(2) is extremely ambiguous. It is not clear whether the birth of the parent must be before, on or after Merdeka Day.

[23] Presumably "domiciled" means permanently resident.

[24] The law is ambiguous and it is not clear whether this limb refers to the parent being domiciled in the Federation or Singapore or to the Malay himself being domiciled in the territories on the relevant date.

[25] Tun Suffian Hashim, An Introduction to the Constitution of Malaysia, 2nd ed., 1976, p. 291.

The requirement of having roots in Peninsular Malaysia or Singapore implies that to be a Malay it is not enough to be of Malay ethnic stock. One must also be born in Malaya or Singapore before Merdeka Day or be descended from parents *one of whom* was born in Malaya or in Singapore or was domiciled in these territories on Merdeka Day. The words "one of whom" implies that persons of mixed parentage can qualify as Malays as long as either the father or mother was born or domiciled in Malaya or Singapore. The law is commendably gender free and does not favour male descent as is the case with some citizenship laws.[26]

Those who qualify: On the basis of the constitutional criteria in Article 160(2), the following categories of persons can qualify as Malays under the Constitution:

- All persons of Malay ethnic stock who satisfy the four requirements of Article 160(2).
- Persons of mixed parentage provided one parent satisfies the four requirements of Article 160(2).
- Muslims of non-Malay races provided they satisfy all requirements of Article 160(2). Thus, Arab, Pakistani, Indian, Chinese, Siamese, Philippine and Kampuchean Muslims who speak Malay, observe Malay custom and have roots in the country by way of birth or descent can be deemed to be Malays for the purpose of the Constitution.
- Children of non-Malay extract who were adopted by Malay parents and have assimilated into the Malay way of life.
- Converts to Islam provided they satisfy all four requirements of Article 160(2).

The following fail to qualify as Malays under the federal definition:

- Persons of ethnic Malay origin who have no roots in Peninsular Malaysia or Singapore. Thus if an Indonesian or Thai Malay who has no ancestral links.

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[26] Refer to Schedule 2 Part I s.. 1(1) (d) of the Federal Constitution.

- With Peninsular Malaysia migrates to this country, he does not, and he cannot ever, satisfy the constitutional definition of a Malay.

- Persons of the Malay race, who for whatever reason, do not profess the religion of Islam. For instance, a Malay who converts out of Islam automatically forfeits his status as a Malay. In the words of Tun Suffian "an Indonesian who habitually speaks Malay and conforms to Malay custom, is not a Malay for the purpose of the Constitution if for instance he does not profess the Muslim religion".[27]

- Sabah and Sarawak Malays are not within the federal definition of a Malay. This should be rectified by amending Article 160(2) to change the words 'born in the Federation' to 'born in the Federation of Malaya or Malaysia'.

- The *orang asli* are not within the definition of a Malay unless they satisfy all four requirements of Article 160(2). Nor are they 'natives' as that term is confined to the indigenous races of Sabah and Sarawak. Article 153 is not applicable to the *orang asli.* However, under Article 8(5)(c) the Constitution permits measures for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula. An example of such a law is the Aboriginal Peoples Act 1954 that establishes *orang asli* areas and *orang asli* reserves.

***Bumiputera*:** The Constitution speaks of Malays and natives of Sabah and Sarawak. The term *Bumiputera* has no legal basis and is of political coinage. There is no known authoritative definition of it anywhere. Perhaps its usefulness lies in uniting under one head the Malays of Peninsular Malaysia and the natives of Sabah and Sarawak. Additionally, it gives to the executive some discretion to grant privileges to those like Indonesian Malays and *orang asli* who do not qualify as Malays or natives under Article 160(2).

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[27] Tun Suffian Hashim, *supra.*

Singapore Malays: To be a Malay one must have links with Peninsular Malaysia or Singapore by birth or descent. The reference to Singapore was inserted in September 1963 when Singapore joined Malaysia but has not been removed after Singapore's separation.

Corporate bodies: Does the concept of a Malay refer only to natural persons or can it encompass corporate entities? There is conflicting evidence. In the Majlis Amanah Rakyat (MARA) Act 1966, MARA has been deemed to be a Malay for the purpose of land and share ownership. In the Malay Reservations Enactment No.1 of 1936 (Johore) the definition of a Malay under section 2 includes authorities, boards, bodies, societies, associations and companies described in the Second Schedule to the Enactment. The (Kelantan) Malay Reservations Enactment No.181 of 1930 in section 3 defines a Malay to include the Majlis Ugama Islam and the official administrator. Under the Malay Reservation Enactments of Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Johor and Terengganu the concept of a 'Malay holding' is employed to enable corporate bodies to hold or own Malay reservation land. But in the Sarawak case of *Manang Lim Native Sdn. Bhd. v Manang Selaman* (1986)1 MLJ 379 it was held by the Supreme Court that the word 'native' must be confined to natural persons and should not include artificial legal entities.

STATE DEFINITIONS OF A MALAY

The thirteen states of the federation have in their Constitutions adopted the federal definition of a Malay contained in Article 160(2). This voluntary act of harmonisation between federal and state laws has profound and possibly adverse implications for the constitutionality of some state laws.

Definitions in Malay Reservations Enactments: All states (other than Pulau Pinang, Melaka[28], Sabah and Sarawak) have their own Malay Reservations Enactments that defines who is a Malay for the purpose of

[28] Melaka is served by the National Land Code (Pulau Pinang and Melaka) Titles Act 1963, Act 518, Part VIII. Special provisions also exist for customary land in Negeri Sembilan and Malay holdings in Terengganu under Article 90 of the Federal Constitution.

the Enactments. Except for Melaka, the state definitions are significantly at odds with the federal definition and with each other. In the various state definitions a person is deemed to be a Malay if he satisfies the following requirements.

1. He professes Islam.

2. He habitually uses Malay (as required in Kedah and Melaka) or any "Malayan language" (as provided in Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Perlis, Terengganu and Kelantan). In Johor use of a "Malaysian language" is accepted.

3. He observes Malay custom (as is required in Melaka).

4. He satisfies the ethnicity requirement.[29]

    - In Kedah, Kuala Lumpur, Negeri Sembilan, Pahang, Perak, Selangor, Kelantan, Terengganu, Perlis and Johor, a person, to qualify as a Malay must be descended from parents at least one of whom is of the 'Malayan race' or of 'Malay origin'.
    - In Kedah and Perlis, Arab descent is permissible.
    - In Johor, 'Malaysian race' is acceptable.
    - In Perlis and Kedah, Siamese origin is permissible.

In no law (other than the law applicable to Melaka) is there a requirement of birth in Peninsular Malaysia or Singapore or descent from parents at least one of whom must have been born or domiciled in Peninsular Malaysia or Singapore. This emphasis on ethnicity but not on links with the Peninsula has led to the situation whereby Malay reserve lands in several states have been sold to non-citizens of Malay extract who do not qualify as Malay under the federal definition but may come within the definition of a Malay under Malay Reservations Enactments.[30]

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[29] Melaka, in line with the federal definition has no race requirement.

[30] Shad Faruqi, "Land Incursions Raise Legal Issues", *Sunday Star,* Nov. 4, 2001, p. 22.

Constitutional dilemma: The conflict between federal and state definitions of a Malay raises a constitutional dilemma. A State Enactment must comply with the State Constitution. Once a State Constitution adopts a federal law, a State Enactment (like the Malay Reservations Enactment) cannot violate the adopted federal law. If it does, it can be declared null and void by the courts. It does appear that the definition of a Malay in each Malay Reservations Enactment violates the adopted federal definition and is, therefore, in direct clash with its own State Constitution. However, the situation is complicated by Article 89(6) which gives wide powers to the states to define a Malay. "In this article ... "Malay" includes any person who, *under the law of the state* in which he is resident, is treated as a Malay for the purposes of the reservation of land." It is submitted that the highest law of the state is the State Constitution and the State Constitution must prevail over the Malay Reservations Enactments. Perhaps a future judicial decision will settle the law in this field.

Definitions always pose problems. In the conceptual analysis of the term 'Malay', the nuances are rich and the implications are far-reaching. It is therefore understandable that history, culture, economics and politics swirl around the law and blur its contours. A wide gap exists between theory and practice, and between the law in the book and the law in action.

Legal posers relating to foreign purchase of Malay reservation land: Malay reservation land is very much in the news since it was discovered that in some states, Malay reserve land was being sold to non-citizens of Malay extract. This raises the poser whether a non-citizen, who has acquired permanent residency in the country, qualifies as a 'Malay' or a *'Bumiputera'*.

Historically speaking the demand for legislative measures to create Malay reserve land was heard as early as 1907. In 1913, the then Federated Malay States Legislative Council enacted the first Malay Reservations Enactment (1913) to apply to Pahang, Perak, Negeri Sembilan and Selangor. The purpose of this law was to prevent market forces from divesting Malays of their ancestral holdings. Malay holdings could not be transferred, charged, leased or otherwise disposed off to any person not being a Malay.

To complement the law of the Federated Malay States, other Malay states followed suit to enact their own legislation – Kedah and Kelantan in 1930, Perlis in 1934, Johor in 1936 and Terengganu in 1941.

The Merdeka Constitution in Article 89 gave recognition to Malay reservations and imposed special majority requirements to make it difficult for state legislatures and the federal parliament to enact legislation to de-reserve Malay lands.

Resolving conflicting definitions: It is submitted that the theory of constitutional supremacy supplies a clear solution to the conflict that has been discovered between State Constitutions and State Malay Reserve Enactments. In the federal set-up of the country, state laws on matters within the state jurisdiction must prevail over federal laws, Article 75 not withstanding.[31] The topic of Malay reservation is in item 2(b) of the State List and, in normal circumstances, the state provision should override the federal provision. But the situation is complicated by two conflicting and competing factors.

First, all state Constitutions have adopted Article 160 of the Federal Constitution as part of their law.[32] Article 160 is the interpretation clause

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[31] In Malaysia's federal set-up a law passed by the federal Parliament can override a state law only if Parliament is within its jurisdiction. Article 75 cannot be interpreted to mean that any conflict in any circumstances between federal and state laws must be resolved in favour of federal law. Article 75 should be interpreted to mean that "if any State law is inconsistent with a (valid) federal laws, the federal law shall prevail...". A federal law on a matter within state jurisdiction is legally permissible in a large number of situations, among them, Articles 71(3), 71(4), 76,79, 92(1) & 150.

[32] Refer to the Laws of the Constitution of Johore, Third Part, Article 6; Constitution of the State of Kedah, Part I, Article 2(3); Law of the Constitution of Kelantan, First Part, Article 4(2); the Constitution of the State of Malacca, Part V, Article 37(4); Constitution of the State of Negeri Sembilan, Second Part, Article 34(5); Constitution of the State of Pahang, Part 1, Article 36(3), Part II, Article 53(3); Constitution of the State of Penang, Part IV; Article 36(4); The Law of the Constitution of Perak, Part 1, Article 4(4); The Laws of the Constitution of Perlis, Article 2(3); Laws of the Constitution of Selangor 1959, Second Part, Article 94(1); and Laws of the Constitution of Terengganu. First Part, Article 2(2).

in the Federal Constitution and it supplies a clear definition of who is a 'Malay'. This means that the federal definition of a 'Malay' is part of all state constitutions. All Malay Reservation Enactments must conform to it. To the extent that a Malay Reservation Enactment violates (the adopted) Article 160(2) of the Federal Constitution, it violates its own Constitution, and is, therefore, null and void to the extent of the inconsistency.

A second complicating factor is that Article 89(6) of the Federal Constitution seems to give to the states the power to adopt their own definition of a 'Malay'. Article 89(6) states that 'Malay' includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land. It is submitted that the words "the law of the State in which he is resident" refer, foremost, to the State Constitution and, then, to the Reservation Enactment. A State Malay Reservation Enactment cannot override the State Constitution and once a State Constitution adopts the federal definition, a Malay Reservation Enactment cannot transgress the federal prescription.

Modality of change: The definition of a Malay in all Malay Reservation Enactments is, therefore, in need of amendment. How should this readjustment be accomplished?

A court declaration may be sought that the definition of a Malay in the various Malay Reservation Enactments is inconsistent with the State Constitutions and, therefore, null and void. The court could issue its ruling with prospective effect in order not to disturb rights and duties that have already accrued between buyers and sellers of Malay reserve land.[33]

Alternatively, the court could rely on Article 162(6) of the Federal Constitution to modify the pre-Merdeka Malay Land Reservation Enactments to bring them into accord with State Constitutions and Article 160(2) of the Federal Constitution. The applicability of Article 162(6) is; however, open to doubt because this provision was inserted in order to maintain the supremacy of the Federal Constitution over pre-

[33] Refer to *PP v Dato' Yap Peng* [1987] 2 MLJ 311.

Merdeka laws. In the situation at hand the issue is that the Malay Land Reservation Enactments are violating their own state Constitutions.

Another way is to get each State Assembly to make a request to the federal Parliament under Article 76(1) (c) of the Federal Constitution to make a uniform law for all the States on this matter. The federally enacted law may add to state definitions the fourth requirement of birth (in Malaya or Singapore) or descent from a parent who was on Merdeka Day domiciled in Malaya or Singapore. The definition could at the same time allow some flexibility to states like Perlis and Kedah that wish to permit Arabs and persons of Thai origin to acquire Malay reservations.

A fourth alternative is for Parliament to act on its own initiative under Article 76(1)(b) to enact a uniform Malay Reservation Enactment for all the states. Under Article 76(4) such a law shall not require the consent or adoption of the legislatures of the states.

Finally, all State Assemblies may amend their Malay Reservation Enactments to make them fall in line with the federal definition that has been adopted by their Constitutions.

SPECIAL POSITION OF SABAH AND SARAWAK NATIVES[34]

As with the Malays of Peninsular Malaysia, the natives of Sabah and Sarawak are entitled to special rights and privileges under Article 153 of the Federal Constitution. Article 153 clauses (1), (2), (3), (6), (8) and (8A) allow reservation, for the natives of Sabah and Sarawak, of such proportion as the Yang di-Pertuan Agong may deem reasonable of :

- positions in the public service
- scholarships, exhibitions and other similar educational or training privileges or special facilities
- permits or licences for the operation of any trade or business, and

[34] This portion of the essay relies heavily on the research of Ramy Bulan, "Native Status Under the Law" in *Public Law in Contemporary Malaysia,* 1999, Longman, p. 248–92.

- places in any University, college and other educational institutions providing education after MCE.

Article 161A (4) states that "the Constitutions of the States of Sabah and Sarawak may make provisions corresponding to Article 153". Further, Article 161A (5) provides that the law relating to Malay reservations shall not apply to Sabah and Sarawak. State law in these states may provide for the reservation of land for natives or for giving them preferential treatment as regards the alienation of land by the State.

Land Rights: In Sabah and Sarawak, the Land Code 1958 in sections 2, 5, 15 and 41 and the Land Ordinance in sections 15, 78 and 79 provide for "Native Customary Land" and "Native Area Land". The former type of land is held under customary land tenure; the latter is held under a registered title.[35] A special link with their "ancestral lands" is of paramount importance to the natives of Sabah and Sarawak and seems to be the basis of their identity. The law gives partial recognition to their claims over native land. In *Kajing Tubek v Ekran Bhd.* [1996] 2 MLJ 288 there were strong judicial statements to the effect that tribal land and forest were not just a source of livelihood but constituted life itself fundamental to the natives' social, cultural and spiritual survival. Unfortunately, on appeal it was held that though the Bakun project would deprive the natives of their livelihood and their way of life, since it was done in accordance with the law, no remedy was available.[36]

Customs: The customs of Sabah and Sarawak are recognised and enforced by special native courts and scholars can find much depth and diversity in the many recorded decisions of these courts.

Natives of Sarawak: Under Article 161A clauses (6) and (7) of the Federal Constitution a person is to be regarded as a "native" of Sarawak if he or she is a citizen and belongs to one of the following indigenous races: the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kelabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs

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[35] *supra,* 249.

[36] *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek* [1997] 3 MLJ 23.

and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits. If a person is of mixed blood, he is still regarded as a native if his parents derive exclusively from these races. It is noteworthy that "Malays" are included in Article 161A's list of natives. This means that under the Federal Constitution the word "Malay" has two different meanings – one under Article 160(2) to refer to the indigenous majority group in Peninsular Malaysia and the other to refer to one of the minority native groups in Sarawak.

Whether the Federal Constitution's list of native groups in Sarawak is truly reflective of the demographic and cultural picture in the state has been subjected to critical academic discussion. The problem is complicated by use of more than one term to describe a native community. Ramy Bulan informs us that some indigenous groups like the Melanau, Kayan, Kelabit, Lun Bawang, Punans and Selaku are missing from the Article 161A (7) enumeration.[37] Besides the above omissions there are some incorrect insertions. For example the Dusun tribe of Sabah is included in the Sarawak list of natives. Some labels that are employed reflect colonial usage and not the characterisation preferred by the people themselves. Thus, the Muruts prefer to be known as Lun Bawang. The Ibans, who are the largest ethnic group, are referred to as Sea Dayaks in Article 161A. The Bidayuh are referred to as Land Dayaks. It is believed by some scholars that these groups do not prefer such characterisation.[38]

Perhaps, for this reason the General Report of the Population Census, Vol. 1 issued by the Department of Statistics, Kuala Lumpur, 1995 does not conform to the constitutional characterisation. This Report lists the tribes in Sarawak as follows: Iban (29.8%); Chinese (28%); Malay (21.2%); Bidayuh (8.3%); Melanau (5.7%); other indigenous groups (6.1 %); others (0.9%).

Natives of Sabah: Article 161A (6) states that a "native" in relation to Sabah means a person who satisfies three requirements. First, he is a citizen of Malaysia. Second, he/she is the child or grandchild of a person

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[37] Ramy Bulan, *supra,* 251 & 261. Other studies on this topic are noted in Ramy Bulan, *supra,* p. 251, note 12; p. 261, notes 45, 47 & 48.

[38] Ramy Bulan, *supra,* 261 note 47.

of a "race indigenous to Sabah". Third, he/she was born on or after Malaysia Day either in Sabah or to a father domiciled in Sabah at the time of the birth of the child.

Presumably the words "child" and "grandchild" refer to both legitimate and illegitimate children. The reference to "a father domiciled in Sabah" indicates that the law suffers from gender bias in that it attaches no value to descent from a Sabah female. The terms "of a race indigenous to Sabah" are nowhere defined in the Federal Constitution and one has to turn to Sabah laws like the Sabah Interpretation (Definition of Native) Ordinance 1952 to give life and meaning to these terms. It is believed that there are 39 different indigenous ethnic communities in Sabah. The Kadazans form the single largest group representing nine linguistic sub-groups.[39] Other important groups include the Abai, Bajau, Baukan, Bisaya, Dumpas, Dusun, Gana, Coastal Kadazan, Kalakaban, Kimarangang, Kolod/Okolo, Kujian, Lingkabau, Lotud, Murut, Nabay, Rumanau, Rungus, Sebangkung, Serudung, Sinabu, Sumambu, Tatana, Tambanua, Tagal, Tengara and Timogun. These groups were, at one time, described by the much disliked term 'Peribumis'. The preferred terms seem to be "*Bumiputera*", "anak Negeri" or "native" to refer to the indigenous people of Sabah and Sarawak and to contrast them with the later migrant communities that settled in the former Borneo states.

The Sabah Interpretation (Definition of Native) Ordinance (1952)[40] details the categories of persons who may be regarded as natives. In the first category are persons both of whose parents are members of an "indigenous community". However, the indigenous communities are not specified. The second category refers to residents of Sabah who are living as members of a native community and are descended from parents or ancestors at least one of whom is or was a native. The third category includes persons who are resident in Sabah; are members of Suluk, Kagayan, Simonol, Sibutu or Ubian communities or indigenous groups in Sarawak and Brunei; are living as members of a native community for a continuous period of three years; are of good character; and are not subject to any restriction by immigration laws. The fourth category refers to persons who are resident in Sabah; are members of

[39] Ramy Bulan, *supra* 251, note 12.
[40] No.12 of 1952, Cap. 64, Laws of North Borneo, 1953.

people indigenous to Indonesia, Sulu group of islands, Federation of Malaya or Singapore; have lived as a member of a native community for five years; are of good character; and are not subject to immigration control Role of the Courts: In both Sabah and Sarawak issues relating to native status are assigned to Native Courts. In Sabah in 1958 the law was amended to provide that any person claiming to be a native must apply to the Native Court for a declaration of his status.[41] In *Liew Siew Yin v D.O. Jesselton* (1959)[42] the offspring of a Chinese father and Dusun mother failed in his claim because he could not prove that he was living as a member of a native community in Sabah. In *Ong Seng Kee v D.O. Inanam* (1959)[43] a Sino-Kadazan who lived in a native area was regarded as sufficiently assimilated to satisfy the status of a native. In *Datuk Syed Kechik Syed Mohd v Government of Malaysia* (1979) 2 MLJ 101 it was held that the ordinary courts ought not to interfere with the declaration of the Native Court that a person is an "anak Negeri" under the laws of Sabah. It must be noted however that after this case the law was amended to allow a Native Court decision to be reviewed by the District Officer or a Board of Officers appointed by the Yang di-Pertua Negeri.[44]

In Sarawak the Native Courts Ordinance 1992 gives power to the District Native Court to determine whether a native has, by conduct or way of life, lost or acquired the status of a native.

Constitutionality: In a country with a supreme Constitution, the validity of all laws can be tested by reference to the supreme Constitution. The definition of a native in the Sabah Interpretation (Definition of Native) Ordinance 1952 does not fully dovetail with the Federal Constitution's Article 161A clause 6(b). The Sabah law's validity may, therefore, be in doubt. The issue is as yet untested in a court.

Another engaging issue, fit for judicial determination, is whether the privileges for the Natives of Sabah and Sarawak apply throughout the Federation or whether these are confined to their own states? Peninsular Malays qualify as natives of Sarawak under Article 161A (7) and as

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41 No.20 of 1958. The present law is the Sabah Native Court Enactment 1992.
42 NCA No.2 of 1959.
43 NCA No.28 of 1959.
44 Ramy Bulan, *supra*, 272.

natives of Sabah under the Sabah Interpretation (Definition of Native) Ordinance 1952. But the natives of Sabah and Sarawak do not qualify as "Malay" under Article 160(2) of the Federal Constitution. Despite this fact it is quite obvious that since 1971, Article 153 imposes an equal affirmative action duty on the Yang di-Pertuan Agong in relation to the natives of Sabah and Sarawak as in relation to the Malays of Peninsular Malaya. Also, there appear some legal and political difficulties about enforcing privileges for Sabah natives in Sarawak, and Sarawak natives in Sabah.