



AFFIRMATIVE ACTION IN MALAYSIA (1971-1990) IN
THE LIGHT OF *MAQĀṢID AL-SHARĪ'AH*

BY

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ABSTRACT

This study analyses affirmative action policies and programmes from the early 1970s to the end of the 1990s in Malaysia through the New Economic Policy (NEP) in light of *Maqāṣid al-Sharī'ah*, namely *darūriyāt* (essential), *hājīyāt* (exigencies) and *tahsinīyāt* (enhancement) and also from the perspective of *Maqāṣid* based *ijtihād*. The objectives of NEP are to increase the income level and employment across all sectors in society and to reduce and eliminate identification of race in certain industries in the economy. These policies are examined especially in the occupational sector and educational system where ethnic quota was practised and subsidies were granted to small and medium enterprises (SMEs) owned by the Malays and the Bumiputra. Five criteria of the *darūriyāt*, namely, the protection of faith (*al-Din*), the protection of self (*an-nafs*), the protection of intellect (*al-Aql*), the protection of posterity (*an-nasl*) and the protection of wealth (*al-Mal*) are considered on whether affirmative action programmes fulfilled the criteria. Aspects from *hājīyāt* and *tahsinīyāt* were also looked into. Since affirmative action is a new phenomenon and there is no direct ruling from Al Qur'an and the Sunnah, then *Maqāṣid* based *ijtihād* are used. Imam al-Shatibi categorizes the *Maqāṣid* based *ijtihād* into four: there must be inseparability of texts and rulings from their intents, it needs to combine universal principles with evidence applicable to a particular case, the goals must be to achieve benefit and prevent harm and lastly the consideration of the outcomes. This study uses qualitative content analysis. It was found that affirmative action policies in Malaysia during the period of 1970s until the 1990s did not contradict *Maqāṣid al-Sharī'ah* principle although there are no clear practices of it during the early Islamic period. There are advantages and disadvantages of practising these policies. Based on the results gained, it clearly shows that the advantages outweighed disadvantages. The affirmative action policies have been introduced to promote peace and equal distribution of wealth in this multi ethnic society in Malaysia. The thesis also calls for Islamic scholars to look at modern economic challenges in this era of nation state and to explore *Maqāṣid* based *ijtihād* further for the benefit of the *ummah* and the civilizational of Islam.

ملخص البحث

تحلل هذه الدراسة سياسات وبرامج العمل الإيجابي من أوائل السبعينيات وحتى نهاية التسعينيات من خلال السياسة الاقتصادية الجديدة في ضوء مقاصد الشريعة، وهي الضروريات والحاجيات والتحسينيات، وكذلك من وجهة نظر الاجتهاد القائم على المقاصد. وعلى الرغم من أن أهداف خطة العمل الوطنية وهي زيادة مستوى الدخل والعمالة في جميع قطاعات المجتمع وتقليل التمييز العرقي في بعض الصناعات في الاقتصاد والقضاء عليه، فإنه لا شك في أن هناك إجراء إيجابيا. وتجري دراسة هذه السياسات خاصة في القطاع المهني والنظام التعليمي حيث تمارس الحصص العرقية وتمنح الإعانات للمؤسسات الصغيرة والمتوسطة التي تملكها ماليزيا والعرق الأصلي. هناك خمسة معايير للضروريات، وهي حماية الإيمان (الدين)، وحماية الذات (النفس)، وحماية العقل (التفكير)، وحماية الأجيال القادمة (النسل)، وحماية الثروة (المال) على ما إذا كانت برامج العمل الإيجابي تفي بالمعايير. وأجرى النظر أيضا في جوانب من الحاجيات والتحسينيات. وبما أن العمل الإيجابي ظاهرة جديدة ولا يوجد حكم مباشر من القرآن والسنة، فسيتم استخدام الاجتهاد في المقاصد. ويصنف الإمام الشاطبي أربعة أفكار رئيسة في الاجتهاد القائم على المقاصد والتي يجب أن تكون هناك تنافر النصوص، والنصوص من نواياها، فإنه يحتاج إلى الجمع بين المبادئ العالمية مع الأدلة التي تنطبق على حالة معينة، يجب أن تكون الأهداف لتحقيق المنفعة ومنع الضرر، وأخيرا النظر في النتائج. وتبين أن سياسات العمل الإيجابي في ماليزيا خلال الفترة من السبعينيات وحتى التسعينيات لم تتعارض مع مبدأ مقاصد الشريعة، على الرغم من عدم وجود ممارسات واضحة لها خلال الفترة الإسلامية الأولى. على الرغم من أن هناك مزايا وعيوب في ممارسة هذه السياسات، استنادا إلى النتائج المكتسبة، فإنه تفوق بوضوح من المزايا. وقد أدخلت سياسات العمل الإيجابي من أجل تعزيز السلام وإعطاء توزيع متساوٍ للشعب وتعزيز الوثام في هذا المجتمع متعدد الأعراق في ماليزيا. كما دعت الأطروحة العلماء الإسلاميين إلى النظر في التحديات الاقتصادية الحديثة في هذا المجال من الدولة القومية والبدء في استكشاف مقاصد مقر الاجتهاد كذلك لصالح الأمة والحضارة الإسلامية

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Thoughts and Civilization.

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I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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This dissertation is dedicated to my beloved parents

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Affirmative action encompasses a variety of efforts to benefit members of groups, primarily racial and ethnic minorities and women, who have been historically discriminated.¹ Lee Hock Guan defines affirmative action as a set of measures to raise the participation of members of an economically disadvantaged group in the areas of education, employment and business where they have been historically excluded or under-represented.²

Maqāṣid refers to a purpose of objective, principle, intent or goal.³ Jasser Auda mentions that *Maqāṣid al-Sharī'ah* is a group of divine intent and moral concepts upon which the Islamic law is based, such as justice, human dignity, free will, magnanimity, facilitation and social cooperation.⁴ Traditional classification of *Maqāṣid* divides them into three level of necessity, which are necessities (*darūriyyāt*), exigencies (*hājjiyyāt*) and enhancement (*tahsīniyyāt*).⁵ The concept of *Maqāṣid* was developed by the 12th century theologian Abu Hamid al Ghazali (d.1111) in reference to five fundamental protection on life, religion, property, progeny and intellect.⁶ However, this concept was revised

¹ John Edward Kellough, *Understanding affirmative action: Politics, discrimination and the search for justice*, (Washington D.C.: Georgetown University Press, 2007).

² Lee Hock Guan, "Affirmative action in Malaysia," *Southeast Asian Affairs*, vol. 2005, no. 1 (2005): 211-228.

³ Mohammad Hashim Kamali, *Maqāṣid al-Syarī'ah, ijtihad and civilizational renewal: Occasional paper* (London: International Institute of Islamic Thought, 2012).

⁴ Jasser Auda, *Maqasid al Syariah: An introductory guide*, (London: International Institute of Islamic Thought, 2008).

⁵ This definition is the early definition made by Abū al-Ma'ālī Abd al-Malik ibn Abd Allāh al-Juwaynī, in *Al-Burhān fī Usūl al-Fiqh*, edited by Abd Al-'Azīm al-Dīb, vol. 1, (Doha, Qatar: n.p., 1978) also known as the Imam of the two sacred shines.

⁶ Later, the definition has been expanded further by Imam Abu Hāmid Al-Ghazālī & Muhammad al-Tusi, *Syifa'al-Ghalil fī Bayan al-Syabah wa al-Mukhil wa Masalik al-Ta'lil. Tahqiq Hamad 'Ubaid al-Kabisi*,

and expanded in the 14th century by Ibn Taymiyyah (d.1328) and was developed as a new philosophy of Islamic law by Abu Ishaq al-Shatibi or commonly known as Imam al-Shatibi (d. 1388).⁷

Affirmative action policy was introduced by the Malaysian state in 1971, called the New Economic Policy (NEP). The two central objectives of the NEP are to eradicate poverty and to restructure society which are the essentially parts of the overall nationalist economic agenda. The NEP is in fact a form of Malay economic nationalism.⁸

The NEP is meant to uplift the socio-economic and political conditions of the historically disadvantaged group but no studies have yet been undertaken to evaluate whether these policies are in conformity with *Maqāṣid al-Sharī'ah*.⁹ This study therefore raises the following questions:

1. Is affirmative action carried out by the government of Malaysia compatible with the principle of *Maqāṣid al-Sharī'ah*?
2. What are the consequences of affirmative action policies in Malaysia based on *Maqāṣid al-Sharī'ah*?
3. What are the arguments against affirmative action and what is the perspective of *Maqāṣid al-Sharī'ah*?

(Baghdad: Mathba'ah al-Irsyad, 1971) and Abu Hāmid Al-Ghazālī, *al-Mustasfā min 'Ilm al-Usūl*, vol. 2, (Baghdad: Muthanna, 1904).

⁷ Halim Rane, "The relevance of a Maqasid approach for political islam post Arab revolutions," *Journal of Law and Religion*, vol. 28, no. 2 (2013): 489-520.

⁸ Shamsul Amri, "The economic dimension of Malay nationalism – The socio-historical roots of the new economic policy and its contemporary implications," *The Developing Economies*, XXXV-3 (September 1997): 240-261.

⁹ "Historically disadvantaged group here refers to the inability of the Malay community to regain control in the economic sphere especially in the rural agricultural sector which is being dominated by British and Chinese-owned plantation and mining and also the urban commercial sector which is being dominated by British agency houses and Chinese family businesses.

1.2 SIGNIFICANCE OF THE STUDY

The prime idea of having affirmative action is to give opportunities for those who have been historically discriminated. There is no doubt that some will benefited from the policies and some will not and this has created debate on the validity of affirmative action in the modern society. The truth is, the debate on the policies is not motivated by knowing the truth or to find justice and equality, but rather it is out of frustration of not benefiting from the program and losing out the opportunities to historically disadvantaged ethnicities.¹⁰ Some of the policies under the NEP is to create a quota system which the intention is to raise the number of Bumiputra places in local universities and also to enable Bumiputra to obtain 30 percent of corporate equity through preferential distribution of discounted blocks of stock in publicly listed companies.¹¹

There is a debate whether this policy has created positive changes to the society. It is argued that the idea of affirmative action is noble but the implementation of the policy does not reflect justice and equality.¹² This is important as implementation of this policy will give direct impact for those who want to compete in gaining business contracts and also attaining enrolment in universities. However, there is argument too that affirmative action is not fully implemented; that women and ethnic minorities are still lacking in higher level positions, especially representative in board of directors or

¹⁰ Kellough, *Understanding affirmative action: politics, discrimination and the search for justice*.

¹¹ Edmund Terence Gomez, Johan Saravanamuttu and Maznah Mohamad, "Malaysia's new economic policy: Resolving horizontal inequalities, creating inequities?" in *The new economic policy in Malaysia: affirmative action, ethnic inequalities and social justice*, edited by E. T. Gomez and J. Saravanamuthu (Singapore: NUS/Institute of Southeast Asian Studies, 2013).

¹² Lee Hock Guan, "Racial citizenship and higher education in Malaysia" in *The new economic policy in Malaysia: Affirmative action, ethnic inequalities and social justice*, edited by E. T. Gomez and J. Saravanamuthu (Singapore: NUS/Institute of Southeast Asian Studies, 2013).

becoming CEOs in company.¹³ Thus, affirmative action programmes designed to assist these groups were, and are, still needed. This study will show whether preferential treatment is allowed in the practice of *Maqāsid Sharī'ah*.

The idea of affirmative action is always to give chances or opportunities to some group of ethnics, in this case is the Malay and the Bumiputra to compete fairly to the historically advantageous group (e.g. Majority Chinese community). In other words, it is a transfer of chances to the people who are already successful to the people who are just to start business or entering into the universities. Since, it involves a better chance in life, the possibilities of having success is high and thus the debate on affirmative action continues until today. By having high skilled job through affirmative action, it will have financial means to support his family and possibilities of becoming wealthy. The same goes to entering universities through quota as it will create better opportunities to have a better job in the future. Thus, it is not surprising to know that the idea of having affirmative action will be opposed by certain group of people especially from the historically advantageous group.

The argument advanced by Thomas E Weisskopf and John D Skrentny that oppose affirmative action is that it is against the concept of pure fairness and equal rights for people and argues that strict interpretation of equal chances must be fully developed and explained.¹⁴ This is the reason that some people call affirmative action as a reverse type of discrimination to historically advantageous group.

¹³ Wan Fauziah Wan Yusoff and Ahmad Kaseri Ramin, "Women on corporate boards: Malaysian perspectives," Paper presented at the 2nd International Conference on Technology Management, Business and Entrepreneurship, Melaka, Malaysia, December 4-5, 2013, pp. 292-300.

¹⁴ Weisskopf, Thomas E, *Affirmative action in the United States and India: A comparative perspective*, (New York: Routledge, 2004), 31 and John David Skrentny, *The ironies of affirmative action: Politics, culture and justice in America*, (Chicago: The University of Chicago Press, 1996), 21.

Developing and implementing affirmative action policies in Malaysia are a complex issue. It is complex as there are so many definitions attached to it and the policies for better opportunities in employment, education and business contracts.¹⁵ However, when implementing this policy, the intended group may be uncertain on the requirements or what need to be done to participate in those policies. This issue is sensitive to the public and not much study has been conducted in this area. Thus, the findings of this study will add to the existing literature on this topic.

1.3 RESEARCH OBJECTIVES

The central objective of this study is to evaluate the practices of affirmative action in implementing economic policy in Malaysia from its formation in 1971 until the 1990s, and its relationship with *Maqāṣid al-Sharī'ah*. Affirmative action is undoubtedly a broad subject; however, for the purpose of this study, the focus is on policies made during the New Economic Policy (NEP) era in Malaysia.¹⁶ Later, it is hoped to inform the public whether the practice of affirmative action is in accordance with *Maqāṣid al-Sharī'ah*. The objectives of this study are as follows:

- 1) To study whether affirmative action is in conformity with the principle of *Maqāṣid al-Sharī'ah*.

Affirmative action has always been a controversial issue as it is perceived to discriminate people who are not considered as historically disadvantaged group. Thus, according to the opponents of affirmative

¹⁵ Affirmative action in Malaysia is complicated as it seen as racial preference. However, it is also seen as a measures to raise the participation of members of an economically disadvantages group in the areas of education, employment and business where they have been historically excluded or under-represented.

¹⁶ NEP is a policy that comes out after the racial riots in May 1969 where Chinese opposition parties winning more seats in the general election. NEP goal is to achieves national unity and basically promotes the idea of affirmative action.

action, it might prevent justice in the society. The principle of *Maqāṣid al-Sharī'ah* is to promote justice. Thus, this study analyses whether the principle of affirmative action and the principle of *Maqāṣid al-Sharī'ah* are in conformity with each other.

- 2) To analyze the arguments against affirmative action in Malaysia and the perspective of *Maqāṣid al-Sharī'ah* on that matter.

As mentioned earlier, the arguments against affirmative action vary. The most commonly known critiques are that it violates the principle of justice and has often only benefited the wrong people. Affirmative action in Malaysia has actually created a brain drain situation in the country and has created unfair competition among people in education and also those in the business industry. Thus, the principle of *Maqāṣid al-Sharī'ah* will be used to check the arguments made by the opponents of affirmative action.

- 3) To examine the consequences of affirmative action policies in Malaysia and whether they have the same objectives and ideas with the concept of *Maqāṣid al-Sharī'ah*.

The consequences of affirmative action in Malaysia also vary. It might help the intended groups or it might lead to other problems, which might not be the intention of the practices of affirmative action. Thus, the concept of *Maqāṣid al-Sharī'ah* will also look into the consequences of affirmative action and whether the objectives are achieved and in accordance with *Maqāṣid al-Sharī'ah*.

1.4 LITERATURE REVIEW

The genesis of affirmative action originated from the Federal Constitution of Malaysia and its provision for reservations of education, civil service employment, training and licensing as instruments for safeguarding the special position of Bumiputras and legitimate interests of other communities.¹⁷

Scholars have studied affirmative action in different perspective. Racial preferences are still being seen as the defining feature of affirmative action although their research is more focused on the issue of inequality across ethnicities rather than affirmative action.¹⁸

Meanwhile Chakravarty and Roslan's discuss the success of affirmative action practices in Malaysia by helping the Bumiputras in alleviating poverty and bolstering household income. However, they do recognize the shortcomings of affirmative action policies in Malaysia due to their failure to boost Bumiputras' participation in equity ownership and enterprise development.¹⁹

Additionally Mukherjee and Wong argue that affirmative action is the cause of the problems that Malaysia is facing such as serious brain drain, reluctance by domestic enterprise to invest in the economy and a decline in the quality of public institutions.²⁰ This has also been echoed by Kong Wee Cheng in his writings, *Affirmative Action or*

¹⁷ Hwok Aun Lee, "Affirmative action in occupational representation: Policies and outcomes," in *The new economic policy in Malaysia: Affirmative action, ethnic inequalities and social justice*, edited by E. T. Gomez and J. Saravanamuthu (Singapore: NUS/Institute of Southeast Asian Studies, 2013).

¹⁸ Jacob Meerman, "The Malaysian success story, the public sector, and inter-ethnic inequality," in *Globalization and national autonomy: The experience of Malaysia*, edited by J. Nelson, J. Meerman and Abdul Rahman Embong (NUS/Institute of Southeast Asian Studies, 2013), 76-115; Ishak Shari, "Economic growth and income inequality in Malaysia, 1971-95," *Journal of the Asia-Pacific Economy*, vol. 5, no. 1-2, (2000): 124 and also Kwame Sundaram Jomo, *The new economic policy and interethnic relations in Malaysia*, (Geneva: UNRISD, 2004).

¹⁹ Shanti P. Chakravarty and Roslan Abdul Hakim, "Ethnic nationalism and income distribution in Malaysia," *The European Journal of Development Research*, vol. 17, no. 2 (2005): 270-288.

²⁰ Hena Mukherjee and Poh Kam Wong, "The National University of Singapore and the University of Malaya: Common roots and different paths," in *The road to academic excellence: The making of world-class research universities*, edited by P. G. Altbach and J. Salmi (Washington DC: World Bank Publications, 2011): 129-166.

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who maintains that affirmative action had only benefited students of rich and affluent families in the target groups and also widened the socio-economic imbalances within the ethnic groups.²¹

Rusaslina Idrus also highlights the problems of affirmative action for indigenous people such as land issue which is very important to the community and a need to correct the injustice experienced by the community by switching to a universal approach that addresses the plight of the community.²²

Khoo Boo Teik claims that affirmative action in Malaysia has made civil service become increasingly Malay-dominated in terms of staff recruitment, training, deployment and promotion at higher administrative and professional levels.²³ Although affirmative action has managed to overturn an earlier ethnic division of labour, its governance structure has reaffirmed an “identification of ethnicity with politico-economic sectors”.²⁴

There is no doubt that affirmative action did help in increasing the number of Bumiputras in universities. This is due to the government tactics to implement enrolment quotas. Most universities have managed to reflect better the population of this country. In 1970, the student population comprised of 40.2% Bumiputras, 48.9% Chinese and 7.3% Indians. The number has increased further in 1985 where students in

²¹ Wee Cheng Kong, *Affirmative action or discrimination: A comparative study of higher education in the US and Malaysia* (Petaling Jaya: Strategic Information and Research Development Centre, 2014).

²² Rusaslina Idrus, “Left behind: The orang asli under the new economic policy,” in *The new economic policy in Malaysia: Affirmative action, ethnic inequalities and social justice*, edited by E. T. Gomez and J. Saravanamuthu (Singapore: NUS/Institute of Southeast Asian Studies, 2013): 265-291.

²³ Boo Teik Khoo, *Ethnic structure, inequality and governance in the public sector: Malaysia experiences* (Geneva: UNRISD, 2005).

²⁴ *Ibid.*, v.

universities have increased to 63.0% Bumiputras, 29.7% Chinese and 6.5% Indians, with variations across universities.²⁵

However, this has caused dissatisfaction among the non-Bumiputras. Many non-Bumiputras who did not manage to secure a place in local universities have to move and choose other options such as moving abroad to further their higher education or choosing local non-degree programmes. This can be seen in 1985 where more Chinese chose to study abroad rather than study in Malaysia.²⁶ In order to solve this problem faced by the non-Bumiputras, private education grew from the 1980s in affiliation with foreign universities or accreditation bodies. This allowed the students to study in Malaysia but obtain a degree from a foreign university. It is usually catered mostly to non-Bumiputras and manages to reduce the tension between ethnicities due to issuance of quota based on ethnicity and not merit.²⁷

However, the allocation of opportunities did have some issues and problems. Malaysia's five-year plan, which monitored the progress of the country, namely in occupational, income and wealth inequality did not take into consideration the background of recipients who benefited from the quota system. A study made by Mehmet and Yip in 1985 clearly shows that children of high income families who were Bumiputra also benefitted from the quota system introduced by the government.²⁸ This is also in line with the study conducted by Selvaratnam in 1988 where he found that

²⁵ Ibid., 31.

²⁶ Faridah Jamaludin, "Malaysia's new economic policy: Has it been a success?" in *Boundaries of clan and color: Transnational comparisons of inter-group disparity*, edited by W. Darity and A. Deshpande, (London: Routledge, 2003): 152-174.

²⁷ Graham Brown, "Making ethnic citizens: The politics and practice of education in Malaysia," *International Journal of Educational Development*, vol. 27, no. 3 (2007): 318-330.

²⁸ Ozay Mehmet and Yip Yat Hoong, "An empirical evaluation of government scholarship policy in Malaysia," *Higher Education*, vol. 14, no. 2 (1985): 197-210.

63% of students in MARA junior colleges actually belonged to urban middle-class families.²⁹

Under the NEP, there is no doubt that there is an increase in participation in the public sector for the Bumiputras, as high as 76.9% in 1999 and 84.8% in 2005.³⁰ Furthermore, it is also a natural extension of the university scholarship programme. The remarkable entry rate of Bumiputras into occupations, especially in works that are considered as professionals is due to policies created to increase employment in public sector. The numbers of Bumiputras among professionals and skilled works has increased from 6.2% in 1970 to 47.2% in 1990.

Nevertheless, post-NEP does not show any significant efforts being made to have balance racial composition in Malaysian firms. There is no really enforced quota based on ethnicity in the non-manufacturing sectors, although there is an effort to balance racial diversity in companies to obtain better funding or to have better strategy in doing business. There is a proposal to have public listed companies to disclose ethnic diversity in the workforce, but no reward is given to any company for doing that. Thus, it is less attractive for companies to do that as it seems as not worthy from the perspective of people doing business.³¹

Although there are significant changes in Bumiputra participation in work force in the public sector, Bumiputras particularly the Malays are still under-represented as managers of enterprises and in manufacturing. This is said to happen when state-owned enterprises or better known as Government Linked Companies (GLCs) offer to

²⁹ Viswanathan Selvaratnam, "Ethnicity, inequality and higher education in Malaysia," *Comparative Education Review*, vol. 32, no. 2 (1988): 173-196

³⁰ Khoo, "*Ethnic structure, inequality and governance in the public sector: Malaysia experience in democracy, governance and human rights*".

³¹ Federal Budget in 2007 and 2008 proposed companies to disclose their employment based on gender and ethnicity. see Abdullah Ahmad Badawi, "2008 Budget speech", Parliament 8 September 2007 at http://www.ctim.org.my/download.asp?cat=44&file=DDEDF_FDDL%2007qtr6%20f2rrpu.2qs

Bumiputras' small and medium enterprises opportunities by providing them licensing and public procurement. However, those companies are said to be unsuccessful due to lack in expertise in managing business and also issues of corruption. The Malaysian government tries to facilitate these Bumiputra who are being groomed in the public sectors, as they acquire some experience and being given positions to assume places of leadership in corporations. However, economic downturn or recession that occur in the whole world in the mid-1980s had shown the incapability of these companies spearheaded by these Bumiputra due to excess capacity, lack of competency and gross under performance.

Thus, to reduce this problem, the government of Malaysia needs to give public procurement contracts to these Bumiputra companies and privatize state entities to increase the chances of making the Bumiputra Economic Community (BEC) successful. However, instead of giving the opportunities to more qualified Bumiputras, state-owned enterprises are awarded to politically connected individuals. In 1997, many Bumiputras who held certain positions in the GLCs had some credibility issues as the nation was hit by a financial crisis. It was forced be re-nationalized. However, GLCs continue to play significant roles in Bumiputra advancement by establishing local supply linkages with GLC-linked industrialization projects with other small and medium enterprises, as they are still being seen as a place to generate employment for other Bumiputras SMEs.³²

The Malaysian treasury also requires Bumiputra companies to have majority stake and more Bumiputra representative in managerial and high-level positions to secure projects produced by the Malaysian government. The problem is, there is no

³² Edmund Terence Gomez, "Nurturing bumiputera capital: SMEs, entrepreneurship and the new economic policy" in *The new economic policy in Malaysia: Affirmative action, ethnic inequalities and social justice*, edited by E. T. Gomez and J. Saravanamuthu (Singapore: NUS/Institute of Southeast Asian Studies, 2013): 87-115.

plans or incentives for Bumiputra companies to enhance their entrepreneurial capacity or improving their technological and skills development as a criteria or procedures for having government projects. In fact, government contract is still being allocated for companies that have linked with political connections or having connections with powerful figures on company boards. Thus, the system is based on patronage and enrichment and it is not on the qualification of the Bumiputras but rather as who the person knows that have power and connections. Therefore, this study analyses affirmative action practices in Malaysia in the light of *Maqāṣid al-Sharī'ah*.

1.5 THEORETICAL FRAMEWORK

Maqāṣid is often linked with *masālih* (interests, benefits) and both are used interchangeably.³³ *Maqāṣid* signifies higher goals and ends whereas *masālih* could either be the same as *Maqāṣid* or may serve as means towards attaining them. The legal theory of *uṣūl al-fiqh* marginalizes the *Maqāṣid*, which is why the methodology for its identification has also remained under-developed. The clear text (of the Quran and Hadith) is the principal source of *Maqāṣid* as agreed by Muslim scholars. Even though protection of the mind (*'aql*) is included in the essential *Maqāṣid* (*darūriyāt*), Muslim scholars could not reach consensus as to whether *aql* can validate a *Maqāṣid* without the authority of a scriptural proof or *naql*. Can rationality alone identify and validate a *Maqāṣid* and purpose of the *Sharī'ah*, and what are the principal indicators and identifiers of *Maqāṣid*?³⁴

The notion of *Maqāṣid* has been expanded to include wider scope of people – the community, nation or humanity in general. Ibn Ashur, for example, differentiates

³³ Kamali, *Maqāṣid al-Syarī'ah, ijtihad and civilizational renewal, Occasional paper* (London: International Institute of Islamic Thought, 2012).

³⁴ *Ibid.*, 20.

Maqāṣid that are concerned with the ‘nation’ (ummah) over *Maqāṣid* that are concerned with individuals. Rashid Rida includes reform and women’s right in his theory of *Maqāṣid*. Yusuf al-Qaradhawi includes human dignity and rights in his theory of *Maqāṣid*.³⁵

The work of Imam al-Shatibi, however, makes a profound contribution to the theory of *Maqāṣid* by focusing on the concept of *maslaha* (public interest) as an approach to overcoming the rigidity imposed by literalism and *qiyas* (analogical reasoning). The *Maqāṣid* theory of Imam al-Shatibi is based on an inductive reasoning of the Qur’an in order to identify the higher objectives, intent and purposes of Qur’anic verses, which are understood to preserve human interests in both this world and the next.³⁶

In relation to the discussion above, this study analyzes affirmative action policies and programmes in Malaysia during the 1970s and 1990s in light of the theory of Imam al-Shatibi on *Maqāṣid al-Sharī’ah* and also other scholars who have studied the subject.³⁷

1.5.1 Conceptual and Operational Definitions of *Maqāṣid al-Sharī’ah*

The *Maqāṣid* of the *Sharī’ah* is basically to achieve the goals of the *Sharī’ah* but somehow the goal to attain the *Sharī’ah* is affected by the historical developments in the *Sharī’ah* itself, the history of *ijtihād*, and major developments in the applied law and customs of society.

³⁵ Auda, *Maqasid al-Shari’ah: An Introductory Guide*.

³⁶ Rane, “The relevance of a *Maqasid* approach for political Islam post Arab revolutions”, 494.

³⁷ See Al-‘Izz ibn ‘Abd al’ Salam, *Qawā’id al-Ahkām fī Masālih al-Anām* (ed, Taha ‘Abd al-Ra’uf Sa’d) (Cairo: al-Matba’ah al-Husayniyyah, 1351 AH) and Ibn Ashur, *Maqāṣid al-Sharī’ah al-Islamiyyah* (ed, Muhammad al-Tahir al-Messawi) (Tunis, 1946).