CONSTITUTIONAL DISCRIMINATION UNDER THE MALAYSIAN CONSTITUTION

The Constitution of the Federation of Malaysia came into being on 16th September 1963. It left intact the scheme of preferential treatment accorded to the Malays and the aboriginal peoples of the Malay Peninsula under the Constitution of the former Federation of Malaya.[1] It also extended this notion of constitutional discrimination to the other component states of Malaysia. In Sabah and Sarawak, special privileges are conferred on the 'natives' of the states. In Sarawak, Malays who are citizens fall into this category. These special privileges, like those referred to in the former Malayan Constitution, relate to the reservation of positions in the public services, the grant of business licences, scholarships and educational facilities.[2] In Singapore, the government is empowered to promote the status of the Malays, but the latter have no special rights to positions in the public services filled by recruitment in Singapore nor special rights with respect to trading licences and permits.[3] It can be seen that all these provisions make a very wide inroad into the general guarantee of equality before the law and equal protection of the laws.[4] However, some departure from the general constitutional scheme of equality and of government a impartiality is not a novelty in the area of constitution-making.

Firstly, departures have been utilized as a method for adjusting the political balance of a heterogeneous society. This device was employed by the British in the early transfer of power from British to Indian hands where due regard was given to power distribution between the two dominant groups viz. the Hindus and the Muslims. More recently, this constitutional device has been put to a more spectacular use in the Constitution of Cyprus, which contains extremely comprehensive provisions covering the allocation of powers between the Greek and Turkish com-

1. In the case of the Malays, these privileges relate to the reservation of positions in the public services, of scholarships and other similar educational and training facilities and the grants of trading licences in their favour. However, posts in the public services scholarships, licences and permits already held by non-Malays are protected, and in the case of the latter two, their renewal, if the renewal might reasonably be expected in the ordinary course of events. (Article 153). Parliament is also empowered to reserve land for alienation to the Malays (Articles 89. 90) and also to restrict enlistment in the Malay Regiment to Malays (Article 8(5)(f)). In the case of the aboriginal peoples the privileges conferred on them are more limited [Article 8(5) (c)].
2. The latter two are absent in the Sarawak provisions. (Article 161A).
3. Article 161G.
4. Article 8(1).

munities. Representation of each community in the Council of Ministers,[5] the House of Representatives,[6] the Public Services Commission[7] and the public services[8] is at the ratio of 70:30. This rigorous quota system even extends to the number of hours allotted to radio and television programmes for each community each week.[9] This division of powers is related to the population figures of Cyprus. According to the 1946 census, Greek Cypriots form about 80 per cent of the total population, and Turkish Cypriots, 18 per cent. The Constitution thus introduces a scheme of "group" if not "individual" equality.[10]

Secondly, blanket prohibitions of discrimination have been eschewed in order to protect the interests of pluralistic minorities, viz. groups which aim to preserve their own culture, while co-existing with the dominant class. This is to prevent them from being swamped by the majority. Under the Indian Constitution, minority groups are guaranteed the right to conserve their language, script and culture.[11] Aside from this limitation on governmental action, the State is empowered to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to these minority groups.[12]

Thirdly, a constitution may sanction preferential treatment as a temporary measure to certain groups in a country which has previously enjoyed special privileges. The rationale of this is to soften the shock of sudden withdrawal of these privileges which would require its holders thereafter to compete with others on an equal basis. This occurred in the case of the Anglo-Indians of India, who formed a religious and linguistic minority. During the sojourn of the British in India, the Anglo-Indians had been accorded certain privileges, e.g. priority in appointment in certain classified services, namely, railway, postal, customs and telegraph services. It was felt at the time the Indian Constitution was drafted that the sudden withdrawal of these long-enjoyed privileges would have adverse effects on them, and it was agreed to abolish this scheme of preferences gradually over a period of ten years.[13] Following the same principle, educational grants made to Anglo-Indian institutions prior to Independence were continued for a period of ten years, during which time they were progressively reduced.[14] In view of the smallness of the Anglo-Indian community, and the fact that it is not compact but interspersed all over the country, seats may be reserved for Anglo-Indians by the President or the Governor of a State in the House of Representa-

5. Article 46 of the Constitution of Cyprus.
6. Article 62(2), *ibid.*
7. Article 124, *ibid.*
8. Article 123, *ibid.*
9. Article 171, *ibid.*
10. The Constitution has since broken down.
11. Articles 29 and 30 of the Constitution of India.
12. Article 350A, *ibid.*
13. Article 336, *ibid.*
14. Article 337, *ibid.*

tives [15] and the State Legislative Assemblies[16] respectively. However, these measures are only temporary in character and are due to expire on 25th January 1970 — twenty years after the coming into force of the Constitution. Presumably if the situation warrants it Parliament can prolong the prescribed period, as it did when it doubled the original period of ten years by passing the Constitution (Eighth Amendment) Act. Once the period prescribed for the continuation of these special privileges expires, the Anglo-Indians are entitled to only such protection as is accorded to other minority groups.[17]

Fourthly, a constitution may empower a State to take ameliorative measures to advance the status of economically, socially and culturally depressed communities. This is frequently referred to as 'protective discrimination'. This expression is used to describe the constitutional scheme introduced into India whereby the State is enjoined to take positive steps for the advancement of the Scheduled Tribes and Castes, the socially and educationally backward classes,[18] as well as the women and children.[19]

The rationale of the concept of protective discrimination is that any declaration of equality is an empty verbal formula, unless affirmative obligations are placed on the State to take positive steps to ameliorate group differences. This paternalistic concept of the functions of government may be attributed to the abandonment of the *laissez-faire* economic philosophy of the late nineteenth and early twentieth centuries, with its notion that the role of the State is to guarantee a maximum of freedom from coercive influence and a protection against the more obvious types of anti-social conduct. In its place is the Positive State, which has, as part of its affirmative obligations, the uplift of the economic and social welfare of its people. This change in attitude towards the role of the government in society is reflected in the broadening of the concept of the rule of law as is seen in a comparison between Dicey's formulation of the rule of law and that formulated by the International Congress of Jurists assembled in New Delhi in 1959 under the aegis of the International Commission of Jurists, better known as the Declaration of Delhi. According to the Dicean analysis, the rule of law connotes primarily (a) the absence of arbitrary or wide discretionary powers and (b) the equal subjection of all persons to the ordinary courts of law. By contrast, the 1959 model of the rule of law as defined in the Declaration of Delhi takes cognizance that:

> "....the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural

15. Article 331, *ibid.*

16. Article 333, *ibid.*

17. *Supra,* at 6.

18. Articles 15(4), 16(4), 29(2) and 335 of the Constitution of India.

19. Article 15(3), *ibid.*

conditions under which his legitimate aspirations and dignity may be realized".[20]

We have indeed come a long way from the Whig *laissez-faire* philosophy of Dicey. Instead of being merely a legal formula wholly concerned with the protection of persons from governmental interference and restraint, this new twist to the conventional notion of the rule of law posits a new relationship between the State and the Individual. It adds social content to the old formula and institutes a government of affirmative orientation which has been approximated in emotive language to the 'Rule of Life',[21] or, in Aristotelian language, lays stress on distributive as opposed to corrective justice.

This change in political thought has engendered a realization, in the constitutional sphere, that in order to establish an egalitarian society, a mere declaration of equality before the law and equal protection of the laws is completely inadequate, since all that it achieves is the guarantee of the type of equality Anatole France so ironically spoke of:

> " The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." [22]

India is a graphic example of the need to inject some form of protective discrimination in favour of certain communities in order to achieve an egalitarian society — the declared aspiration of the Indian people. The country has a vast population, heterogeneous in structure, and traditionally based on the ignoble caste system. At the bottom of the castes, are the untouchables, a title which virtually describes the attitude of the other communities towards them. Ranging from the untouchables to the Brahmins, the highest caste, are several intermediate castes, many of which are depressed communities, in the sense that they are economically, socially and educationally backward. Having laboured for centuries under several disabilities, these depressed groups cannot be expected to lift themselves up by their own bootstraps. They cannot compete with the more advanced and established groups. Indeed, as has been said:

> " A social system existing since thousands of years cannot be simply written off by the adoption of an equality clause. It was therefore essential to enact, apart from the general provision of Article 14,....a degree of discrimination in favour of backward sections of the community such as would speed up the process of real equalization." [23]

Moreover, a blanket prohibition against discrimination has the adverse effect of precluding the State from taking ameliorative measures to remove the various disabilities of the depressed classes. This may be

20. See the International Commission of Jurists' publicaton *The Rule of Law in a Free Society.* See also Thorson, "A New Concept of the Rule of Law", (1960) 38 Can. B.R. 239.

21. See *The Rule of Law in a Free Society, ibid,* pp. iv, vii, foreward by Jean Flavian Lalive.

22. J. Cournos, *A Modern Plutarch* (1928) p. 27. See also *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649, 655; *Griffin* v. *Illinois,* 351 U.S. 12, 23 (1956).

23. C. H. Alexandrowicz, *Constitutional Development in India,* (1957) p. 57.

illustrated by *State of Madras* v. *Dorairajan.*[24] Article 29(2) of the Indian Constitution prohibits discrimination relating to the admission of citizens into any educational institution maintained by the State, or to receiving aid out of State funds, on the ground, *inter alia,* of caste. The Madras Communal General Order alloted seats community-wise in both engineering and medical colleges. The petitioners, both Brahmins, were refused admission to these institutions, not on the merits, but because the seats reserved for Brahmins had already been filled. They challenged the General Order on the ground that it discriminated against them because of their caste. The State sought to justify the Order by arguing that the purpose behind the allocation of seats in these colleges on a communal basis was to give members of the backward classes an opportunity to be admitted into these colleges without competing with other applicants, to the former's advantage, as enjoined by the directive principles of State policy.[25] The Supreme Court rejected this contention, ruling that the Communal General Order was null and void as it violated Article 29(2) of the Constitution.

Similarly, in *Jagwant Kuar* v. *Bombay*[26] an order requisitioning land for the construction of a Harijan (one of the depressed communities) colony was struck down as discriminatory, as the facilities to be provided were to be limited to Harijans only.

Both these cases illustrate that a blanket prohibition against discrimination prevents the State from taking ameliorative measures in favour of the backward classes. In India the position was subsequently remedied by adding a further clause to Article 15 empowering the State to take steps for the advancement of such groups.

The position in India today is that untouchability has been abolished,[27] and any attempt to exclude persons who previously belonged to this caste from places frequented by others would be invalid;[28] special provisions may be made in favour of women and children;[29] special measures may be taken to promote the status of the scheduled castes and tribes and, more generally, the backward classes; and these may relate to the reservation of posts or appointments in the public services in favour of them,[30] or of seats in the House of People[31] and the State Assemblies.[32] The Constitution also provides grant-in-aid to be given to the States for

24. A.I.R. 1951 S.C. 226.

25. Chapter IV, Constitution of India. These principles are not justiciable. (Article 37).

26. A.I.R. 1952 Bom. 461.

27. Article 17 of the Constitution of India.

28. Article 15(2), *ibid.*

29. Article 15 (3), *ibid.*

30. Articles 15(4), 16(4) and 335, *ibid.*

31. Article 330, *ibid.*

32. Article 332, *ibid.*

the advancement of the welfare of the Scheduled Tribes.[33] Aside from these specific provisions sanctioning positive state action towards this direction, the Constitution also contains a set of directive principles of state policy which seek to establish a social order in which economic, social and political justice inspire all the institutions of national life.[34] These principles are not justiciable,[35] but they indicate the goals towards which India should strive. Although these principles are only moral precepts, they are not completely valueless, since it is naive to suppose that people in general, or politicians in particular, act in certain ways only when they are under a legal obligation so to act. One need only refer to the observance of conventions in the United Kingdom breach of which would not be declared illegal by the courts. The unenforcibility of conventions in no way prevents full respect being accorded them. Thus it is submitted that these directive principles of government have an educative value and one should not underestimate their effect on a party which takes over the reins of government through constitutional means. The generality with which these principles are framed, and the fact that they do not impose a particular economic or social order to be achieved in a particular way, leaves ample room to a party which captures power to achieve these goals in conformity with their own political philosophy.

It may be seem from the aforesaid that a comprehensive scheme of protective discrimination has been initiated in India, founded on the notion that:

> "…. to avoid specific and positively favourable provisions for the weak is, in fact, to prefer the strong".[36]

This view is diametrically opposite to the underlying philosophy of the American Constitution that:

> "….the weak are entitled to no favours because they are weak. They are accorded some freedom from the abuse of power by government and to a very limited degree from the abuse of power by individuals. Within that framework they must make their climb to equality in fact as best as they may".[37]

It is submitted that such a guarantee of equality is ineffectual to achieve an egalitarian society. All that it guarantees is the preservation of unequal established equalities, and this becomes apparent when one examines the position of the Negroes in the United States today.

33. Article 275, *ibid.*

34. I. Jennings described them as providing for Fabian socialism without the socialism in *Some Characteristics of the Indian Constitution,* p. 31.

35. Artice 37, of the Constitution of India.

36. H. E. Groves, "Constitution of the Federation of Malaya", 5 *Howard Law Review,* (1959), p. 205.

37. *Ibid,* p. 206. There is, however, an exception to this generalization, namely the American Indians, upon whom benefits have been specially conferred by federal legislation as a long-standing practice. However, these Indian tribes are generally regarded as independent political communities associated with the United States by treaty, and therefore not really part of the American community. See generally F. S. Cohen, *Handbook of Federal Indian Law.*

In 1865, the Thirteenth Amendment abolished slavery, but no special provisions were enacted empowering the State to take affirmative measures in favour of the ex-slaves to give reality to their emancipation. The only privileges conferred on them were protection from discriminatory state actions generally, and more particularly in the exercise of their voting rights. These limitations on governmental action are embodied in the Fourteenth and Fifteenth Amendments which apply to all persons though originally passed to safeguard the position of the Negroes.[38]

It is significant that these constitutional guarantees only enjoin the States not to discriminate against Negroes, but require no positive action from them to devise schemes for their advancement. The latter were thus left to harness whatever resources they could obtain in their climb to equality. This *laissez faire* attitude has left the Negroes in a vulnerable position, the toll of which can be seen if one measures the economic role of the Negroes in the United States today. A review of the situation in 1961, almost a century after the abolition of slavery, reveals that:

> " One can walk through capitols from attic to basement, through the spreading buildings of State agencies, through court-houses and city halls and search in vain among the armies of clerks, typists, telephone operators, supervisors for a single Negro employee".[39]

It is submitted that although this statement only refers to the position in the South, it in no way detracts from the thesis advanced that a mere declaration of equality without any further requirement of State participation in the advancement of the interests of a depressed community — and no community can claim to be more submerged than one which for decades had existed in servitude — is inadequate, and merely perpetuates established inequalities. At any rate, the review also indicates that although unfairness in governmental employment is particularly flagrant in the South, it is not entirely limited to the southern states.[40] The position of the Negroes today is that they are kept outside "the main stream of employment"; whatever jobs they hold are of the "janitorial garbageman variety" or are "rigidly defined quota jobs, such as policemen or professionals" and the latter only form an "infinitesimal fraction of the number of white employees of government in the South".[41] Moreover, it was said that the common characteristics shared by all Negro employees is that there is no place to which to advance.[42] The immediate future does not appear too rosy. Contrast this with the position in India where the States adopt a policy in which seats in public

38. In the case of the Fifteenth Amendment, this is indicated by the expression "previous servitude" contained in it. As to the Fourteenth Amendment, see Jacobus ten Broek, *The Antislavery Origins of the Fourteenth Amendment;* J. B James, "The Framing of the Fourteen Amendment", 7 *Stanford Law Review,* 3 (1954); J. P. Frank and Robert F. Munro, The Original Understanding of 'Equal Protection of the Laws', 50 *Columbia Law Review* 153 (1950).

39. H. E. Groves, "States as 'Fair' Employers", 7 *Howard Law Journal,* (1961), p. 1.

40. *Ibid,* p. 2.

41. *Ibid,* p. 2.

42. *Ibid,* pp. 2 - 3.

services and public educational institutions are reserved for the backward communities. This is one mode in which the emergence of the Scheduled Tribes, Scheduled Castes and other backward classes is hoped to be accelerated.

In the educational field it has taken approximately ninety years for Negroes to assert their right to attend the same schools and colleges as white students. In 1896, the *imprimatur* of the Supreme Court was given to the doctrine of "separate but equal" in *Plessy v. Ferguson,*[43] and although the actual pronouncement of the Court was based on the validity of a Louisiana Statute requiring railroads to provide "equal but separate" coaches for white and coloured passengers, its rationale was extended to sustain segregation in the public schools. It was not until 1954 that the Supreme Court categorically repudiated this doctrine in *Brown v. Board of Education;* [44] Warren C.J. in delivering the opinion of the Court stated that racial segregation in public schools had a detrimental effect on coloured children in that it fostered in them a sense of inferiority which retarded their mental and educational development, and therefore was bad *per se.* It cannot be denied that a century is a long time to assert one's rights.

It is clear from the history of racial segregation that the process of equalization in the United States is largely left in the hands of the courts. It is true that since the last few decades, the Supreme Court has consistently interpreted the Constitution "to ensure genuine equality of public treatment to racial minorities".[45] The Court has given an expansive interpretation to "state action" so as to enlarge the operation of the equal protection clause. It has struck down discriminatory action by the legislative,[46] executive[47] and judicial[48] organs of government. However, the courts are not the most appropriate instruments through which social and economic revolutions can be effected. Any ruling made by them depends on the accident of litigation. Moreover a judicial decree only binds the parties before it. The judicial process is too slow and too uncertain, and too great a dependence is placed on the particular philosophy of a court, which varies from time to time. Even without the incorporation of preferential treatment in favour of Negroes, judicial and non-judicial fears have been expressed as to the danger of the Negro becoming "the special favourite of the law". This utter lack of solicitude for the welfare of the Negro found expression even as early as 1883, eighteen years after the Thirteenth Amendment abolished slavery in the United States. In the *Civil Rights Cases* decided in that year, Bradley J. had occasion to observe:

43. 163 U.S. 537 (1896).

44. 347 U.S. 483 (1954).

45. Spicer, "The Supreme Court and Racial Discrimination", *Vand. Law Review,* 821, 834 (1958).

46. *Strander v. West Virginia* 100 U.S. 303 (1879).

47. *Ex parte Young* 209 U.S. 213 (1908); *Sterling* v. *Constantin* 287 U.S. 378 (1932).

48. *Ex parte Virginia* 100 U.S. 339 (1879).

> " When a man has emerged from slavery and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favourite of the laws, and when his rights, as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." [49]

This attitude was echoed by a considerable proportion of the public at that time,[50] yet it is clear that the fear was remote from the truth. Harlan J. who dissented vigorously in the case, decried this attitude as one of tyranny by the more prosperous classes which only doled out such privileges as they chose to grant.[51] In 1963, at the time of writing, it is still a far cry from the fear that the Negro is "the special favourite of the law". Indeed, well might one quote the late President Kennedy's summing up of the status of American Negroes today in his special message to Congress in February 1963, calling it to approve legislation to fight anti-Negro discrimination.[52] He said:

> " The Negro baby born in American today, regardless of the section or State in which he is born, has about:
>
> One-half as much chance of completing high school as a white baby born on the same day;
>
> One-third as much chance of completing college;
>
> One-third as much chance of becoming a professional man;
>
> Twice as much chance of becoming unemployed;
>
> One-seventh as much chance of earning US.$10,000 a year;
>
> A life expectancy which is seven years less, and prospects of earning only half as much."

One point, however, has to be made clear. In stressing the inefficacy of judicial action alone, unsupplemented by legislative and executive participation in the attainment of equality in the fullest sense of the word, it is not submitted that the incorporation of protective measures in favour of the weak and vulnerable in a society will work as a panacea. The thesis advanced is that it will facilitate the legislature and the executive in their task of establishing an egalitarian society. It also inspires greater consciousness of the aims desired to be achieved and this would be more effective if elevated to a constitutional ideal. It is conceivable that even if the United States Constitution had expressly required the integration of public schools and universities, its implementation would have met with stiff opposition from the States; there would probably have been several Little Rocks, where federal troops would have to be called in to enforce integration orders, but it is inconceivable that such opposition would survive through the century as time and education would have worn it down. It is unlikely that any incident

49. 109 U.S. 3, 25 (1883).

50. See R. J. Harris, *The Quest For Equality,* (1960), p. 89.

51. 109 U.S. at 62 (1883).

52. *The Straits Times,* 28th February, 1963.

equivalent to the Meredith fracas[53] would have occurred as it did as late as 1962.

In the case of the Federation of Malaysia, what is the rationale behind the conferment of special privileges on (a) the aboriginal peoples and (b) the Malays? What is the justification for creating the Orwellian situation that "all persons are equal, but some are more equal than others"?

In the case of the former, the justification for empowering the State to take ameliorative measures in their favour is based on the notion of protective discrimination. The aborigines are the indigenous people of Malaysia and are extremely backward. It is therefore necessary that the government should not be precluded from taking discriminatory measures to elevate them from their submerged status and hence the exception to the general prohibition against discrimination.

With regard to the position of the Malays, the rationale behind their preferential treatment is more complex. The justification generally advanced is their need for protective discrimination based on the ground that the Malays form an economically depressed community, and that if positive steps are not taken to advance their economic status, it is very likely that:

> "....the more aggressive, better educated, economically more powerful Chinese could by the purchase of land, the domination of public service, as well as private industry and commerce, increasingly submerge the Malays into a status of inferiority from which their emergence would be visionary".[54]

This economic vulnerability and weakness of the Malays may be illustrated by the following passage from Winstedt's *Malaya and Its History,* where he said:

> " Everywhere the Chinese and the Indians are inflexible in excluding the Malay from commerce. When the Kedah Government once called for tenders for the erection of buildings and stipulated that a quarter of the labour force must be Malay, no Chinese or Indian would condone the breaking of their closed ring by tendering, though payment of ten per cent above the sum tendered was offered. When a Malay co-operative society tried to export its copra by a Chinese coastal steamer to Singapore, the first cargo was left on the jetty and the second was found on arrival to have mysteriously diminished. When the government gave loans to Perak fishermen to get them

53. The admission of James Meredith, a Negro into the University of Mississippi pursuant to an order of court in October 1962, triggered off violent clashes between federal marshals appointed to escort him to the university campus, and Southerners who received the overt support of the State Governor, resulting in the death of two men. Since then, in the second quarter of 1963, there had been several violent clashes between the Negroes and the White segregationists in several southern states where the Negroes had answered the clarion call to take mass action to fight for equal rights.

54. H. E. Groves, "Constitution of the Federation of Malaya", 5 *Howard Law Journal* (1959), p. 205.

> out of the clutch of the Chinese middleman, the Chinese manufacturers at Penang refused to sell the fishermen ice."[55]

Another argument advanced in justification of the special privileges accorded the Malays and which is merely an extension of the first, is that:

> " An economically depressed Malay community in a prosperous Malaya will not mean a peaceful Malaya. An economically depressed Malay community will never be able to achieve the desired degree of co-operation with the substantially more prosperous non-Malay communities. It is therefore in the long term interest of all of us to support any measures which will enable our Malay brethren to improve their economic status.
>
> " Such an attitude and policy is dictated not only by sentiment but by sheer commonsense and will benefit not only the Malays themselves but this country as a whole, because anything which tends to raise total productivity and the productivity per capita must obviously benefit the whole country." [56]

This argument was forwarded by the Minister of Finance in the course of the Legislative Council debate on the constitutional proposals of the Federation of Malaya and was predicated on his earlier statement that it was indisputable that the Malays were economically behind the other races in Malaya.[57] The Minister of Finance has thus gone a little further than the argument that the Malays are economically weak and vulnerable in justification of the conferment of special privileges on them. Firstly, he suggested that failure to promote the interests of the Malays may result in communal strife. This is a double-edged argument because the grant of special privileges to the Malays in perpetuity, as it is done under the Malaysian Constitution,[58] may well create dissatisfaction on the part of other races, with a similar result. At any rate, the fact that the Malays suffer from economic disabilities should itself be sufficient justification for granting them special privileges irrespective of whether dire consequences would result. The problem rests more on the form these privileges should take. This shall be considered in greater detail later on.

The second limb of the argument advanced by the Minister of Finance is somewhat difficult to follow. The argument that anything which raises the total productivity will benefit the country as a whole,

55. Compare the assessment of the poverty of the Malays by Ungku A. Aziz in "Facts and Fallacies on the Malay Economy". *The Straits Times,* 28th February — 5th March, 1957.

56. Federation of Malaya, Legislative Council Debates, Thirteenth and Fourteenth Meetings of the Second Session of the Second Legislative Council, co. 2870 (1957).

57. *Ibid.*

58. Article 159 prescribes a two-thirds majority of both Houses of Parliament sitting separately on the Second and Third Readings for any amendment of the Constitution save those stated in clause (5). Clause (5) requires the further consent of the Conference of Rulers before there can be any amendment of Articles relating to the special position of the Malays. It is inconceivable that the Conference of Rulers would be eager to give the requisite consent. It is noteworthy that clause (5) itself is not, entrenched and could be amended by the ordinary amending procedure. In this way, the consent of the Conference of Rulers may be by-passed. However, a conservative court may declare such an amendment invalid on the ground that it is against "the spirit of the Constitution".

is hardly relevant as the basis of discriminatory treatment between the Malays and the non-Malays. Indeed, one might even venture to suggest that if total productivity would be raised by conferring special privileges on one group of the community, then it could better be achieved by conferring these privileges on the economically superior Chinese.

It is submitted that the conferment of special privileges on the Malays is not purely motivated by economic considerations as in the case of India, or in the case of the aborigines in Malaysia. This is borne out by a number of factors.

Firstly, if the true purpose of conferring special privileges on the Malays is to enable them to compete with the more progressive races, then, once parity is achieved, these special privileges should cease, since the reason for incorporating them into the Constitution no longer exists. Instead, Article 159(5) perpetuates these special privileges by giving the Conference of Rulers the power to veto any attempt to abolish them. This departs significantly from the proposal of the Reid Commission that these privileges should be reviewed by Parliament every fifteen years with a view to their eventual abolition. Again, the Minister of Finance sought to justify the permanent character of these special privileges on the ground that:

> "....the Malays are a proud and sensitive race. They are also an intelligent race, and I know that they appreciate the significance and implications of this provision far better than most people realise. I have no doubt in my mind whatsoever that when the time comes, the Malays themselves will ask for its abolition, but this is a matter which we must obviously leave to them to decide." [59]

Suffice it to say that this view is not generally shared by others. A system of preferences and reservations create strong vested interests, and it will not be easy to discard it even when the reason for its existence ceases. It is difficult to see how qualities of pride, sensitivity and intelligence contribute towards the relinquishment of vested rights. Moreover, if the purpose of this preferential treatment is to raise the economic status of the Malays, surely the question whether parity has been achieved should not be left to the determination of the recipients of these benefits.

Secondly, the position of the Malays would have been advanced without offence to the sensitivities of other races if, instead of according them preferential treatment as a race, preferential treatment had been phrased to cover all persons in the lower economic strata. This would include the bulk of the Malays, thus achieving the avowed purpose of discriminating in favour of the Malays. The substitution of an economic for a racial criterion would also be more equitable since it would reach those non-Malays who belong to the same economic strata. It would also cover the aborigines who are in the same position. Instead, a cleavage is drawn between the Malays and the aboriginal peoples, in the conferment of special privileges for both groups, and this supports the proposition that the so-called special position of the Malays was

59. Federation of Malaya, Legislative Council Debates, Thirteenth and Fourteenth Meetings of the Second Session of the Second Legislative Council col. 2871.

inserted into the Constitution not only to secure benefits to those who are economically weak and vulnerable, but also to emphasize that the Malays are a distinct group which entitled them *ipso facto* to preferential treatment.

One is fortified in drawing this conclusion by the fact that the special privileges afforded the Malays under the Constitution was not an outcome of a sudden awareness of the economic weakness of the Malays, but was merely a continuance of previously enjoyed rights. The treaties entered into between the British and the Malay Sultans, through which the former established their system of indirect rule in Malaya, had always recognized the special position of the Malays who were the subjects of the Malay Sultans, acknowledged by the British. The effect of the residential system established by the British, under which the Sultans received the protection of the British in return for promising to act on the advice of British Residents attached to their courts, preserved the semblance of Malay rule and this has helped to engender in the Malay mind that Malaysia belongs to the Malays and therefore they are entitled *ipso facto* to special treatment. Thus clause 19(i)(d) of the Federation of Malaya Agreement 1948, enjoined the High Commissioner "to safeguard the special position of the Malays and the legitimate interests of the other communities". Pursuant to this policy, even before the Federation of Malaya Constitution came into being in 1957, the Malays were already enjoying priority in admission to the Malayan Civil Service,[60] in the grant of scholarships, bursaries, permits and licences required to operate certain trades and businesses; Malay reservations were also a common feature and it is significant that a corresponding power to alienate land to non-Malays was sparingly used.

It is also noteworthy that the special privileges conferred on the Malays under the Malaysian Constitution correspond closely to the privileges they had previously enjoyed. All these strengthen the view that part of the rationale behind the conferment of special privileges on the Malays is found in the principle of historical continuity, and the maintenance of the *status quo.*

Another query which has arisen in connection with the grant of special privileges to the Malays is whether the type of preferential treatment provided by Article 153 is the best method of combating the economic ills of the Malays. The reservation of places in the public services, scholarships, licences and permits in favour of the Malays, as authorised by Article 153, has been in operation for the past few decades without any significant progress in the economic well-being of the Malays, proof of which is seen in the present need to continue preferential treatment to them. The inevitable conclusion one draws from this is that the conferment of this category of special privileges completely fails to scratch even the surface of the problem. Ungku A. Aziz in an article on the "Facts and Fallacies on the Malay Economy" [61] vividly pointed out the

60. Before 1953, the Civil Service was only open to Malays and British subjects of European descent. After 1953, this quota was enlarged to admit one-fifth of the entrants from the other communities. At the time of writing, the ratio of admission is still four Malays to one non-Malay.

61. *The Straits Times,* 28th February — 5th March, 1957.

error in this approach. The Malay economy is a rural economy based on agriculture and fishing. The bulk of the Malay population [62] is engaged in padi farming and fishing — the poorest occupations in the country. It is therefore not surprising that a large proportion of the Malays are so poor. These occupations are unprofitable because of low productivity resulting from obsolete methods, exploitation and neglect by the government, e.g. in the case of padi-farming, the methods employed are outdated, and the yield is poor. The farmers are exploited by their landlords who charge very high rents, by shopkeepers on whom they are dependent for the sale of their produce and the purchase of necessities, and on moneylenders who, in providing them with credit in kind or with loans in cash, charge excessive interest. All these cause the Malay farmers to be perpetually in debt.

The remedy for this sorry state of affairs is for the government to take positive measures to eliminate these root evils. It calls for the eradication of illiteracy, the improvement of farming methods with better seeds, improved ploughing, pest control, fertilisers and irrigation. To bring all these modern agricultural techniques within the reach of these farmers, it is necessary first of all, to free them from their dependence on shopkeepers and moneylenders for both marketing and credit. This monopoly must be broken by setting up national marketing organisations, and establishing rural co-operatives to provide for marketing, processing and credit.[63] However, the success of the latter depends very much on the encouragement and aid it receives from the government.[64]

All these reveal strikingly the complete inadequacy of Article 153. Of what use are scholarships and places in the public services if one is illiterate ? Similarly, of what use are permits and licences to operate undertakings if one does not possess any capital to operate them ? Before the bulk of the Malays who live in poverty can enjoy these privileges, the standard of living must be elevated from mere subsistence level, and this they cannot achieve, on their own as they cannot be expected to lift themselves up by their own bootstraps. Article 153 leaves this basic problem untouched. Instead, its effect is to benefit the Malays already wealthy. It also creates a middle-class of Malay capitalists. This benefits the class itself, but does not reach the Malay peasantry who form the bulk of the Malay population.[65] The substitution of Malay middlemen for the Chinese and Indian shopkeepers and moneylenders the Malay farmers and fishermen usually depend upon does not really relieve the Malay farmers and fishermen, as there is no reason to believe that Malay businessmen will be any different in their methods

62. 76% of the Malay working population earns its living by fishing and farming i.e. three out of four working Malays. See *ibid.*

63. See John Lowe, *The Malayan Experiment,* Fabian Research Series 213, p. 21; Ungku A. Aziz, "Facts and Fallacies on the Malayan Economy, *The Straits Times,* 28th Feburaury — 5th March, 1957.

64. For the steps government has taken and proposes to take in this direction, see John Lowe, *The Malayan Experiment,* Fabian Research Series 213, p. 21; Federation of Malaya Second Five-Year Plan 1961 — 1965, p. 35.

65. See J. J. Puthucheary, *Ownership and Control in the Malayan Economy,* (1960), p. 179 — 180.

from non-Malay businessmen. Experience shows that Indian money-lenders do not moderate their rapacity when dealing with their own countrymen, and it is inconceivable that Malay capitalists would be more lenient towards Malays. The reason is that "exploitation ignores racial sympathies".[66]

Moreover, preferences accorded the Malays in the form of permits and licences has resulted in the practice of 'name-lending'. Very often a State may reserve certain licences, e.g., taxi-licences, mining licences and timber-cutting permits, for Malays, which owing to lack of capital are not taken up. Meanwhile, some enterprising non-Malays approach the Malays for the loan of their names to apply for these licences and permits in return for a pension. Again, it is inconceivable how the creation of this class of 'pensioners' really benefits the Malay peasantry.

In the final analysis it can be seen that Article 153 does not really benefit the bulk of the Malay population. Since it does not achieve its avowed object, it would have been far more preferable if the constitution-makers had adopted the more 'neutral' approach taken by India, where the State may discriminate in favour of certain economically, socially and educationally backward groups, based on criteria other than that of race. Such a provision would have permitted the achievement of the avowed objectives of Article 153. It would also cover the allocation of scholarships, bursaries, licences or permits to all Malays except those who by virtue of their station in life would not be eligible, e.g., the wealthy Malays. Moreover, it would avoid offending the sensitivities of members of the other communities who may feel discriminated against if these special privileges are perpetuated even after parity is reached. In contrast to this, Article 153 has the added disadvantage of potentially endangering the social cohesion existing today among the various communities. One reason is that it could lead to frustration among those against whom the existing quota system operates unfairly, e.g., in the case of the Malayan Civil Service, a large number of well qualified non-Malays find themselves barred from entry into the service because the ratio of four Malays to one non-Malay has to be maintained. This could lead to the creation of a group of dissatisfied and disgruntled young men and women, hardly conducive to the good of the country. Moreover, discussion on the topic of the special privileges of the Malays frequently gives rise to heated controversy. Only recently, the Chairman of the Penang City Council Transport Committee moved a resolution deploring the rejection of its applications for new bus services and for route variations by the Regional Licensing Board on the basis of the government's policy requiring Malay capital participation in the transport industry.[67] The City Council being a local authority operating on a non-profit basis with no possible participation of Malay capital, the application of this policy would adversely affect its competition with private enterprise. However, the resolution immediately brought a warning from the Assistant Minister of Commerce and Industry that "irresponsible remarks on government policy on Malay participation in business may

66. Ungku A. Aziz, *op. cit.*

67. See *The Straits Times,* 1st February 1963.

lead to undesirable consequences".[68] This example reveals the sensitive nature of the problem which has been given emphasis by the incorporation into the Constitution of special privileges on racial lines. It is significant that no one has yet quarrelled with the grant of special privileges to the aborigines.

Considerable stress has been made of the potential danger of these special privileges, if they are perpetuated to the existing social cohesion because the subject-matter is so susceptible of exploitation, especially by political parties based on communal lines. A commentator, after a 1960 survey of the election results of the last five years, stated that the electorate had fragmented along sectarian and racialist lines, and that the political parties around which the electorate had fragmented were the Socialist Front, the Pan-Malayan Islamic Party, and the People's Progressive Party. He then went on to state that in the case of the latter two:

> " given their sectarianism, their opportunism and their lack of practical programmes, it becomes easy to see how perilous a situation will arise if their strength continues to grow".[69]

In this context, the perpetuation of preferential treatment to a racial group may well become "a rock on which any democracy may founder".[70]

S. M. HUANG-THIO.

68. *Ibid,* 2nd February 1963.

69. Huang Tze-Chin, "A Rainbow without a Pot of Gold", *The Sunday Mail,* 12th June 1960.

70. H. E. Groves, "Constitution of the Federation of Malaya", 5 *Howard Law Review* (1959), p. 212.