ABSTRACT

This study aims at recognizing the rationale of the protection discrimination in the constitution from the perspective of ethnic relations in Malaysia, other than identifying and confirming if this kind of discrimination is against the concept of law equality and the concept of equality and justice in Islam. This study takes the shape of a qualitative study. The data was obtained from extensive library study. The findings have shown that the concept of protection discrimination is not opposed to the principle of law equality for the rectification of political, economic and social imbalance amongst the Malaysian people. The outcome of the discussion also produces the fact that the special position of the Malays is not conflicting with the principle of equality in Islam, with this based on four arguments, which are firstly, although the Malays are granted the privilege as dictated in the constitution, it is not through robbing off the non-Malays’ properties and assets but instead having access to them through the excess from the overall economy. Second of all, the implementation done on this special status has not, in anyway, affected the economic, educational and political conditions of the non-Malays but even in sectors of economy and education, they non-Malays have fared way better than the Malay counterparts. Thirdly, the Malay’s remarkable position has long existed before the Independence and re-included when the constitution was formulated. The final argument is that, this specialty is birthed from an agreement sealed through negotiations between ethnic groups.

Key words: Federal Constitution, Equality, Protection discrimination, Ethnic, Malaysia

Introduction

The Constitution allocates that each and every person is equal to the eyes of the law and is entitled to gain equal protection in the legislation. Any form of discrimination is prohibited – the one that takes sides with any one person on the premise that he or she is one of the King’s people of any state, except for those allowed by the constitution. Citizens discrimination cannot be practised solely on the reasons of religion, race, generation or birth place in any given Law or in the appointment of any incumbency or position under the public authority or in any law administration pertinent to the acquisition, holding, or property elimination, or in relation to the founding or running of any trade, business, career or occupation. The public authority is not permitted to perform discrimination on anybody, on the excuse that he or she resides or runs a business in any state in the Federal territory or outside the jurisdiction of the said authority. This is what has been termed as the Equality Concept.

Methods:

This article based on concept paper. To obtain data, content analysis method was applied.

Result and Discussion

The Principle of Equality in The Federal Constitution:

The concept of equality is a noble theoretical platform, and purpose that seeks to be achieved by most constitutional and independent nations. Under the principle of law sovereignty, every citizen irrespective of ethnicity, religion or skin colour must be treated equally. According to this principle, every citizen cannot be
through the

to be no positive constitutional plan to elevate the living status of these people in the United States. Therefore,

(a) prohibit:

the special position reserved for the Malays. This is strengthened by Article 5 whereby this equality does not

is one clear example granted by the Federal Constitution to the Yang Di Pertuan Agong for the preservation of

With reference to the Federal Constitution, equal rights are allocated in Article 8 (1) except for those that

been left behind in the economy in comparison with other groups who are more active in this country (Hashim

agrarian system cannot be changed into a modern system in a fortnight. Without protection, The Malays had

to the gradual obsoleteness of the Malay society. According to Hashim Yeop Sani, a community with a feudal

ethnics. The same condition would apply whereby the equal system and opportunities without barrier, will lead

and economic change, it is undeniable that a fraction of the people have been left behind in the country’s surge

of advancement.

Total equality in the multi-racial society, with different groups and in different levels of development will

only cause chaos and outrage. In 1865, the 13th Amendment of the United States Constitution was done to

abolish slavery. The implication is seen in the fact that the Black people who were once made slaves before the

amendment were given the special status in the forms of only self-freedom and the right to vote. There seemed
to be no positive constitutional plan to elevate the living status of these people in the United States. Therefore,

through the laisser faire system, it exposes the Black people to a state that has lagged far behind the other

ethnics. The same condition would apply whereby the equal system and opportunities without barrier, will lead
to the gradual obsoleteness of the Malay society. According to Hashim Yeop Sani, a community with a feudal

agrarian system cannot be changed into a modern system in a fortnight. Without protection, The Malays had

been left behind in the economy in comparison with other groups who are more active in this country (Hashim


With reference to the Federal Constitution, equal rights are allocated in Article 8 (1) except for those that

have been clearly permitted in the Constitution, rendering this equality allocation no longer absolute. Article 153
is one clear example granted by the Federal Constitution to the Yang Di Pertuan Agong for the preservation of
the special position reserved for the Malays. This is strengthened by Article 5 whereby this equality does not

prohibit:

(a) Any allocation that makes the rules and regulations concerning self-law;

(b) Any allocation for the protection, prosperity or the development of the Native People (including land
reservation) or reserving for the Natives, any position of the public services deemed suitable at a reasonable rate.

(c) Any allocation that restricts the entry of service in the Malay army to the Malays.

For certain, these equal rights are no longer absolute. The presence of this doctrine causes the basic rights to be
made milder and given conditional rights. This is something that cannot be denied in the country with multi-
racial communities and the social position that is not balanced.

The Protection Discrimination in The Federal Constitution:

In analysing the Malays in the Constitution, it should be noted that the protection discrimination has given
strength to the linkage between the constitution and the ethnic relations in Malaysia. Before we get into detail
the concept of the protection discrimination, we need to understand the meaning of discrimination. Discrimination is defined as an act of differentiating in an affair or matter due to skin colour, race and others (Kamus Dewan). Discrimination also carries the meaning of treatment that varies towards a person or a group of persons in the same or different situations (Brita Sundberg-Weitman 1977).

For a multi-racial country, it is a norm to have the constitution fo the country placing the protection
discrimination as an allocation that is important and one that necessitates acknowledgement. Through this
provision, law provides special rights and protection to the ethnic groups in a country and at the same time, not
deny the opportunities to other groups or ethnicities. This is made ready to help the ethnic group in several
life aspects like the public services, economy, education and so on. Through this, ethnic groups that have lagged
behind in the country’s development can be assisted and their status of life raised, to thrive amongst other ethnic
groups that are already a few steps ahead.

India, as one clear example shows the protection discrimination practised as the country has multiple groups
of various races, tribes and groups that speak different languages, live in different cultures and keen worshippers
of varying religions. This does not escape complications as the majority of these people are under-developed
and are included in the minority group. With this condition, the Indian constitution has provided the protection
to this small group.

This is contained in Article 46 of the Indian Constitution which requires the government to provide special
protection for the education and economy of the under-developed communities, especially the “scheduled
caste” or the “scheduled tribe”. Similar to this, is the Article 15(1), whereby the government cannot discriminate
any citizen on the pretext of religion, race, caste, gender or birth place. However, Article 15(4) allocates an
exemption whereby there is nothing in the Constitution or in Article 24 (2) that prohibits the government from
making any special provision for the social or economic advancement of any under-developed class of the
society. Therefore, the policy that has been made effective in India, other than the ‘scheduled caste or tribe’ is based
on under-development or poverty (H.M. Seervai 1976).

This is not something new as there is an allocation which is similar to other constitutions, especially in the
multi-ethnic community like the Indian Constitution (exclusive rights of the Anglo-Indian in India). An example
is seen in the priority of appointment in certain services like railway, post, custom and telegraph services. The
Cyprus Constitution (power allocation between the Greeks and Turks by representative in the Ministerial Board
Hall, Representative Hall, Public Service Commission and public services with the initial ratio 70:30). A lot of
these provisions are temporary by nature, to guarantee fair competition based on the same policy. Allocations in
the Federal Constitution are comparable with the protection discrimination in the Indian Constitution that serves
a method of constitution to advance the ethnic groups and under-developed castes.

A rational opinion offered on this issue was from C. H. Alexandrowicz in the book Constitutional
Development in India whereby:

\[ \text{A social system that exists for thousands of years, cannot simply be forgotten by adopting one sentence of similarity. Therefore, it is crucial formulate the law other than the general allocation of Article 14 ... which provides a discriminatory degree that preserves the community that lags behind and will speed up the process of equality (Hashim Yeop Sani 1980).} \]

In Malaysia, this concept occurs in several issues under the constitutional allocations. This is clear under
Article 153 which provides the protection to the Malay ethnic and the Bumiputera in Sabah dan Sarawak. If we
look at the history, the presence of English in the Malay states is yielded from the agreement between the
English and the Malay royalties. The sovereignty of these Kings have not been questioned. This can be seen in a
few agreements between the Kings of those states that had completed the Malay Federation agreement Hal
1948. These agreements have illustrated a desire, in general (Hashim Yeop Sani 1973). As an example, every
agreement states that:

\[ \text{As wished by the King, the Majesty has agreed that it is the responsibility of the Government of state to prepare and encourage the development of education and training to the Malay people in that state.} \]

On February 1952, General Templer who was the High Commissioner of the British had received an order
from the British General Secretary for the colonised states that contained the British Government’s policy
towards the Malay Federation. Among the contents inside the order were that in order to get a united Malay
race, there must be a general formula of citizenship for all that assumes this federal or any part of it as their
actual residence and their object of loyalty, a Malayan race that unites and ideally does not involve any group to
have to abandon their cultures, norms and customs but before it can be achieved, the Malays must be given the
right encouragement and assistance to play their role on the economic endeavours of his country to enable the
rectification of the economic imbalance (Hashim Yeop Sani 1973).

In return, in relation to the issue of collective citizenship, the Work Committee and the Second Committee
who had revised the 1948 Malaya Federation Agreement Draft had weighed the issue concerning the Malays’
special position and proposed for reconfirmation. This reconfirmation is contained in Article 19 of the 1948
Malaya Federation Agreement which explains the responsibility of the High Commissioner to protect the rights,
power and status of the Malay Kings and the exclusive rights of the Malays and also the valid, important needs
of other races. This provision is originated from Article 153 (Kamal Halili Hassan 1990).

In the arguments of the Legislative Hall, the 13th and 14th meetings of the Second session of the Second
Legislative Hall of the 1956 Malaya Federation had been elaborated by the then-Minister of Finance:

\[ \text{The Malays suffering the blow from the economic angle in the well-off Malaya Federation does not indicate that the Federation is harmonious. These economic victims will not reach a degree of cooperation that is anticipated by the wealthier non-Malays. Therefore, for the long-term, we all need to help in any step to enable our Malay brothers to better their economic status...such a stance and attitude is motivated not only from our compassion but also from our conscience (Hashim Yeop Sani 1973).} \]
Briefly put, it can be stated here that the discrimination of protection is initiated for the following reasons:

1. It is done to rectify the political imbalance in a country, with multi-racial and independent nature. For instance in Malaysia, the priority of entering the public services is granted to the Malays with the purpose that they are able to dominate the country’s political state, as government officers would normally play an important role in implementing the policy of the rulers. Same goes with the army and police forces which are conquered by the Malays for the exact same reason.

2. The discrimination of protection is given to the minority so that their significance can be defended from being swamped by the majority. As an example, in the Indian Constitution, the minority’s rights like language, culture and belief are assured and defended.

3. The constitution prioritises the groups that have savoured and relished the special position before. The aim is so that any drastic change does not take place when the constitution is brought to the centerstage. A speciality that has long been enjoyed if it were taken away, can of course ignite the fury of the particular group. For instance in Malaysia, the special status of the Malays has actually been around in the colonised era as the outcome of the agreement sealed between the English colonials and the Malay kings. Also similarly, in India, the Anglo-Indians who have been entitled for some exclusive rights before the independence can also enjoy the exclusivity longer if the Indian Constitution is to be introduced.

4. The Constitution has given the jurisdiction to the government to improve the living status in terms of the economy, social and culture of the under-developed society. Without this protection discrimination, it is not possible for the under-developed to rise and compete with the developed ones. The Indian and Malaysian constitutions have shown clear evidence of this matter.

5. The protection discrimination also happens because of the compromise among groups made at the time the constitution was formulated. Something that is given to other groups means that the group would have the rights in several other exclusivities. For instance, in the Federal Constitution, the degree of citizenship given to the immigrants must be replaced with the granting of several special provisions to the Bumiputera and what is known as the Social Contract (Kamal Hallili Hassan 1990).

Conclusion:

The discussion of this study shows that the concept of the protection discrimination does not go on the opposite way from the principle of law equality, to re-marginalise the political, economic and social imbalance amongst the Malaysians. The study outcome also shows that the special position of the Malays does not conflict the equality principle based on four main contentions, one being that the Malays do gain the access to the special allocations as dictated in the constitution, it does not go through the snatching off of the non-Malay’s properties and assets but instead gaining them from the additional assets from the overall economy. Secondly, the implementation of the Malays’ special position does not leave an impact on the positions of the economy, education also the politics of the non-Malays, but even in sectors of economy and education, they are in far better position than the Malays. Thirdly, the special position of the Malays is one that has long existed before the Independence and reenacted when the constitution was formulated. Fourth, it is a proposition that has been collectively agreed by the ethnic groups.

References