

ANGLIA RUSKIN UNIVERSITY

**A Critical Comparative Analysis of Racial
Integration Laws and its Impact on Professional
Team Sports**

TENG GUAN KHOO

**A dissertation in partial fulfilment of the requirements of
Anglia Ruskin University for the degree of
Doctor of Philosophy**

Submitted: August 2011

ACKNOWLEDGEMENTS

My deepest gratitude and appreciation goes to John O’Leary, my first supervisor who has introduced the ‘world of lex sportiva’ and provided continuous guidance and support towards the completion of the research. His expertise and knowledge on this subject area has contributed substantially towards this research. It has also been a pleasure to have John as my supervisor and mentor during my undergraduate (LLB) and postgraduate (LLM) research thesis in 2001/02 and 2003/04 respectively.

My sincere appreciation also goes to Dr. Tom Mortimer, my supervisor who has provided valuable inputs in the subject area and critical feedbacks on my work. I am equally appreciative of his expert knowledge in the research methods in particular. I would like to thank my supervisor, Dr. David Skinner and Prof. Eugene Giddens for their additional inputs towards the completion of this research. I would also like to thank Prof. John White, my supervisor (Until September 2010) who has been supportive throughout my journey in completing this research.

Many thanks to Simon Evans (LAIBS), Christine Durrant, Dr. Kevin Wilkinson (Until January 2008) and Dr. William Scaife (Student Services) who have helped me to proof read my thesis and provided support whenever in need. I would also like to thank all those who have provided their support in many ways. I am particularly grateful to Patience Shikwambana, Vladimir Trninic, Kallie Kriel, Barend van Graan, Prof. George Mpedi, Douglas Frame, Ian Blackshaw, Jim Gray, John Wolohan and Donald Craib for sharing their thoughts and experiences in this area. I am also equally grateful to Prof. Caroline Strange and her team in the Research Department for all their support.

My sincere thanks to my family, in particular my parents (Boo Eng and Siew Chin), brother (Teng Hin) and sister (Hooi Teng), Sanny Mok and Shi Chang Ping for their undivided support, continuous prayers and love during the course of this research. Special thanks to all my friends in Malaysia and the United Kingdom who also gave their support throughout the duration of this research.

Last but not least, I am equally grateful to all my fellow past and present colleagues, friends (Anglia Law School, Lord Ashcroft International Business School, Research and Development Services, ISMS, NORTH Group, University Library and Estates and Facilities) and my previous and present Business Law students in Anglia Ruskin University who have provided much needed technical and moral support towards the completion of this research.

ANGLIA RUSKIN UNIVERSITY
ABSTRACT
FACULTY OF ARTS, LAW AND SOCIAL SCIENCES

DOCTOR OF PHILOSOPHY

A CRITICAL COMPARATIVE ANALYSIS OF RACIAL INTEGRATION LAWS AND ITS
IMPACT ON PROFESSIONAL TEAM SPORTS
By TENG GUAN KHOO
AUGUST 2011

The following research aims to examine the interaction of law, either hard law (legislation) or soft law (governing body regulation), on achieving a balance between racial equality and success in sport. Nearly all national jurisdictions have legislated to some degree in an attempt to affect equality or equality of opportunity for its citizens. This might be based on achieving equality of opportunity or by means of affirmative action. The research aim is to ascertain how far racial discrimination laws have positive or negative impacts on the success of sports in different countries. The research also has a series of supplementary objectives.

- ✚ To ascertain and consider critically the extent to which the law in various jurisdictions (Malaysia, South Africa, England and the United States) has been used to promote equality.
- ✚ To develop a sequential model to describe general trends to predict the influence of affirmative action and equal opportunity legislation upon the potential success of countries' sporting achievements.
- ✚ To review tensions inherent in reconciling the equality of citizens at a national level and their impacts upon the international sporting success of that nation.
- ✚ To establish a correlative relationship between the types of anti-discrimination law within nations and the impact of these upon the degree of international sporting success of those nations.

The research conducted concentrates primarily on qualitative methods by first adopting a doctrinal approach in a comparative legal study of four jurisdictions (Malaysia, South Africa, England and the United States). A non-doctrinal approach is then adopted and a qualitative

intrinsic case study completed, including interviews concerning the subject area. Thus, the research has used multi-method qualitative approaches.

The research indicated different anti-discrimination approaches taken in achieving equality. This can be typified by countries such as the United States or England based primarily on meritocracy and countries such as South Africa and Malaysia based primarily on preferential treatment. There is evidence to suggest that these approaches do have a certain correlation, albeit not similar in the outcome of achieving equality for selection. From the evidence presented, the overall study illustrates that racial discrimination laws in the four jurisdictions produced a mixed outcome in relation to the success of professional team sports. Specifically, England and the United States witnessed a positive impact in terms of achieving international success in sports even though there are inherent difficulties in reconciling the equality of citizens at a national level. For Malaysia and South Africa, the result tends to be positive in general at this stage although it is equally recognised that this approach might result in some negative impacts in the long run. The research however is subject to certain limitations which are outside the scope of this thesis, but it is recognised that these might affect the overall success of professional team sports within those countries.

TABLE OF CONTENTS

Chapter	Title	Page
	Acknowledgement	i
	Abstract	iii
	Table of Contents	v
	List of Charts	x
	List of Legislation	xi
	List of Cases	xvi
	List of Appendices	xviii
	Abbreviation of Terms	xix
Chapter 1	Introduction to Racial Discrimination in Sport	1
1.1	Definition of Discrimination and Discrimination Law	3
1.2	Definition of Sport	10
1.3	Modern Games, Modern Society – Breaking Down the Barrier of Discrimination	14
1.4	Racial and Ethnic Discrimination	21
Chapter 2	Research Methodologies	28
2.1	Introduction	28
2.2	Qualitative and Quantitative Analysis	28
2.3	Phenomenology Method	30
2.4	Comparative Methods	31
2.5	Case Study Methods	32
2.6	Black Letter Law	33
2.7	Socio-Legal Methods	35
2.8	Interviews	37
2.9	Conclusion	40

Chapter 3	Jurisprudential Theories of Equality in Sport	43
3.1	Alternative Form of Equality in Sports – Principles of Affirmative Action and Equal Opportunity	44
3.1.1	Theories of Discrimination Law	46
3.1.1.1	Distributive Justice and Affirmative Action in Sports	46
3.1.1.2	Utilitarianism and Equal Opportunities in Sports	50
3.2	Definition of Affirmative Action and Equal Opportunities – In Depth Studies	55
3.2.1	The Sports Factor – Dealing with Various Interpretations within the Theories	57
(a)	Strong Affirmative Action	63
(b)	Intermediate / Medium Form of Affirmative Action	66
(c)	Weak Form of Affirmative Action	70
(d)	Strict Equal Opportunity	73
(e)	The Principle of Equal Opportunity and Theory of Positive Action – The Assimilative Theory	75
(f)	The Principle of Equal Opportunity and Theory of Affirmative Action – The Primary and Secondary Theory	77
3.3	Theory of Affirmative Action and Equal Opportunity on Collision Course?	79
3.4	Conclusion	83
Chapter 4	Sports and Discrimination: Historical and Political Context	87
4.1	Introduction	87
4.2	Politics of Affirmative Action and Equal Opportunities	87
4.2.1	Political Background of Malaysia, South Africa, England and the United States	87
4.2.1.1	Malaysia and South Africa	88
4.2.1.2	England and the United States	94
4.2.1.3	Summary	99
4.3	Sports as a Political Agenda	101

4.4	Internal Political Success and External Sporting Success within Countries	107
Chapter 5	Comparative Legal Studies and Analysis of Anti-Discrimination Law and Regulations in Sports	112
5.1	Introduction	112
5.2	Comparative Legal Studies between the Law and its Relationship in Sports	113
5.2.1	Malaysia and South Africa – Front Runner in Affirmative Action	113
5.2.1.1	The Constitution’s View on Equality	115
5.2.1.2	Strengthening Legislations on ‘Equality’ - Affirmative Action Supplements	121
5.2.1.3	Conclusion	128
5.2.2	England and the United States – Champions of Equal Opportunity	130
5.2.2.1	Towards a Common Goal in Achieving Legislative Equality	133
5.2.2.2	Legislative Provisions – Positive Action and Affirmative Action in England and the United States	142
5.2.2.3	Foreign Nationals as ‘Aliens’ in Sport – Race Discrimination?	148
5.2.2.4	Equal Opportunity – Incorporation as Part of the Law?	149
5.2.2.5	Conclusion	151
5.3	A Summary	152
Chapter 6	The Relationship between Legislation and Sports’ Regulation	155
6.1	National Sports Governing Bodies’ Regulation – Meeting the Balance between the Law and International Sporting Federation.	158

6.2	Sports, the Law and Sports' Regulation in Racism – Inevitable Blending	162
6.3	A conclusion – Politics of Affirmative Action, Equal Opportunity, the Law and Sports Regulation	166
Chapter 7	Racial Discrimination in Sport – The Impact of the Law	171
7.1	General Introduction	171
7.2	What Makes a Good Sport?	172
7.3	Affirmative and Equal Opportunity in Sport – The Practical Effect	179
7.3.1	Racial Discrimination in Sport – The Implication of Affirmative Action and Equal Opportunity	182
7.4	Country Analyses	185
7.4.1	England	185
7.4.2	The United States	193
7.4.3	South Africa	200
7.4.4	Malaysia	206
7.5	Racial Discrimination and Effects in Sport – An Evaluation	213
7.6	Conclusion	222
Chapter 8	Conclusion	225
8.1	Introduction	225
8.2	An Executive Summary – The Story So Far ...	225
8.3	The Trend between Affirmative Action / Equal Opportunities and Sporting Success	239
8.4	The Trend Continues, Relevance into other areas	243
8.4.1	Selective and Comprehensive Education System in England	243
8.4.2	Appointment of Judges in England	247
8.5	Moving On – The Final Observation	250

References	254
Appendices	278

LIST OF CHARTS

Chart 1	Sub-Theories of Affirmative Action and Equal Opportunity	85
Chart 2	Rate / Chances of Participation for Ethnic Minorities	106
Chart 3	Rate / Chances of Participation for Ethnic Minorities and Success Rate in Sport	110
Chart 4	English Rugby Team	187
Chart 5	English Cricket Team	190
Chart 6	United States Basketball Team	194
Chart 7	United States (National Football League)	197
Chart 8	South African Rugby Team	201
Chart 9	South African Cricket Team	204
Chart 10	Malaysian Badminton Team	207
Chart 11	Malaysian Field Hockey Team	209
Chart 12	New Predictive Model	240

LIST OF LEGISLATION

BOTSWANA

Botswana Constitution of 1996

ENGLAND

Aliens Act 1905

Aliens Registration Act 1914

Constitutional Reform Act 2005

Education Act 1944

Equality Act 2006

s.8

Equality Act 2010

s.4

s.9

s.13

s.14

s.19

s.158

s.159(1)-(4)

Race Relations Act 1965

Race Relations Act 1976

s.1

s.1(1)(a)

s.1(1)(b)

s.3A

s.3(1)

s.5

s.5(2)(a)-(d)

s.35

s.37(1)(b)

s.38(2)(a)

Race Relations (Amendment) Act 2000

Race Relations Act 2001

Sex Discrimination Act 1975

Sex Disqualification Act 1919

Sunday Observance Act 1625

ESTONIA

Estonian Sports Act 1998

EUROPEAN LEGISLATION

Treaties

EC Treaty (Treaty of Rome) 1957

Art.39

Treaty of Amsterdam 1997

Art.13

Treaty of Nice 2001

Treaty of Lisbon 2007

Regulations

Race Relations Regulations 2003

Directives

Council Directive 2000/78/EC

Race Equality Council Directives 2003/43/EC

Council Directive 2004/113/EC

Council Directive 2006/54/EC

MALAYSIA

Constitutional (Amendments) Act 1971

Federation of Malaya Agreement of 1948

Clause 19(1)(d)

Malayan Federal Constitution of 1957

Article 8

Malaysian Federal Constitution of 1963

Art.8

Art.8(2)

Art.8(5)

Art.8(5)(c)

Art.12

Art.153

Malaysian Fisheries Development Act 1971

National Paddy and Rice Act 1971

National Sports Council of Malaysia Act 1971

s.4(2)

National Urban and Development Act 1971

s.3(b)

Sedition Act 1971

s.3(1)(e)

s.3(1)(f)

REPUBLIC OF IRELAND

Irish Sports Council Act 1999

REPUBLIC OF SOUTH AFRICA

Constitution of the Republic of South Africa of 1993

Constitution of the Republic of South Africa of 1996

s.9(1)

s.9(2)

s.9(4)

s.9(5)

s.26

s.29

s.36(1)

Employment Equity Act 1998

s.13(1)

s.15

Group Areas Act 1965

National Sport and Recreation Amendment Act 2007

s.13A

s.13(5)

s.13(8)

Native Affairs Act 1920

Native Labour Regulation Act 1911

Native Lands Act 1913

Native (Urban Areas) Act 1923

Population Registration Act 1950

South African Act 1910

REPUBLIC OF SINGAPORE

Constitution of the Republic of Singapore of 1965
Art.152

UNITED STATES OF AMERICA

Civil Rights Act 1868

Civil Rights Act 1875

Civil Rights Act 1964

Title II

s.201

s.203(3)(a)

Title VI

Title VII

s.703

s.703(1)(a)

s.703(2)

s.703(3)(e)

Civil Rights Act 1991

Presidential Executive Order 10925

Presidential Executive Order 11246

Presidential Executive Order 11478

Presidential Executive Order 13078

Presidential Executive Order 13153

Educational Amendments Act 1972

Title IX

LIST OF CASES

ENGLAND

Hussaney v Chester City Football Club and Kevin Ratcliffe Unreported, IT Case No.,
2102426/97

Enderby Town Football Club Limited v The Football Association (1971) Ch 591

R v Dalby (1982) 1 W.L.R 425

R v Kennedy (2008) 1A.C 269 (HL)

Shen Fu Chang v Stellin Mohlin (Unreported) 5th July 1977

Singh v The Football Association (2001) ET Case Number 5203593/99

EUROPEAN COURT OF JUSTICE (ECJ)

David Meca-Medina and Igor Majcen v Commission of the European Communities (2006) ECJ
(C519/04)

Deutscher Handballbunde V v Kolpak ‘Kolpak’s case’ (2003) ECJ (C438/00)

Kalanke v Freie Hansestadt Bremen (C450/93) (1996) 1All E.R (EC) 66

Union Royale Belge des Societes De Football v Bosman ‘Bosman’s case’ (1993) C415/93

FEDERAL REPUBLIC OF GERMANY

Katrin Krabbe v IAAF (1995) Landgericht Munchen I; File No.7 HKO 16991/94

MALAYSIA

Datuk Haji Harun bin Haji Idris v Public Prosecutor (1977) 2 Malayan Law Journal, 155, 165

REPUBLIC OF SOUTH AFRICA

Minister of Finance v Van Heerden (2004) 12 BLLR 1181 CC

President of the Republic of South Africa v Hugo (1997) (4) SA 1 (CC) 1997 (6), BCLR 708
(CC)

UNITED STATES OF AMERICA

Brown v Board of Education of Topeka (1954) 347 U.S 483
Cox v National Football League 889 F. Supp. 118, 119 (S.D.N.Y 1995)
Cross v Board of Education of Dollarway, Arkansas (1975) E.D. Ark.
De Funis v Odegaard (1974) 94 S. Ct. 1704
Dowling v United States (1979) D. Mass.
Dred Scott v Sanford 60 U.S. 393 ‘Dred Scott’s case’ (1857)
Meritor Sav. Bank, FSB v Vinson 477 U.S 57, 65-66 (1986)
Michels v United States Olympic Committee (USOC) 741 F. 2d 155, 156 (7th Cir. 1984)
Nehemiah v Athletics Congress 765 F. 2d 42 (3rd Cir. 1985)
Oldfield v Athletics Congress 779 F. 2nd 505, 507 (9th Cir. 1985)
Parents involved in Community Schools v Seattle School District No. 1 et al
Plessy v Ferguson (1896) 163 U.S 537
Reynolds v IAAF (1992) Et. AL 505 US 1301
Sweatt v Painter (1945) 339, U.S 629, 70 S. Ct. 848

LIST OF APPENDICES

Appendix 1	Telephone Interview with Donald Craib	278
Appendix 2	Telephone Interview with Jim Gray	281
Appendix 3	Telephone Interview with John Wolohan	284
Appendix 4	Telephone Interview with Douglas Frame	287
Appendix 5	Telephone Interview with Ian Blackshaw	289
Appendix 6	Interview with Vladimir Trninic	291
Appendix 7	Interview with Barend van Graan	294
Appendix 8	Interview with Patience Shikwambana	297
Appendix 9	Interview with Kallie Kriel	299

ABBREVIATION OF TERMS

ANC	African National Congress
AFL	American Football League
BAM	Badminton Association of Malaysia
CAS	Court of Arbitration for Sports
CFL	Canadian Football League
CRA	Civil Rights Act
CRE	Commission for Racial Equality
CSA	Cricket South Africa
DRC	Disability Rights Commission
EC	European Community
ECB	English Cricket Board
ECHR	European Convention of Human Rights
EEOC	Equal Employment Opportunities Commission
EHRC	Equality and Human Rights Commission
FAM	Football Association of Malaysia
FIFA	International Football Federation
FINA	Federational Internationale de Natation
FIH	International Hockey Federation
IAAF	International Amateur Athletics Federation
IBF	International Badminton Federation
ICC	International Cricket Council
IOC	International Olympic Committee
IRB	International Rugby Board
ISF	International Sports Federation
IPC	International Paralympics Committee
JAC	Judicial Appointments Commission
MOC	Malayan Olympic Council
MHF	Malaysian Hockey Federation
NACCI	National Advisory Committee for Commonwealth Immigrants

NCAA	National Collegiate Athletic Association
NBA	National Basketball Association
NDP	National Development Policy
NEP	National Economic Policy
NFL	National Football League
NOC	National Olympic Committee
NSC	National Sports Council
NP	National Party
NRFL	Northern Rugby Football Leagues
OCM	Olympic Council of Malaysia
OCOG	Organising Committee of the Olympic Games
RRA	Race Relations Act
RFU	Rugby Football Union
SASA	South African Sporting Authorities
SASSOC	South African Sports Confederation and Sports Committee
SDA	Sex Discrimination Act
The FA	The Football Association
UEFA	United European Football Association
USFSA	Union of French Athletic Sports Societies
UMNO	United Malays National Organisation
UNESCO	United Nations Economic and Social Council
WADA	World Anti-Doping Agency
WBC	World Basketball Championship

Chapter 1 – Introduction to Race Discrimination in Sport

The following research provides a critical comparative analysis of racial discrimination laws, regulations and their impacts in sport. The research aims to examine the interaction of law, either hard law (legislation) or soft law (governing body regulation), on achieving a balance between racial equality and success in sport. The concept of promoting racial equality is a major issue in countries possessing different ethnic groups and races. As a consequence, nearly all national jurisdictions have legislated to some degree in an attempt to affect equality or equality of opportunity for its citizens. This might be based on achieving equality of opportunity (as typified by countries such as the United States or England based primarily on meritocracy) or by means of affirmative action (exemplified by countries such as South Africa and Malaysia based primarily on preferential treatment).

The research aims to ascertain how far racial discrimination laws have positive or negative impacts on the success of sports in different countries. The research also has a series of supplementary objectives:

- ✚ To ascertain and consider critically the extent to which the law in various jurisdictions (Malaysia, South Africa, England and the United States) has been used to promote equality.
- ✚ To develop a sequential model to describe general trends to predict the influence of affirmative action and equal opportunity legislation upon the potential success of countries' sporting achievements.
- ✚ To review tensions inherent in reconciling the equality of citizens at a national level and their impacts upon the international sporting success of that nation.
- ✚ To establish a correlative relationship between the types of anti-discrimination law within nations and the impact of these upon the degree of international sporting success of those nations.

In general, affirmative action is ‘directed towards empowering those groups that have been adversely affected by past and present exclusionary practices’¹ within a country. Although it may appear as being discriminatory against other racial or ethnic groups, affirmative action is arguably necessary in ensuring protection for previously disadvantaged groups. In sport, affirmative action is used as a measure to ‘redress the disadvantages in employment experienced by designated groups’.²

Equal opportunity in contrast, is designed to ‘achieve equity in the workplace by promoting equal opportunity and fair treatment through the elimination of unfair discrimination.’³ In short, equal opportunity is designed to ensure that no one is ‘treated less favourably than he treats or would treat other persons’.⁴ This definition in principle applies equally for all areas including sport.

These issues have been considered by other writers in relation to sport. Gardiner⁵ and Cloete⁶ have analysed the general impact of equality legislative provisions / national law in sport⁷. Although Pojman⁸ and Mosley⁹ have considered various forms of affirmative action from an employment and a sociological perspective, these do not specifically cover the area of sport.

This research looks beyond the theoretical effects of affirmative action, equal opportunity and the extent of racial discrimination in sport and aims to clarify the effects of national legislation in affecting the degree of sporting success within the chosen jurisdictions. In other words, this will enable a reader to; in general, quantify

¹ Albert Mosley and Nicholas Capaldi, *Affirmative Action: Social Justice or Unfair Preference?* (Rowman and Littlefield 1996). For understanding and in-depth analysis of affirmative action, see later in Chapter 1.1 and 3

² Rian Cloete and Steve Cornelius, *Introduction to Sports Law in South Africa* (Lexis Nexis Butterworth 2009) 92. For understanding and in-depth analysis of equal opportunity, see later in Chapter 1.1 and 3.

³ *ibid* 92.

⁴ Race Relations Act 1976 as amended, s 1

⁵ See Simon Gardiner, Mark James, John O’Leary et al, *Sports Law* (3rd edn, Cavendish 2006)

⁶ See Cloete and Cornelius (n2)

⁷ See Rochelle Le Roux and Steve Cornelius (eds), *Sport: The Right to Participate and Other legal Issues* (University Document Management Services 2003)

⁸ ‘The Case Against Affirmative Action’ (*Sacramento State - Leadership Begins Here*) <http://www.csus.edu/indiv/g/gaskilld/business_computer_ethics/The%20Case%20Against%20Affirmative%20Action.htm> accessed 4 February 2009

⁹ Albert Mosley and Nicholas Capaldi, *Affirmative Action – Social Justice or Unfair Preference?* (Rowman and Littlefield Publishers 1996) 68

success in sport and racial participation as a result of legal intervention. This area has not previously been researched, although there is an abundance of articles and texts relating generally to discrimination in various fields including sport¹⁰.

The following countries have been selected for analysis: Malaysia, South Africa, England and the United States. These examples represent a spectrum of legal approaches. The prevailing political philosophy in both South Africa and Malaysia has resulted in laws designed to combat discrimination by means of affirmative action. In contrast, England and the United States attempt to deal with racial discrimination by means of anti-discrimination policies designed to achieve equality of opportunity. These countries have been chosen due to evidence that racism exists in that sport, or that racial representation in that sport has been skewed by state and governing body interference.

Within these country case studies, the following sports have been chosen for analysis. In both England and South Africa, the focus is on rugby union and cricket. Both were founded in England and since then have flourished to become part of the national heritage of the country. Besides reflecting the country's national identity, both sports command popular support among the local population and the country has achieved considerable success over the years. In Malaysia, the focus is on badminton and field hockey; both being the most popular sports in the country. Malaysia is ranked among the world top ten countries with respect to these sports and in badminton it has produced top-ranked players as listed by the International Badminton Federation (IBF). In the United States, once more due to their popularity there, basketball and American Football will be considered. Whilst basketball's popularity is well recognised, American Football has also been considered as a truly American sport.

1.1 Definition of Discrimination and Discrimination Law

This section discusses the term discrimination, equal opportunity and affirmative action – methods used to justify discrimination law. As Vandenhoele argues, 'There is

¹⁰ See Robert Siekmann and Jan Willem Soek, *The European Union and Sport: Legal and Policy Documents* (The Hague 2005). Richard Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003). See also Timothy Jones, 'The Race Directive: Redefining Protection from Discrimination in EU Law' (2003) 5 EHRLR 515

no universally accepted definition of discrimination ... nor do the seven core UN Human Rights Treaties offer a common definition of discrimination or equality'.¹¹ As a result of this, Vandenhoe continues that discrimination 'can be seen from the conduct itself and imposition of some kind of disadvantage or harm on the persons on whom it is directed'.¹²

Discrimination can be seen as a manifestation of inequality and prejudice¹³. Scales commented, 'The inequality approach reach stereotypes which, though not biologically based, have largely made themselves true through a history of inequality ... inequality approach is not triggered by irrationality but by disadvantage'.¹⁴ Prejudice meanwhile can be defined as 'Thinking ill of others without sufficient warrant'.¹⁵ Simpson and Yinger shared the similar view in that prejudice involves prejudgement such as stigmatising some groups as inferior¹⁶. Prejudice is a feeling or set of feelings lodged in the individual. Blumer suggested that prejudice is usually depicted as 'consisting of feelings such as antipathy, hostility, hatred, intolerance and aggressiveness'.¹⁷ It is crucial to note both discrimination and prejudice are different despite closely related. While prejudice refers to an individual's attitude or symbolic response towards another, it may not necessarily involve overt action towards members of a minority group. Discrimination however relates to the consequence or eventual outcome of the action which refers to 'unfair, effective and injurious treatment' to minority groups¹⁸. Although prejudice and discrimination are not

¹¹ Wouter Vandenhoe, *Non Discrimination and Equality in the view of the UN Human Rights Treaty Bodies* (Intersectia 2005) 32. Also see Elizabeth Anderson in 'Integration, Affirmative Action, and Strict Scrutiny' (2002) 77 New York University Law Review, 1195 where she defines discrimination as 'A discrete event, a one time loss accruing to an individual victim, the effects of which seriously extend to no further than her dependants'

¹² *ibid* 32

¹³ See Lawrence Kahn, 'Discrimination in Professional Sports: A Survey of the Literature' (1991) 44 Industrial and Labour Relations Review 395-418, 397. He argues labour market discrimination could result from employer prejudice, co-worker discrimination or customer preferences

¹⁴ Ann Scales, 'The Emergence of Feminist Jurisprudence: An Essay' in M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (7th edition, Sweet and Maxwell 2001)

¹⁵ Colin Tatz, 'Race, Politics and Sport', (1984) 1 The Journal of the Australian Society for Sports History 1

¹⁶ George Eaton Simpson and Milton Yinger, *Racial and Cultural Minorities – An Analysis of Prejudice and Discrimination* (5th edn, Plenum Press 1985) 22

¹⁷ Herbert Blumer, 'Race Prejudice as a sense of Group Position' [1985] The Pacific Sociological Review 1. See also Robert Miles, 'Apropos The Idea of Race ... Again' in Les Back and John Solomos, *Theories of Race and Racism – A Reader* (eds) (Routledge 2000) 127 where Miles described 'prejudice' as a notion that predated the creation of the concept of racism

¹⁸ Simpson and Yinger (n16) 23

similar, these terms nonetheless possess a symbiotic relationship which equally suggests that they are not empirically separate.

The above evaluations suggest the term discrimination is largely associated with inequality and differential treatments given to certain groups due to inherent feelings of prejudice. These consequently place those groups in a disadvantaged position over the others, and subsequently excluded. For the purposes of this research, racial discrimination refers to instances where an individual from a certain racial group has been denied equal access to opportunity, rights or benefits enjoyed by others.

Young meanwhile describes discrimination as a form of oppression. In her work 'Justice and the Politics of Difference': 'Discrimination refers primarily to two forms of disabling constraints, oppression and domination'.¹⁹ In her view unequal distribution of resources extended to the basic social structure, for instance issues concerning division of labour; discrimination could be taken as exploitation since it creates a structural difference between different social groups which would lead to social exclusion. Individual differences result in unequal treatment, based on prejudicial thoughts, which then result in oppression and potential exploitation. Young's description of discrimination can also be applied to racial discrimination. Crenshaw relates oppression to discrimination against another race; 'The most significant aspect of black oppression seems to be what is believed about Black Americans ... black people are boxed in largely because there is a consensus among many whites that the oppression of Blacks is legitimate'.²⁰

In a slightly different context however, discrimination has also been defined formally and informally within a country's legislation or within any international organisation such as the United Nations. For example, the United Kingdom possesses uncoded constitutional framework and therefore, the common law provision, with its emphasis on freedom of contract, would only find discrimination if there is a pre-existing contractual obligation and property rights being infringed. Nothing in the common law provision made reference, if any, to conducts which result in disadvantage

¹⁹ Iris Marion Young, 'Justice and the Politics of Difference' in Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law – Theory and Context* (Sweet and Maxwell 2008)

²⁰ Kimberle Williams Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 7 HLR 101

towards a specific grounds such as race or sex. At present however, the discriminatory provisions are codified which also include the United Kingdom with the eventual introduction of the Race Relations Act 1976 as amended. A good example of a formal definition can be found under the International Convention on the Elimination of All Forms of Racial Discrimination in 1966 where it has been defined as:

Any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the definition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²¹

Deakin and Morris have however sought to define discrimination by reference to direct or indirect forms of discrimination, from which one can evaluate whether a party has been discriminated based on his race. The party would have to show that he or she is directly or indirectly affected by actions which subsequently resulted in him or her being placed in a disadvantaged position compared to others. Deakin and Morris suggest that 'a two-fold definition of discrimination'.²² Direct discrimination refers to unequal treatment based on the relevant prohibited grounds, while indirect discrimination results from the application of provision, criterion, or practice which is neutral on the surface, but disadvantages the members of one group as opposed to another. Direct discrimination occurs where a person is treated differently from, or receives less favourable treatment, to another person. As McColgan suggests, this is a form of intentional discrimination²³, the lack of 'like for like'²⁴ treatment. In the context of racial discrimination in sport, a player is not selected to represent the national team based on his racial background or ethnicity.

Direct discrimination does not cover practices that are fair in form but discriminatory in operation. Indirect discrimination addresses the difficulty in proving that a person

²¹ Ian Brownlie and Guy Goodwin-Gill, *Brownlie's Documents on Human Rights* (eds) (6th edn, Oxford University Press, 2009)

²² Simon Deakin and Gillian Morris, *Labor Law* (5th edn, Hart Publishing 2009)

²³ Aileen McColgan, *Discrimination Law – Text, Cases and Materials* (2nd edn, Hart Publishing 2005)

76

²⁴ McColgan (n22) 76

has discriminatory intent, and was introduced to address the issue of institutional racism. In the Stephen Lawrence Inquiry Lord MacPherson defined it as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.²⁵

Thus discrimination does not possess a single definition, but relates to different forms of beliefs, acts or conduct which have degrading effects on others in general. The act of discrimination could be directed specifically at certain individuals or indirectly towards certain groups. As mentioned earlier, the International Convention on the Elimination of All Forms of Racial Discrimination of 1966²⁶ defines discrimination by reference to not one, but many different forms of conduct which cause disadvantage to certain groups. The Convention added that it would only constitute discrimination where ‘that action has an unjustifiable disparate impact upon a group ...’. The term disparate impact makes reference to the term indirect discrimination.

Any study of the theory of discrimination should consider of the notion of discrimination law in achieving equality. It is essential at this stage to provide an understanding of both equal opportunity and affirmative action since both methods are used by different countries to regulate discrimination law. Further in-depth analysis surrounding the definition of equal opportunity and affirmative action will be highlighted in Chapter 3. Generally, the law surrounding the prevention of discrimination revolves around the principles of equality and justice. According to Mill, ‘Any liberal political and legal systems need to be able to “justify” legal intervention which would have a potential impact on the liberty of an individual’.²⁷

²⁵ Bamforth, Maleiha and O’Cinneide (n16) 336

²⁶ See Brownlie and Goodwin-Gill (n21). ‘In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin’

²⁷ John Stuart Mill, *On Liberty and other Writings* (Cambridge University Press 1989)

Mill also stated that the only justification for an interference with the liberty of another is to prevent 'harm to others'.²⁸

Other writers such as Dworkin and Rawls gave somewhat similar justifications for introducing discrimination law. Dworkin argued that all citizens should be 'treated with equal respect and concern'.²⁹ Consequently, there is a need to treat others fairly, justly and in a way so as to respect their dignity as humans. Rawls meanwhile in his 'Theory of Justice' argued that all citizens are 'free, moral and equal'.³⁰ In the context of racial discrimination, Brest argues that 'The anti-discrimination principle is a principle of justice that prevents and rectifies racial injustice ... it is concerned with the exclusion caused by the malign use of racial criteria from decision making procedure, but it is also concerned with unjust results'.³¹ The argument raised by Brest is essential since it provides further authority in affording protection to groups which have been marginalised.

As a result, equality of opportunity emerged as a principle to forward the notion of equality. This principle, to be analysed further in Chapters 3, 4 and 5, can be seen as instrumental in the drafting of anti-racial discrimination law in England and the United States. According to the White Paper which preceded the Sex Discrimination Act 1975 and specifically the Race Relations Act 1976, the aim of the legislation was 'To introduce effective measures to discourage discriminatory conduct and to promote genuine opportunity for both sexes and race'.³² Here, the concept of equality of opportunity surrounds the idea of merit. According to Nolan, equal opportunity can be viewed as 'The right meritorious treatment as a justification for anti-discrimination treatment'.³³

Other writers such as Bamforth and Fredman discuss the concept of equal opportunity. Fredman suggested that equal opportunity possessed a requirement that

²⁸ *ibid.* Mill

²⁹ Ronald Dworkin, *A Matter of Principle* (OUP 1985)

³⁰ John Rawls, 'Theory of Justice' in Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet and Maxwell 2008)

³¹ Paul Brest, 'In Defense of the Anti-Discrimination Principle' (1976) *Harvard Law Review* 1

³² Bamforth, Maleiha and O'Cinneide (n16) 127

³³ David Nolan, 'A Right to Meritorious Treatment' in C. Gearty and A. Tomkins (eds), *Understanding Human Rights* (Cassell 1996)

‘Like should be treated with like’³⁴ described the ‘removal of obstacles to the advancement of women or minorities ... and measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good’.³⁵ Hence, equal opportunity could be viewed as a measure to ensure that each group is treated equally, and selection should be based on merit.

At first glance, equality of opportunity could also refer to equality of outcomes or resources. On closer examination however, these concepts are different although they share similarities in terms of achieving equality. Equality of opportunity broadly refers to formal equality and equality of treatment since nationality, race, sex or any other characteristic should neither determine the opportunities that are open to such individuals, only talent and achievement. In contrast, equality of outcomes and resources³⁶ ‘implies that all runners finish the race in the line together regardless of their starting point and the speed at which they run ... and positively contradicts equality of opportunity and formal equality’.³⁷ Therefore, equality of outcomes imposes measures to achieve fair shares for all in order to reduce inequality. Consequently, this attempt to promote equality could be akin to those of positive discrimination or affirmative action, another concept used to justify discrimination law.

The term affirmative action, originally embraced in the United States, came as a consequence of an Executive Order issued by President Johnson in 1965. Under the Clinton administration, affirmative action can be described as ‘any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination’.³⁸ McCrudden provided a general understanding of the affirmative action concept. He referred to affirmative action as, ‘Need-based programs, outreach programs and

³⁴ Sandra Fredman, *Discrimination Law* (OUP 2002) 15

³⁵ *ibid* 15

³⁶ See Ronald Dworkin, *Law’s Empire* (Fontana Press 1986) 297 where he suggested that the norm of equality of resources stipulates that to achieve equality the agency ought to give everybody a share of goods that is exactly identical to everyone else’s and that exhausts all available resources to be distributed

³⁷ Andrew Heywood, *Political Theory* (3rd edn, Palgrave Macmillan 2004) 291-292. See also John Stanley, ‘Equality of Opportunity as Philosophy and Ideology’ (1977) 5 *Political Theory* 61

³⁸ Moises Salinas, *The Politics of Stereotype – Psychology and Affirmative Action* (Praeger 2003) 7

preferential treatment’.³⁹ The latter, as argued by McCrudden, refers to quotas and the tie-break model. In short, affirmative action could therefore be considered as the broadest form of positive action.

It is clear that this concept is aimed towards providing certain groups with an additional edge or advantage over other groups. On the other end of the spectrum, affirmative action has been linked to remedial response and as a means to promote diversity. According to Brennan, J in *Bakke*⁴⁰, affirmative action may apply ‘Where the purpose of such programs is to remove the disparate racial impact its action might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination’.

From here, affirmative action and equal opportunity are recognised as justifications in order to address the issue of discrimination and to advance equality for all races. In general terms, equal opportunity strives to ensure equal participation for all races while affirmative action seeks to provide additional means especially to previously deprived ethnic and racial groups. Further in depth analysis on the jurisprudential theories of discrimination will be discussed in Chapter 3. While the above paragraphs relate to the general conception of discrimination and understanding into equal opportunity and affirmative action, the following section sets out to identify definitions of sport. The research will then proceed towards an historical account of discrimination in sport, providing a comprehensive review of the main issues and themes.

1.2 Definition of Sport

Sport has, perhaps more than any other enterprise, become a complex, globalised industry which is worth of billions of dollars annually. The right to participate, and whether it exists at all, is consequently a matter of seminal importance that underpins the world of sport.⁴¹

³⁹ Chris McCrudden, ‘Rethinking Positive Action’ in Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (2nd edn, Oxford and Portland, 2005)

⁴⁰ *University of California Regents v Bakke* 438 U.S 265 (1978)

⁴¹ *Le Roux and Cornelius* (n7) 1

Sport is an integral part of society and has existed since before the dawn of the first modern Olympic Games held in Athens, Greece in 1896. However, it is essential to understand the relevance of sport as an integral part of society. Sport can be defined as ‘A broad range of activities encompassed by the term leisure and undertaken in what we would describe as our leisure time’.⁴² An alternative definition might include sport as ‘a form of entertainment or fun’.⁴³ These definitions appear to generalise the concept of sport and suggest a form of recreational activity. Gardiner et al describe sport as a human activity that exists somewhere along the continuum from work to play⁴⁴. Hence, Gardiner’s definition seems to be in agreement with the definition provided above.

Therefore, to take the phrase ‘sport’ literally could imply many different forms of activity or play, be it with or without physical exertion which does not differentiate between different societal groups. For instance, modern football and rugby involve physical exertion and the employment of skills to outplay opponents. In contrast, sport also includes other activities which only utilise mental skills to outplay opponents such as the game of chess. Within these sports, it is worth appreciating that some are played at the professional level, others at an amateur, novice or youth level. As a consequence, it is pertinent to narrow down the definition of sport.

For the purpose of this research, we will be observing the concept of sporting participation at the professional level. In relation to this research, ‘sport participation’ ‘is founded on the principle that people need diversion from their work and recreation provides this diversion and generally emphasised their social side while high performance participants aim to defeat one another’.⁴⁵ According to Cornelius, there are many different types of participants in sports. These participants include athletes, teams, associations, event officials, trainers, coaches, organisers, spectators and

⁴² ‘Definition of Sport’ (*Regional Support Centre*) <http://www.rsc-sw-scotland.ac.uk/project_pages/docfiles/sport_fitness/Definition%20of%20Sport/Definition%20of%20Sport.doc> accessed 21 March 2011. Also refer to ‘Sport England’s new direction and definition for National Indicator’ (*Department for Culture, Media and Sport*, 8 Dec 2007) <<http://www.culture.gov.uk/images/publications/SportEnglandsnewdirectionanddefinitionofsportforNationalIndicator8.pdf>> accessed 21 March 2011

⁴³ Allen Guttman, ‘The Development of Modern Sports’ in Jay Coakley and Eric Dunning (eds), *Handbook of Sports Studies* (Reprinted SAGE 2010) 261. In renaissance sports, it was described as a ‘loosely organised and poorly regulated melee that took place in open fields and meadowland’.

⁴⁴ Gardiner, James and O’Leary et al. (n5) 14

⁴⁵ Ronald Woods, *Social Issues in Sport* (Human Kinetics 2007) 35

others⁴⁶. For the purpose of this research, the main focus will be on sportspersons and team players from certain types of sports. Meanwhile, the term ‘professional’ is ‘inextricably linked to quality which in turn, is about the values that are intrinsic to the profession itself ... and that to describe a person or a practice as “professional” is to pay the highest compliment in terms of expertise and competence’.⁴⁷ Therefore, this research will only analyse racial discrimination and regulation in sport from these perspectives.

In terms of providing a legal definition for sports, Gardiner is of the opinion that there is no precise legal definition of sport under English Law, an assertion with which the researcher concurs⁴⁸. Anderson described the ‘challenge to arrive at an objective workable definition of an activity that now appears to encompass everything from chess to combat sport, from darts to synchronised diving’.⁴⁹ In England, there is no legal definition of sport. According to Sport England:

There are many different opinions as to what constitutes a sporting activity and the Sports Councils do not have their own definition of sport. However, we operate a recognition process to establish which sports we may consider working with. When deciding whether to recognise a sport, the Sports Councils look to see if it meets the Council of Europe’s European Sports Charter 1993 definition of sport.⁵⁰

⁴⁶ Le Roux and Cornelius (n7) 3-17

⁴⁷ Becky Warrior, ‘Reflections of an education professional’ (2002) 1 *Journal of Hospitality, Leisure, Sport and Tourism Education*, 57. Traditionally, professionalism has been associated with belonging to a profession and therefore being a professional. See Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Harper and Row 1977). In David Mautz, ‘Public Accounting: Which kind of professionalism’ (1988) 2 *Accounting and Horizons*, 75, he merely relates the term professional as a person with ‘expert competence’

⁴⁸ Gardiner, James and O’Leary (n5) 18

⁴⁹ Jack Anderson, *Modern Sports Law – A Textbook* (Hart Publishing 2010) 4. See also Bero Rigauer, ‘Marxist Theories’ in Jay Coakley and Eric Dunning (eds), *Handbook of Sports Studies* (Reprinted, SAGE 2010) where Rigauer simply defines sport as ‘Formal and informal forms of participation of athletes and supporters in social activities emphasising special motor skills, competition and leisure’.

⁵⁰ ‘How we recognise sports’ (*Sport England*, 2010)

<http://www.sportengland.org/about_us/recognised_sports/how_we_recognise_sports.aspx> accessed 15 February 2011. Initially, the European Sport for All Charter (Council of Europe 1980) divided sport into four broad categories as competitive games and sport which are characterised by the acceptance of rules and responses to opposing challenge; Outdoor pursuits in which participants seek to negotiate some particular terrain; Aesthetic movement which includes activities in the performance of which, the individual is not so much looking beyond themselves and is responding to the sensuous pleasure of patterned bodily movement and conditioning activity.

Under Article 2 of the European Sports Charter of the Council of Europe, sport is defined as, 'all forms of physical activity which, through casual or organised participation, aims at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels'.⁵¹

Some countries have attempted to provide a legal definition of sport. The Estonian Sports Act 1998 defines sport as '... playing activity of a predominantly competitive and physical nature, or a corresponding educational activity'.⁵² The Irish Sports Council Act 1999 establishes that sports are '... all forms of physical activity which, through organised participation, aims at expressing or improving physical fitness and at obtaining improved results in competition at all levels'.⁵³ Providing a legal definition for sport is by no means a simple process, the definitions provided above reflect more the objectives of sport.

The Prevention and Combating of Corrupt Activities Act No. 12 of 2004 provides a legal definition for sporting events. Section 1 defines sporting event as:

Any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted.⁵⁴

For the first time, this creates a link between sports and the law rather than relying on conventional views which tend to associate sports with its core objectives. Although the main aim of the Act is aimed at prevention and criminalising corruption at all levels, the Act also extends its influence to the regulation of sporting activities. The Act describes the governance of corruption in sporting events, and places a duty on certain people to report corrupt activities to the relevant authorities. With sport

⁵¹ Jan Willem Soek, 'Sport in National Sports Acts and Constitutions: Definitions, Ratio Legis and Objectives' (*CBS Interactive Business UK*) <http://findarticles.com/p/articles/mi_m2ABX/is_3-4/ai_n25012280> accessed 24 July 2009

⁵² Soek (n51)

⁵³ Soek (n51)

⁵⁴ 'Government Gazette – Republic of South Africa' (*Southern African Legal Information (SAFLII)*) <http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf> accessed 12 February 2011

becoming more popular, it would not be surprising to find legislators attempting to provide legal definitions of sport in the near future.

The history of sport has had periods where certain individuals or groups have been prohibited from participating in sports due to their respective backgrounds. At present, we could refer discrimination to those instances involving gender and race. In addition, there are others which have developed throughout the late 20th century, notably, discrimination based on a person's ability and sexual orientation. Discrimination commonly takes place in the workplace or in other employment related situations. In contrast, it is equally essential to note that different forms of discrimination have also taken place in the sports' industry⁵⁵. As a result, differing action plans and legislations have been created in order to preserve equality and to ensure that no racial or ethnic groups have been sidelined. Before venturing into this area further, it is crucial for one to analyse the emergence of discrimination. Finally, this research will narrow the scope to the area of racial discrimination in sport.

1.3 Modern Games, Modern Society - Breaking down the barrier of Discrimination

The first Olympic Games were held in Olympia in Greece in 776 BC and were held to honour the Greek Gods. Women were not allowed to participate but had to participate in their own Games of Hera, in commemoration of a Greek Goddess the wife of Zeus who ruled over the women and earth. This is the first example of discriminatory practice, specifically, gender based discrimination. In 396 BC, Kyniska, a Spartan princess, was allowed to participate in the Chariot Race alongside her male counterparts, and won the race, but was barred from collecting her prize in person due to her status as a woman⁵⁶.

Other forms of discrimination appear in the ancient historical record. The Roman Emperor Nero positively discriminated against other capable challengers to win the chariot race in 66 A.D, when he forced them to withdraw from the race in order for himself to be crowned the sole champion⁵⁷. Others claim that judges accepted bribes from the Emperor to award him first place in the race despite the fact that he fell out

⁵⁵ See Chapter 4

⁵⁶ Donald Kyle, *Sport and Spectacle in the Ancient World* (Blackwell Publishing 2007) 188-189

⁵⁷ Cloete and Cornelius (n2) 3

of his chariot and failed to finish his race⁵⁸. The Games were abolished by Emperor Theodosius I in 394AD after almost a thousand years of competition due to immense corruption and efforts to ban any elements of depicting the Pagan cults.⁵⁹

It is evident from the above that discrimination has existed at least since the beginning of the Ancient Games. The case involving Emperor Nero could be taken as a precedent in demonstrating new forms of favouritism in the sense that one should be declared as a winner based on status. Favouritism could also be discriminatory practice since the others are treated unequally by the judges. Despite the abolition of the Ancient Games, sports have continued to develop over time although smaller in scale. During Roman times, many forms of activities such as hunting, wrestling, boxing and other equestrian events were held locally. On the other hand, the development of sport during those times was mainly influenced and seen as a preparation for life⁶⁰, whereby young athletes prepared themselves to be future military leaders and for any form of warfare. The strength they possessed would enable them to defeat their enemies⁶¹. Sporting activities could be seen as akin to war.

Sport ultimately 'disassociated' itself from war and emerged as a form of recreation as well as increasingly being regulated by the authorities. During the 14th-17th century, England for instance witnessed increasing regulations in matters involving sporting activities and the prohibition of sport on Sundays.

In England, football was sometimes a symbol of resistance to authority or change ... In East Anglia, which had its own popular variant, camp ball, it frequently marked objections to Fenland drainage schemes or enclosures ... Amidst this turmoil cricket was better suited both to gambling and to the preservation of social order.⁶²

⁵⁸ Peter Finley and Linda Finley, *The Sports Industry's War on Athletes* (Praeger Publishers 2006) 62

⁵⁹ Christopher Hill, *Olympic Politics* (Manchester University Press 1992) 6. See also 'Ancient Olympic Games 776 BC-393 AD' (*Olympic.org – Official Site of the Olympic Movement*) <http://www.olympic.org/uk/games/ancient/index_uk.asp> accessed 23 July 2009

⁶⁰ Coakley and Dunning (n43) 248

⁶¹ *ibid* 249. Also see Eric Dunning, *Barbarians, Gentlemen and Players* (OUP 1979)

⁶² Gardiner, James and O'Leary et al (n5) 30. See also David Birley, *Sport and the Making of Britain* (Manchester University Press 1993) 115

The Victorian Age in particular spurred the growth and development⁶³ of sport. Rules were formalised and sports governing bodies were established. Examples include the Football Association (The FA), Rugby Union and Athletic Club. Across the Atlantic, new sports were invented and structured, such as basketball and the revised version of rugby football. While these sports began to incorporate participation from all level of societies, schools in England included sports as part of extra-curricular activities⁶⁴. The promotion of modern sports across all ranges of society – school children, lower class, working class and elite class contributed to William Penny Brookes' idea of reintroducing the Ancient Olympics, with variations⁶⁵. Together with Pierre De Coubertin from the Union of French Athletic Sports Societies (USFSA) and support from the Zappas Foundation⁶⁶, the modern Olympic Games materialised.

Various empires ruled the world when De Coubertin and Dimitrios Vikelas from the Zappas Foundation introduced the modern Olympic Games in the late 19th century. Brookes died a year before the introduction of the Games. Only a few countries participated with colonies controlled by Great Britain⁶⁷ and France not allowed to participate. The introduction of the first British Empire Games, (later known as the Commonwealth Games) in Ontario, Canada in 1930 also reflected the ever-growing importance of sports within society, although only eleven countries participated⁶⁸.

Before the revival of the modern Olympic Games, Coubertin insisted that the Games were intended for all humankind, to foster individual and collective goodwill, and thus, to contribute to world peace. With the establishment of the Olympic Movement, the Olympic Charter was introduced as a symbol of hope and inspiration for the countries around the world to join the sporting family. The goal of the Olympic Movement is to 'contribute to building a peaceful and better world by educating youth through sports practised without discrimination of any kind and in the Olympic spirit,

⁶³ ibid 30

⁶⁴ Hill (n59) 9-15

⁶⁵ ibid 13. Also see 'British Olympic Movement – Revivalist Games' (*British Olympic Association*) <<http://www.olympics.org.uk/contentpage.aspx?page=307>> accessed 23 July 2009

⁶⁶ Zappas Foundation gained its name from Evangelios Zappas, a rich merchant of Greek origin living in Romania and responsible for the successful running of Athen Games in 1859 and 1870.

⁶⁷ However, this excludes any states, which were granted the 'dominion' status by Great Britain. For example, Canada, Australia, New Zealand and Union of South Africa were allowed to participate after obtaining their 'dominion' status by His Majesty the King of Great Britain, Northern Ireland* (then known as Ireland) and Islands.

⁶⁸ British Olympic Association (n65)

which requires mutual understanding with a spirit of friendship, solidarity and fair play'.⁶⁹

These words from the Olympic Charter state the Olympic Movement's belief that athletic talent, and not race, gender, religious belief or politics, should determine whether athletes may participate in the Olympic Games or not. Specifically, the fundamental principles of the Olympics also stated that 'The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play...'.⁷⁰ The Olympic Charter still represents a driving force in encouraging athletes from all over the world to participate in this global event held every four years. The Charter has remained an important piece of documentation since the International Olympic Committee (IOC), Organising Committees of the Olympic Games (OCOG), National Olympic Committees (NOCs), the International Sports Federation (ISF) subscribed to this universal rule.

The modern theory of discrimination has also emerged in sports as a consequence of this. The introduction of the Olympic Movement, though with the intention of uniting the world through sport has often found it difficult to break the barriers of discrimination. Hill stated that 'All sports have had to take a view on questions of international politics'.⁷¹ We will explore the evolution of discrimination and its relevance to the modern age, tracking the workings of discrimination in relation to gender differences, drugs and disabilities as a background to the main focus on race discrimination in sport.

Gender discrimination has a long history. Females were not allowed to participate in any events, and sometimes were even prevented from witnessing the prestigious events. Coubertin himself challenged this practice under the Olympic Charter. While acknowledging his goodwill and contribution in reviving the spirit of Olympics, his

⁶⁹ 'The Olympic Movement – What is the Goal of the Olympic Movement?' (*Olympic.org – Official Site of the Olympic Movement*, 2009) <http://www.olympic.org/uk/organisation/index_uk.asp> accessed 23 July 2009

⁷⁰ 'Olympic Charter' (*Olympic.org – Official Site of the Olympic Movement*, 2009) <http://multimedia.olympic.org/pdf/en_report_122.pdf> accessed 23 July 2009

⁷¹ Hill (n59) 31

background and strict religious upbringing in a Roman Catholic family made him sceptical towards women's participation in sports, and during his 29 years as the president of the IOC, he discouraged any form of vigorous women's participation in the Summer Olympics stating that, 'It is indecent that the spectators should be exposed to the risk of seeing the body of a woman being smashed before their very eyes. Besides, no matter how toughened a sportswoman may be, her organism is not cut out to sustain certain shocks'.⁷²

Subsequent presidents such as Baillet-Latour, Edstrom and Brundage discouraged active campaigning for more women in the Olympic Games⁷³. Superstitious and religious reasoning has been used to prevent or limit the participation of women in sport, but gender discrimination in the summer and winter Olympic Games has reduced while in other international sporting tournaments, women are now able to participate in areas formerly set aside exclusively for men.

A potentially new form of discrimination involves disability. Although legislation is generally enforced to prohibit any form of discrimination based on a person's disability, nothing specific has been mentioned for sport. The right for the disabled to participate under different disability categories is enshrined under the rules and regulations enacted by the International Paralympics Committee (IPC). The case of Oscar Pistorius⁷⁴ is perhaps the best illustration of discrimination against athletes on the grounds of disability. Pistorius, a paraplegic athlete, was deemed unable to compete for South Africa at the 2008 Beijing Olympics by the International Amateur Athletics Federation (IAAF) on the grounds of his reliance upon prosthetic limbs. This exclusion was based upon IAAF Rule 144(e), which states that the use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device should preclude that athlete from participation in IAAF-sanctioned competitions. Pistorius subsequently appealed to the Court of Arbitration in Sport (CAS), which ultimately revoked his exclusion with immediate effect, even though this became somewhat academic in light of the fact that the athlete failed to achieve the requisite

⁷² Rob Beamish and Ian Ritchie, *Fastest, Highest, Strongest: A Critique of High Performance Sport* (Routledge 2006) 40-41

⁷³ John Lucas, *Future of the Olympic Games* (Human Kinetics Books 1992) 134-135

⁷⁴ *Pistorius v IAAF* CAS 2008/A/1480

qualification standard and was therefore excluded on the grounds of non-qualification⁷⁵.

In the CAS findings, it was held that Pistorius is eligible to compete in IAAF-sanctioned events while wearing the Ossur Cheetah Flex-Foot prosthesis model. Since CAS considered it to be a unique case, however, this finding would be related to the individual case and would have 'absolutely no application to any other athlete, or other type of prosthetic limb'.⁷⁶ Pistorius appeal based on unlawful discrimination was however rejected since the Principality of Monaco; whose law govern the IAAF has neither signed nor ratified the United Nations Convention on the Rights of Persons with Disabilities. Despite this, the decision delivered by CAS indirectly made recognition 'of the putative right to sport'⁷⁷ and '... participation on an equal basis to sporting activities'.⁷⁸ Since the prosthetic limb did not afford any advantages to Pistorius, he was allowed to participate on an equal footing as other able-bodied athletes. In terms of racial integration in sport, the decision in Pistorius enshrined the principle of the right to participate for every individual, who should not be subjected to exclusion, although this did not extend to the right to selection.

The condemnation of discrimination has also been used positively in order to prevent cheating in sport. The Olympic Charter provides that all athletes must be willing to participate fairly in the Olympic Games. The concept of fair play is now more concentrated on the problem of drug abuse by athletes during the Olympic Games or any international games. This in a way constitutes discrimination towards the other athletes that come to the Games clean. Discrimination in this form occurs when an athlete consumes illegal or prohibited drugs that would enhance his or her performance thus gaining an edge or advantage over another competitor. The history of drug usage in sports goes back to the 1840s and 1850s where unconfirmed rumours

⁷⁵ Paolo Baldini, 'Pistorius fails to make South Africa's team for Beijing' *The Guardian* (London, 18 July 2008) <<http://www.guardian.co.uk/sport/2008/jul/18/olympicgames2008.athletics2>> accessed 26 July 2009

⁷⁶ *Pistorius v IAAF* (Hunter, Rivkin and Rochat). For full outcome of the case, see Arbitration CAS 2008/A/1480 Pistorius v IAAF, award of 16 May 2008 (Court of Arbitration for Sport) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf>> assessed 9 Feb 2011

⁷⁷ Dave McArdle, 'Just One of the Challenges of 21st Century Life': Oscar Pistorius in the Court of Arbitration for Sport' (2008) 5(2) *A Journal of Law, Technology and Society* <<http://www.law.ed.ac.uk/ahrc/script-ed/vol5-2/mcardle.asp>> accessed 31 March 2011

⁷⁸ Hunter, Rivkin and Rochat (n76) 9. Para 28

of drug use among competitive professional athletes circulated in the United States. In addition, more rumours in relation to the use of stimulants and alcohol to enhance athletes' performance appeared during the first four Olympic Games.

The fight against prohibited drugs began when the issue reached its peak in the 1960s. In an optimistic tone, Prince Alexandre de Merode, founder of the IOC's *Medicale* stated, 'Let us look forward to a time soon when Olympic gold medal winners will not feel the need to make a detour to their local drug store'.⁷⁹ After the Ben Johnson case in Seoul, South Korea in 1988, draconian drug testing procedures were introduced. In Ben Johnson's case, his native country, officials, coaches and government officials were humiliated in the Dubin Report. Ben Johnson's short-lived victory in Seoul served as an insult to other participants. More importantly, he had discriminated against others by seeking an unfair advantage over his rival competitors. In addition, the disintegration of East Germany in 1989 had been greeted by shock and disbelief internationally. Under the so-called 'Plan 14.25', the government of East Germany had ordered a systematic doping of their athletics during the 1980s. Since then, the IOC tightened up the rules on doping to affirm the true meaning of fair play in the Olympic Charter. One of the IOC's main initiatives involved the creation of a World Anti-Doping Agency (WADA), an independent body established in 1999 which set unified standards for anti-doping work and co-ordinated the efforts of sports organisations and public authorities to combat doping in sport. From then on, sanctions would be imposed on any athlete who was found guilty of doping in sport.

At this stage, we would be able to appreciate different forms of anti-modern discrimination involving sports. Here, one could argue that the application of discrimination principles could be used in order to undermine a person's right to participate or be utilised in order to ensure fair play. Both gender and doping issues continue to dominate the world of sports with the emergence of others such as disabilities or even the right of participation in sport involving transgender groups. Yet another major area which continues to haunt the sporting industry involves discrimination on the grounds of racial or ethnic background – which is the core area

⁷⁹ Alexandre de M'érode, 'Le CIO veut gagner la guerre de la pureté' (1988) *Bruxelles Le Soir*

for this research. The next section will therefore be dedicated to the issue of racial discrimination in sport involving the right to participate.

1.4 Racial and Ethnic Discrimination

As mentioned above, the main objective of the Olympic Games is to ensure that every individual is afforded the right to participate free from any discrimination. In addition to matters concerning gender, doping and disabilities, it is without doubt that prevention of discrimination also includes ethnic and racial differences. However, we often encounter questions disputing the validity of the Charter. Moreover, do countries, **ISF** or the **NOCs**, adhere to the basic provision of ensuring every individual enjoys the right to participate in sports? This sub-chapter aims to address this issue and finally, the crucial elements of this research.

There are some differences between the terms racial and ethnic background although Jarvie suggested that 'ethnicity, racism and race are so closely intermingled for many specialists that the terms are often found together'.⁸⁰ From the sociological and epidemiologic view however, different interpretations are given. According to Lin and Kelsey⁸¹, race is more centred on a 'persons who are relatively homogenous with respect to biological inheritance'. The definition of an ethnic group is taken a step further as constituting 'a social group characterised by a distinctive social and cultural tradition, maintained within the group from generation to generation, a common history and origin and a sense of identification with the group'. This area remains an open discussion with some commentators suggesting that the term ethnicity is used since it would be improper to utilise the term race. For the purpose of this research however, both these terms will be treated as synonymous.

From the beginning of the Olympic Games until the Second World War, only a few countries participated. Some countries were still under foreign rule or influence and as such, they could not participate as an independent country. For instance, the former British Empire used to rule one third of the entire globe, and all those born in any of

⁸⁰ Grant Jarvie, 'Sport, Racism and Ethnicity' in Jay Coakley and Eric Dunning (eds), *Handbook of Sports Studies* (Reprinted, SAGE 2010) 336

⁸¹ Scarlett Lin and Jennifer Kelsey, 'Use of Race and Ethnicity in Epidemiologic Research: Concepts, Methodological Issues and Suggestions for Research' (2000) 22 *Epidemiologic Reviews* 187, 188

the British Colonies or Protectorates were treated as British Subjects, with similar rights and privileges with the other Subjects⁸². The definition of British Subjects also included any British Citizens born in the United Kingdom and Islands⁸³. This would imply that individuals from every corner of the Empire were entitled to represent the United Kingdom for the Games.

According to MacKenzie, 'English supremacy should last until the end of time, because it means universal freedom, universal liberty, and emancipation from everything degrading'.⁸⁴ His view with reference to British Empire was shared by Lord Curzon who stated, 'There has never been anything so great in the world's history as the British Empire, so great an instrument for the good of humanity'.⁸⁵ The statements made by MacKenzie and Curzon demonstrated the optimism about the future of the Empire and its subjects across the globe. While it is true that the age of colonialism contributed to new developments, further discoveries and the enhancement of civilised ideas in society, questions remained about the role of its subjects in sport's participation.

As a result, the then dominant players in the world failed to grasp the meaning of the Olympic Charter. Instead, countries under British rule did not have any opportunity to expose their gifted talent in the Olympic Games. From 1896, participation from the British Empire only came from the United Kingdom itself⁸⁶. While they were correct in confining participation in order to protect their own interests, the act could be viewed as an unjustified form of racial or ethnic discrimination against the natives of other countries when it comes to the issue of participation in sport. This could perhaps be substantiated on the grounds that 'some Malaysians (instead of representing the United Kingdom) may have participated for their country of origin, such as China and

⁸² 'Who is a British Subject?' (UK Border Agency, 2009)

<<http://www.ukba.homeoffice.gov.uk/britishcitizenship/othernationality/britishsubjects>> accessed 26 July 2009. However, the status of British Subjects afforded to individuals from Palestine is not akin to those of other colonies or protectorates. The citizens of the Dominions also shared the same British Subject hood however; they are able to participate as a nation due to their status. For more information, please refer to British Nationality Act 1914 (As repealed by the British Nationality Acts of 1948 and 1981) and Aliens Act 1914

⁸³ *ibid* UK Border Agency

⁸⁴ Anthony Stockwell, 'Power, Authority and Freedom' in Peter J Marshall (ed), *The Cambridge Illustrated History of the British Empire* (Cambridge University Press 2001)

⁸⁵ Stockwell (n84) 7

⁸⁶ 'Team GB – Athlete Profile' (British Olympic Association, 2009)
<<http://www.olympics.org.uk/profiles.aspx>> accessed 26 July 2009

India'.⁸⁷ The result was considered a setback to all countries that were then colonies and protectorates as they were also subject to localised types of discrimination in their own countries. This also directly infringed the objective of the Charter, which emphasised that politics should not play any role in determining the participation of a country in the Games.

As a consequence, the first few Olympic Games only showcased achievements from one side of the world, covering mainly the European continent and countries from the American continent. In other words, the other side of the mainly Asian and African continent were precluded and had little or no idea of the Games' existence. This leads us to concur and appreciate the fact that only the Europeans who were then considered as 'superior' were allowed to enter into the grand event⁸⁸ while the others were excluded. The modern theory relating to race discrimination in sport was developed during the period leading to, and during, the Summer Olympic Games in 1936 where Hitler proclaimed the 'Aryan race as the superior people of the world' and utilised the Games as a 'showcase for the superiority of fascism, spiritual and physical superiority of the blond, blue-eyed conquerors of the new order over the Jews, blacks and other lesser breeds'.⁸⁹ Jews were excluded from the Games, with the exception of Helene Mayer, a half Jewish fencer as a token gesture to mollify the West while the achievements by Afro-Americans such as Jesse Owens, Ralph Metcalfe and Cornelius Johnson were not recognised by Hitler.

The period after the Second World War saw the political scene change. More countries and athletes from different backgrounds and races started participating in the Games. This resulted in newly formed countries gaining self-governing status and independence from their former colonial masters. Countries populated by people from different races, ethnic groups, tribes and origins from all over the continent

⁸⁷ 'Brief Record of Malaysia's Participation in the Past Olympic Games since 1956' (*The Olympic Council of Malaysia*) <<http://www.olympic.org.my/web/gamesrecords/olympicg/history.htm>> accessed 26 July 2009

⁸⁸ Coakley and Dunning (n 80) 335. The idea of 'superior' and 'inferior' races, and particularly the idea that race shapes performance and athleticism, can be traced back to the Greeks of the Hellenic period if not at least to the Middle Ages in Europe.

⁸⁹ Tim Delaney and Tim Madigan, *The Sociology of Sport: An Introduction* (McFarland and Company Publishers 2009) 200

participated in their first ever modern Olympic Games⁹⁰. The barricades that served as a tool to limit the participation of citizens on the ground of race and gender in particular diminished. As new nations joined the major sporting families, the participation of sportspersons increased in other international competitions such as badminton, rugby, field hockey and others. To take an example by way of illustration – during the 1896 Olympic Games in Athens, only 14 nations took part whereas 205 nations⁹¹ were involved in the 2008 Beijing Olympic Games.

As we progressed towards the end of the 20th century, anti-racial and ethnic discrimination law was commonly found embedded as part of a country's constitution. For example, both England and the United States enacted anti-discrimination provisions during the 1960s⁹². With the continued movements of people and massive immigration from one country to another, the law on prohibiting discrimination became increasingly essential in order to preserve peace and order amongst the societies in general. Due to the differences between countries, it was also common to find that different methods were utilised in various sectors and industries in order to create an equal and just society including the public services sector, education, housing, employment and other areas categorised by respective governments within the country. In some countries, it might be suitable where additional rights or preferential treatments were given to certain racial or ethnic groups in order to redress their previous predicament. Countries such as Malaysia and the Republic of South Africa are among the examples of this.

On the other hand, some nations took a prudent approach in trying to address the discrimination issue surrounding ethnic minority groups. Instead of affording additional entitlements to other ethnic groups, some countries such as England and the United States decided to take an approach akin to that of pure meritocracy⁹³. Essentially, an individual would be selected if he or she possessed the required talent and capabilities. Meritocracy is one of the core issues in sports, especially in trying to afford equal opportunity for all racial and ethnic groups to be involved.

⁹⁰ 'The Modern Olympic Games' (*Olympic.org – Official Website of the Olympic Movement*, 2010) <http://multimedia.olympic.org/pdf/en_report_668.pdf> accessed 20 March 2010

⁹¹ British Olympic Association (n 60)

⁹² Race Relations Act 1965 later to be replaced by Race Relations Act 1976 as amended and Civil Rights Act 1964

⁹³ See further in Chapter 4 and 5

According to Jarvie:

Sport itself ... has some inherent property that makes it a possible instrument of integration and harmonious race relations ... has contributed to unique political struggles which have involved black and ethnic political mobilisation and the struggle for equality of and for black peoples and other ethnic minority groups; has produced stereotypes, prejudices and myths about ethnic minority groups which have contributed both to discrimination against and an under-representation of ethnic minority peoples within certain sports.⁹⁴

Sports, therefore, could be considered as the first instrument to break up disunity in the world although politically, countries were still encountering internal as well as external problems of their own. Like any other area however, the issue of participation in sport was, and at present remains, one of the more interesting areas for further exploration. Essentially, this reflects the main aim of the research in analysing racial discrimination laws and regulations in sports with reference to Malaysia, South Africa, England and the United States.

In order to achieve equality, the theory of affirmative action and equal opportunity are introduced. Although different in substance, both theories share a similar goal of realising equality. In theory, affirmative action is a measure that gives additional rights to benefit certain racial and ethnic groups. In contrast, equal opportunity advocates for equal rights to be involved in any activities. The question effectively is, to what extent are the practices of affirmative action and equal opportunity applied in countries when it comes to sport?

It is however worth noting that different countries have differing political and historical backgrounds. The historical and political perspective of the four countries, Malaysia, South Africa, England and the United States for instance are poles apart. Both affirmative action and equal opportunity have since been used by politicians who have incorporated these practices as part of the law in their respective countries.

⁹⁴ Coakley and Dunning (n 80) 334

With citizens from different races and ethnic groups making up the population of these countries, it is interesting to examine the approach taken by the present governments in order to achieve equality. Hence, the crucial research question will aim to explore and analyse the extent of laws used to promote equality in various jurisdictions when it comes to sport. Detailed analysis involving the theories of affirmative action and equal opportunity will therefore present an opportunity to conceptualise the interrelationships and roles in manipulating the political background as well as the course of legislation within the four chosen jurisdictions

With reference to Jarvie, the core reason for sport's participation is an 'instrument of integration and harmonious race relations'.⁹⁵ To achieve harmonious race relations via the law however raises another contentious issue. For a nation, participation in sport is equally an opportunity to display their abilities to be successful in any given international sporting competition. At the political level, this implies achieving both internal and external success. Hence, it could be said that a successful method in managing the issue of racial discrimination via the theory of affirmative action and equal opportunity would also contribute to international sporting success. Are we however ready to sum up based on this conclusion? The following research question will attempt to examine whether tensions exist in reconciling equality of citizens at a national level and the international sporting success of that nation?

In contrast, making reference to the law alone would not suffice. Unlike other sectors such as employment law, contract law or tort law, sports regulations are governed 'independently' by various ISF, NOCs and the IOC. In addition, the presence of the CAS raises doubts about the interventionist role of national law as a problem solving mechanism when it comes to the issue of participation in sport⁹⁶. This would therefore question the legitimacy of analysing the importance of legislative provisions in promoting such equality. Interestingly however, the growing popularity of sports

⁹⁵ *ibid* 334.

⁹⁶ For example, in *David Meca-Medina and Igor Majcan v. Commission of the European Communities* [2006] C-519/04 No. 65/06, the ECJ confirmed that EU Law did not apply to rules that were of pure 'sporting interest' on the basis that such rules had nothing to do with economic activities to which EC Treaty relates. For more, please refer to Gianni Infantino, 'Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport' (*Union of European Football Association*, 2 October 2006) <http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf> accessed 20 March 2010

has resulted in the process of juridification. As we continue, the process of juridification has opened up a new dimension in creating a symbiotic relationship between the law and sport's regulation.

Finally, this research considers the practical application of anti-discrimination law and regulations into selected sports within the chosen jurisdictions. Common sense would have foretold that laws based on the theory of affirmative action would generally observe a lower rate of sporting success. Is this the case however? With a wide range of interviews and data collection therefore, this may provide an insight into the effect of the law in sports. As a result, is it possible to identify a correlative relationship between the anti-discrimination law of a nation and the general impact on the international sporting success of that nation? In essence, this research will provide a critical analysis in relation to racial discrimination and regulations in sport. Prior to this however, the next chapter seeks to evaluate various methodologies and their potentials and limitations for the purposes of this research.

Chapter 2: Research Methodology

2.1 Introduction

Providing a clear research design or framework can help address the core research questions. Polkinghorne describes methodology as ‘an examination of the possible plans to be carried out; the journeys to be undertaken (in research) so that understanding can be obtained’.⁹⁷ There have, in the past, been arguments that methods within the legal field are not worth considering but, as Salter points out, the provision of ‘a methodological section can enhance both the quality and rigour of a law dissertation by not only explaining aspects of the topic but also in justifying the appropriateness’⁹⁸ of the selected approach.

Different methods will be undertaken for this research. In Malaysia, South Africa, England and the United States, information has been obtained from research interviews, credited sports’ websites and publications by relevant ministries of sport from the specific countries. Information gathered has enabled the projection of the level of participation based on race from the past to the present which in turn has assisted in projecting the success or failure of the country in the chosen sport. This chapter commences by evaluating the differences between two primary approaches to research, namely qualitative and quantitative. Following this, other specific methods are scrutinised and their applicability to legal research considered.

2.2 Qualitative and Quantitative Analysis

Given the fact that both qualitative and quantitative approaches are widely utilised in various research fields, it is hardly surprising that both concepts have been subjected to various interpretations. Denscombe argues that qualitative research ‘is an umbrella term that covers a variety of styles of social research, drawing on a variety of disciplines such as sociology, social anthropology and social physiology’.⁹⁹ In

⁹⁷ Donald Polkinghorne, *Methodology for the Human Sciences: System of Inquiry* (New York Press 1983) 8

⁹⁸ Michael Salter and Jason Mason, *Writing Law Dissertations* (Pearson 2007) 43

⁹⁹ Michael Denscombe, *The Good Research Guide* (2nd edn, Open University Press 2004) 267

contrast, quantitative techniques generate ‘numerical data or data from clinical trials that can be converted into numbers’. One seeks to understand a social or human problem from multiple perspectives, whilst the other focuses on an enquiry into an identified problem, based on testing a theory, measured with numbers and analysed using statistical techniques.

In relation to the following research into the area of racial discrimination in sport, qualitative techniques would appear to be the most valid in terms of achieving the stated aims and objectives of the study. This assertion is supported by the need to consider the political and historical background of the different countries being analysed, together with the interpretation of applicable laws, regulations and political orientation. The value of quantitative applications would appear to be more limited, although the research will be supported by the inclusion of charts but this will remain very much a secondary application, one that is illustrative as opposed to authoritative.

Certain commentators emphasise the benefits of a mixture of qualitative and quantitative approaches, not least in ensuring that data are adequately analysed and grounded. Denscombe, for example, suggests that ‘the data and the analysis have their roots in the conditions of social existence... and [that there should be little scope for] ‘armchair theorizing’ or ‘ideas plucked out of thin air’.¹⁰⁰ Quantitative methods, however, lend themselves to more objective, scientific research based on larger data sets than those generated within this research. For this reason, such an approach is not considered applicable to the following study. Instead, focus upon mixed qualitative methods is viewed as more appropriate, due to the limited scope of the data sets produced and investigated. For instance, the issue concerning race and ethnicity in Malaysia and South Africa involve elements of political sensitivity. As a consequence, it is difficult to obtain charts and figures involving participation according to race in sport from these countries. This would undermine the accuracy and validity of the research if the analysis was exclusively quantitative. For this reason, the utilisation of quantitative research methods will not be viable for this research. A preferred organising method in this case, therefore, relates to the application of phenomenology.

¹⁰⁰ *ibid* 280.

2.3 Phenomenology Method

There is no proper legal definition of phenomenology; however, it could be described as a 'study of structures of experience, or consciousness. Literally, phenomenology is the study of "phenomena": the appearances of things, or things as they appear in our experience, or the ways we experience things, thus the meanings things have in our experience'.¹⁰¹ This fits well with the aims of the research as this, too, relates to the law in action. The phenomenological method was first introduced by Husserl¹⁰² and has developed strongly since the Second World War¹⁰³. Denscombe suggests that the 'phenomenological approach places special emphasis on the individual's view and personal experiences'.¹⁰⁴ In short, phenomenology can be viewed as an approach that focuses on how life is experienced. Crucially, why and to what extent does this method impact on the legal perspective? In order to determine this, it is pertinent to reconsider Denscombe's earlier statement. Here, he advocates that the method is essentially connected with human experience, a theme that fits comfortably with the following research. In other words, this involves obtaining a clear picture of 'things in themselves',¹⁰⁵ – the things as directly experienced by people, where the researcher 'tries to gain access to the individuals' life worlds, which is their world of experience, it is where consciousness exists'.¹⁰⁶

This approach is suited to small-scale research, and in providing authentic accounts surrounding the individuals involved. In a legal context, phenomenology enables the researcher to reveal the importance of the law in action without further investigation at the initial stage into a wider context. In relation to the following research, this requires the understanding of historical and political contexts of the four chosen jurisdictions (Malaysia, South Africa, England and the United States) in addition to

¹⁰¹ David Woodruff Smith, 'Phenomenology', *The Stanford Encyclopaedia of Philosophy* (Summer edn 2008) <<http://plato.stanford.edu/entries/phenomenology/>> accessed 15 February 2011

¹⁰² 'What is Phenomenology?' (*Center for Advance Research in Phenomenology*) <<http://www.phenomenologycenter.org/phenom.htm>> accessed 8 August 2009

¹⁰³ *ibid.* Center for Advance Research in Phenomenology. For instance, the phenomenology philosophy has been used to describe one's experience during the Cold War period and also related to issues concerning ecology, gender, ethnicity, religion and technology in the 20th century.

¹⁰⁴ Denscombe (n99) 97

¹⁰⁵ Denscombe (n99) 98

¹⁰⁶ See John MacDonald, 'Looking at Phenomenological Qualitative Research Methods' (*Associated Content*) <<http://www.southalabama.edu/coe/bset/johnson/lectures/lec12.htm>> accessed 8 August 2009

the legal rules. Therefore, it is essential to obtain rich data from relevant individuals from these countries in order to provide authentic accounts in relation to the occurrence, understanding and appreciation of racial discrimination law and regulation in sport. As Spiegelberg argues, this approach limits itself to ‘direct investigation and description of phenomena as consciously experienced, without theories about their causal explanation and as free as possible from unexamined preconceptions and presuppositions’.¹⁰⁷ Thus, a phenomenological approach has been adopted to inform and develop the research.

2.4 Comparative Methods

As mentioned previously, the nature of this research requires an understanding of historical and political backgrounds of the four chosen jurisdictions (Malaysia, South Africa, England and the United States) in addition to the legal rules. Specifically, it is essential to obtain rich data from relevant actors from these countries in order to provide the authentic accounts required in relation to the occurrence, understanding and appreciation of racial discrimination law and regulation in sport. This requirement of the research necessitates the use of comparative methods, specifically through the application of case study-based inquiry (See below). While the phenomenological method provides insights, comparative techniques enable the researcher to locate these insights into a more focused interrogation of the issues raised. It is important, therefore, at this juncture, to explain how the comparative case studies are to be designed and investigated. Firstly, the use of interviews enables the collection of comparative data from the four jurisdictions, which are then analysed through a combination of black letter law and socio-legal methods that allow the researcher to interrogate the case study data in more depth. Employment of such a multi-methodology is especially valuable in legal research as it enables the research to provide a broader context for the research findings.

¹⁰⁷ Martinus Nijhoff, *Phenomenological Perspectives: Historical and Systematic Essays In Honor Of Herbert Spiegelberg* (The Hague 1975) 57

2.5 Case Study Methods

The use of case studies has become increasingly widespread in social research¹⁰⁸. Case studies occur where ‘the researcher explores in depth a program, an event, an activity, a process or more individuals. This is also where researchers collect detailed information using a variety of data collection procedures over a sustained period of time’.¹⁰⁹ Case studies could imply single or multiple investigations and can include qualitative or quantitative evidence. Denscombe observed that ‘case study research is a matter of research strategy, not research methods’.¹¹⁰ Thus, a case study provides a valuable platform for researchers to utilise other varieties of research methods such as black letter law and socio-legal approaches as part of the investigation of the thesis. This approach has been adopted for this particular study. As a strategy which is associated with qualitative approaches, case studies simply focus on relationships and processes within social settings and provide an in-depth interrogation of the subject matter.

Together with phenomenology and comparative methods, case studies are essential in order to achieve the objectives of this research which aims to examine the interaction of law, either hard law (legislation) or soft law (governing body regulations) on achieving the balance between racial equality and success in sport within the four jurisdictions. For research aimed at making a critical comparative analysis of racial discrimination and regulation in four chosen jurisdictions, multiple case studies have been identified as an appropriate strategy. Crucially, this involves investigation into the core issue of racial discrimination and its effect on sporting success. The importance of this strategy has been summed up by Yin, who stressed ‘case study is a ‘naturally occurring’ phenomenon’.¹¹¹ Undoubtedly, this research is centred on analysing the past, ongoing and potential future of racial discrimination in sport. Therefore, one could deduce that this research is not artificially generated but rather an appreciation of the ‘real’ natural settings of the countries involved. This

¹⁰⁸ John Creswell, *Research Design – Qualitative, Quantitative and Mixed Methods Approaches* (2nd edn, SAGE 2003). Also see Robert Stake, *The Art of Case Study Research* (SAGE 1995)

¹⁰⁹ *ibid* Creswell. 15

¹¹⁰ Denscombe (n99) 32

¹¹¹ Robert Yin, *Case Study Research: Design and Methods*, (2nd edn, SAGE 1994) 25

understanding supports the adoption of case study application in the context of the following research.

Case study methods would therefore confirm the reliability of this research since they involve detailed and holistic investigation¹¹². For example, this research focuses on an investigation into the operation of the anti-racial discriminative law within different countries. In addition to the above, this strategy would also provide an in depth study and appreciation of the theoretical and practical workings of the countries' legislations and regulations by sports governing bodies. Furthermore, other important features such as political and social developments, and historical settings, of the four chosen countries over time can also be emphasised. This will provide a vital understanding into the chosen area of research.

2.6 Black Letter Law

In the first instance, black letter law approaches provide 'the rules applicable to a particular area of the law ... without application to the particular facts and circumstances of a hypothetical or real legal problem, plus the pattern of questions necessary to apply those rules in a legal manner'.¹¹³ This approach is consistent with the need for this research to develop a full understanding of the law and relevant legislation governing the four selected jurisdictions. Black letter law can be described as 'the rules applicable to a particular area of the law, stated (often in outline form), without application to the particular facts and circumstances of a hypothetical or real legal problem, plus the pattern of questions necessary to apply those rules in a logical manner'.¹¹⁴ In this case, the following research requires a full understanding of the law and relevant legislations pertaining to the selected comparative case studies in relation to equality. As a result, it is considered that a black letter law approach is a method consistent with the needs of analysing the case studies.

¹¹² Martin Davies, 'Case Study Analysis and Case Study Method' (*The University of Melbourne – Faculty of Economics and Commerce*) <<http://tlu.ecom.unimelb.edu.au/pdfs/crals/Lecture%205-Case%20Study%20Method.pdf>> accessed 30 October 2009

¹¹³ Walter Hofheinz, 'Legal Analysis' (*Law Office of Walter Hofheinz*) <<http://www.hofheinzlaw.com/LANLSYS.php#anchor43700>> accessed 7 August 2009

¹¹⁴ *ibid* Hofheinz

As Vick highlighted, ‘law possesses its own unique vocabulary, cultural practices, institutional conventions and interpretative methods for carrying out legal analysis’.¹¹⁵ In short, this method relies extensively on court judgements and statutes to explain the law in each of the jurisdictions. To implement this approach, it is essential to interpret, evaluate and elaborate the laws literally. Black letter law approaches have been applied, even in the recent case of *R v Kennedy*¹¹⁶ where the judges applied the law according to the words alone. Such an approach has also been applied extensively in North America and other common law jurisdictions. The doctrine of precedent, for instance, which highlights the ‘harmonious relationship’¹¹⁷ from the lowest to the highest level of the pyramid (Hierarchy of the Courts), demonstrates the workings of the black letter law approach.

With reference to this thesis, substantial parts of the research are centred on the strict interpretation of equality law and other related sub-provisions. In order to provide an in-depth understanding of the theoretical workings and intricacies of relevant legal doctrines, it is important to emphasise exclusively on the ‘letter of the law’. It is accepted; however, that utilisation of this method alone would limit the research findings to descriptive and technical interpretations, necessitating the use of another approach (described below) that relates to the socio-legal method. McConville and Chui cited the primary disadvantages of relying entirely on the black letter law approach by observing that ‘It [Black letter law approach] is intellectually rigid, inflexible and inward looking way of understanding law and operation of the legal system’.¹¹⁸

For example, one of the objectives of this research requires critical and in-depth evaluation of the political, historical and legal backgrounds involving the four chosen jurisdictions. The black letter law approach is not meant to cater for such approaches. Moreover, this research is not restricted to the doctrinal meaning of law. Essentially, this approach will not fit research which also places emphasis on the practical effects of the law and regulations from these countries.

¹¹⁵ Douglas Vick, ‘Interdisciplinary and the Discipline of Law’ (2004) 31 JLS 163 and 174

¹¹⁶ [2008] 1 A.C 269 (HL). Contrast with *R v. Dalby* [1982] 1 W.L.R 425.

¹¹⁷ Salter and Mason (n 98) 51

¹¹⁸ Mike McConville and Chui Wing Hong, *Research Methods for Law* (Edinburgh University Press 2007) 4

This approach will, however, assist in appreciating the law in its original form, an outcome that could not be achieved with reference to socio-legal issues alone. In the first instance, therefore, anti-racial discrimination laws and legislations in each of the selected jurisdictions will be analysed according to the intention of the Parliament and then interrogated further using broader socio-legal methods. This will provide a clear understanding of the theoretical interpretations and workings of the law in each of the case study situations, providing information that will enable the researcher to advance and expand discussions further through the adoption of the socio-legal method.

2.7 Socio-Legal Methods

Socio-legal scholarship has been described as ‘the most important scholarship presently being undertaken in the legal world. Its importance is not only in what it has achieved... but also in what it promises’.¹¹⁹ This statement emphasises the importance of the socio-legal method towards the furtherance of this research, fleshing out the details identified within the Black Letter Law application. Augmenting the primary phenomenological method, the socio-legal approach has become increasingly popular in research of this kind. As such, socio-legal methods can perhaps best be defined as those ‘studies [that] reinstate the centrality of social scientific approaches, using both qualitative and quantitative research methods to investigate the impact of law in action, and the key role played by ideological factors, including public policy’.¹²⁰ Before moving on, it is important at this juncture to emphasise the point that socio-legal approaches are closely associated, and therefore consistent, with the phenomenological method. While the latter examines the human experience with the law, the socio-legal method is aimed towards analysing, ‘investigating and assessing the practical impact of law in action’¹²¹ supporting the assertion that the two approaches are compatible. For the purposes of this research, an attempt has been made to evaluate both phenomenological and socio-legal methods separately in order to provide critical insight into the usefulness of these methods, rather than handling them both within the socio-legal chapter.

¹¹⁹ Richard Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (OUP 1995) 314

¹²⁰ Denscombe (n99) 119

¹²¹ Salter and Mason (n98) 130-31

Charlesworth has argued that legal rules can ‘remain unintelligible when interpreted in a non-contextual manner which excludes their social, political and policy dimensions’.¹²² In terms of the following research, context is all important. The nature of the research necessitates the need for constant understanding surrounding the developments and reforms taking place with the anti-discrimination law within the four chosen jurisdictions. The socio-legal method therefore allows assumptions to be made with regards to the law. For instance, some policies might not be reflective of the actual interpretation and functions of the anti-discrimination law in sport. To consider legal rules in a literal sense only would therefore appear to be inappropriate. Instead it is crucial to address the effect of those rules in the context of society and the full range of stakeholder groups involved in, or impacted upon.

Even the Law Commission, through the process of ‘post legislative scrutiny’¹²³ has recognised the importance of such methods in reviewing the black letter of the law. This provides a logical progression for the interrogation of the case studies therefore, through consideration of the reasoning behind the implementation of the law. The relevance of the method to this thesis is thus significant, enabling the investigation of the political, historical and social significance of relevant policies in the various countries which are integral to the formulation of legal rules. Also known as ‘interdisciplinary’, this approach involves collaboration between the law itself and the ‘combination of the theories, methods and research techniques of sociological, economic, social policy and cultural studies that are integrated and synthesised’.¹²⁴

In summary, a socio-legal method enables the researcher to raise further wide-ranging questions, building upon the foundation provided by the Black Letter Law approach. For this research, therefore, the questions might specifically involve the actual extent to which anti-discrimination law in sports’ regulation affects international sporting success. Here, the socio-legal method emphasises the practical impact of how the law actually works in society and what actually takes place within a given country,

¹²² Lorie Charlesworth, *On Historical Contextualisation: Some Critical Socio-Legal Reflection* (Crimes and Misdemeanours 2007) 1-35

¹²³ ‘Note on the Law Commission and Statute Law Society Seminar on Post-Legislative Scrutiny’ (*Law Commission*, 31 January 2006) <http://www.lawcom.gov.uk/docs/pls_seminar_010306.pdf> accessed 14 August 2009

¹²⁴ Vick (n115) 165

challenging the difference between the ‘law in books’ and the ‘law in action’¹²⁵. This will enable the researcher to better explain the practical outcome of anti-discrimination law within the sporting sector both within and between the different jurisdictions. Moreover, this work will shed light on how anti-discrimination laws and regulations actually impact upon the various racial and ethnic groups inhabiting those countries.

The focus of the primary research relates to the collection and comparison of data pertaining to the four distinct case study examples. Initially, the generated information is based on a review of secondary sources drawn from existing literature and interrogated through the methods identified above. This valuable discourse is built upon through the generation of primary data derived from a series of interviews with key players and experts in the field of racial discrimination in sport. In the first instance, this data was generated through a range of research techniques as developed below.

2.8 Interviews

As argued in previous sections of this methodology, phenomenological and socio-legal methods involve an investigation into an individual’s personal experience with the law, analysis pertaining to the political and historical background of the countries and finally, an examination of how the law impacts upon society as a whole. One of the main ways to provide primary data to develop these arguments is through the conducting of interviews. Salter remarks that ‘qualitative research (phenomenological and socio-legal methods) ...may use in-depth interviews of either ‘structured’ or ‘semi-structured’ types’.¹²⁶ In relation to the jurisdictions selected for instance, semi-structured interviews are used to enable comparison across diverse social and political contexts. At this stage it is useful to distinguish between the conducting of interviews and what can be classed simply as conversation. The crucial factor here can be seen as the time factors involved in the generation of data. As such, an interview needs to be pre-arranged rather than occurring merely by chance. Denscombe and Silverman describe an interview as ‘involving a set of assumptions and understandings about the

¹²⁵ Salter and Mason (n98) 155

¹²⁶ *ibid* Salter and Mason 167

situation which are not normally associated with a casual conversation'.¹²⁷ An interview, therefore, needs to be planned and designed rather than emerge within what may otherwise constitute a mere conversation. For the purposes of this research it is essential to identify experts in each of the jurisdictions and organise interviews as an integral part of the case study development process. The justification for using interview techniques rather than conversation lies in the ability of the researcher to design a series of questions to generate information that enables comparisons to be drawn across the selected jurisdictions.

In the scope of this research, interviews are seen as essential in order to obtain data that may be considered as 'sensitive' in nature. As such, different types of interview approaches are available to the researcher, including those conducted face-to-face, by telephone or within a group. For instance, face to face interviews were conducted in South Africa and several telephone interviews were conducted with relevant respondents in England and the United States. Denscombe broadens the scope further by distinguishing between structured, semi-structured, unstructured, one-to-one and focus group interviews. In the context of this research, taking account of the spatial and political distances between the jurisdictions selected, the most appropriate interview technique relies upon semi-structured interviews, enabling the researcher to access primary views from key players without restricting the gathered data to generalities or generic responses. This also reflects the need for the researcher to be aware of political sensitivities across the jurisdictions selected. This can be seen as a form of relativism¹²⁸ where the different approaches reflect not just policy directions but also cultural differences within the framing of the laws and policies.

For the research, one-to-one interviews have been used in order to gather data for cross-analysis later on in the thesis. Given the consideration and potential sensitivity with regards to the nature of this research, one-to-one interviews remained the preferred option although group interviews are viewed as having several advantages

¹²⁷ Denscombe (n99) 163-164. Denscombe describes that for an interview to take place, there must be consent to take part, interviewee's words can be treated as 'on the record' and 'for the record'; the agenda for the discussion is set by the researcher'.

¹²⁸ Relativism emphasises the different cultural and political context at play across jurisdictions and the need to avoid monoculture solutions.

over one-to-one interviews¹²⁹. More essentially, the sensitivity of this research would result in the ‘practical difficulty in getting people together to discuss matters on one occasion’.¹³⁰ For this reason, alongside logistical difficulties in getting different respondents together, the theme of group interviews has been dismissed as a viable method for this study.

Conducting interviews as a means of obtaining qualitative data ensures that the depth of information can be explored and it provides insights¹³¹ into understanding the experiences faced by individuals and the workings of the law in various jurisdictions. This is particularly useful to the nature of the research which requires a full appreciation of legal applications involving discrimination in sports. Crucially, interviewees could also provide up to date information or data which is not readily available in other texts. Such data would assist in ensuring the consistency of the research. Interview materials could also be employed to check the validity of information derived from textbooks or journal articles. Where the interviewees could not be observed directly due to distance, interviews could still be conducted via telephone. Several telephone interviews were conducted with individuals residing in the United States and England. For example, the researcher was unable to travel to the United States due to financial constraints, although key experts were sought as part of the jurisdiction study. One of these experts was a prominent attorney in law specialising in sports law. As it was not possible to meet face to face, a telephone interview was prepared and undertaken to generate the required information. Similarly, in the UK, a member of the Court Arbitration of Sports (CAS) was travelling overseas during the interview process and once again this necessitated a telephone rather than face-to-face interview. This approach demonstrates the flexibility of this preferred method.

Interviews however could be one-sided and it is crucial for the researcher to reflect this in the construction of the interview design, making sure that they do not include leading questions. Arguably, some interviewees may give a different interpretation

¹²⁹ Ann Lewis, ‘Group Child Interviews as a Research Tool’ (1992) *BERJ*, Vol. 18 413-432

¹³⁰ Denscombe (n99) 168

¹³¹ *ibid* 189-190

from the truth¹³² i.e.: the real intended application of the law. As with the phenomenological and socio-legal method, interviews are also subjected to doubts as to their reliability. Quoting an example, interviews conducted with affected parties in South Africa might only explain one side of the story and not reflect the entire situation. For example, some of the respondents (primarily the opponents of Affirmative Action in South Africa such as Afri-Forum) exhibit a strong inclination towards one view based upon cultural and political views. Following this, there could be a chance that qualitative interviews might include unrelated topics or issues. For instance, a non-structured interview might result in obtaining irrelevant materials, thereby skewing the research findings. There are occasions where interviews could be conducted by telephone or other means of communication such as e-mail. In conclusion, adopting interviews as one of the research methods could assist in enhancing the legitimacy of this research. Complete and detailed descriptions enable the research to be seen as more reliable.

2.9 Conclusion

The preceding chapter has set out the relevant methods to be utilised within the following research, focusing upon qualitative approaches. Recognising the need for an in-depth understanding of the political and historical context of the chosen jurisdictions, it has been established that a phenomenological method will be pursued, supported by other comparative methods. Central among these are a series of case study investigations that are crucial to the satisfaction of the research aims surrounding what is a critical comparative study of anti-racial discrimination law in sport across the selected jurisdictions. Cross case study analysis will be used to ensure the validity and grounding of the research and its analysis, thereby precluding the need for quantitative inputs which, in relation to the limited data sets, are not deemed appropriate to the study.

While the phenomenological method will enable the main themes of this study to emerge, allowing the researcher to better design appropriate questions, the case study analysis will adopt a combination of socio-legal and black letter law methods to

¹³² *ibid* 190

discover the generated data within each of the chosen jurisdictions. This can be described as a comparative approach, taking advantage of elements of each method, overcoming the limitations associated with the application of any single methodology. For instance, the black letter law approach, as stated above, has been subject to certain criticisms and limitations. As a result, a socio-legal approach has also been adopted to enable the researcher to investigate and examine the reasons behind the implementation of the law and the extent of its application rather than just interpreting the law as it is. This approach enables the research to focus upon the extent to which anti-discrimination laws have impacted upon sport and hence upon a country's sporting success. With regard to quantitative enquiry, a series of statistics, charts and graphs are presented to illustrate the success rate and participation of sportspersons from various racial and ethnic backgrounds across the selected jurisdictions. This information is intended to support the qualitative approaches highlighted above and is useful in validating or confirming the research findings, although it remains secondary and illustrative rather than authoritative. It should also be noted that the information provided within these charts and statistics might be too general to be used as a valid comparator, further justifying the focus on qualitative methods.

In summary, the following research relies upon a range of qualitative approaches, in itself a form of mixed methodology, although for reasons identified above, it does not involve primary quantitative analysis. While this may therefore be seen to preclude much of the discussion surrounding multi-method approaches, it is vital within this research that each of the adopted methods contribute to the satisfaction of established aims and objectives. Morse supports this type of research in which 'a researcher [collects] multiple forms of qualitative data...within grounded theory research'.¹³³ Referring to this as a multi-method (as opposed to a mixed-method) approach, this has been identified as the core approach employed within the following research.

The following chapter establishes the relevant theories and debates surrounding the jurisprudential theories of sport, introducing affirmative action and equal opportunities as means of achieving equality of participation. This comprises secondary research in the first instance and can be seen as a literature review, with the

¹³³ Creswell (n108) 12

chapter culminating in a sub-division of affirmative action and equal opportunities approaches.

Chapter 3: Jurisprudential Theories of Equality in Sport

‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’,¹³⁴

Universal Declaration of Human Rights 1948

The model of promoting equality amongst individuals has been propagated and adopted since the end of the Second World War in addressing the issue of imbalances that exist between societies. Such urgency was needed in view of preventing the repetition of history, and diversification has since become a common phenomenon within countries. Developing and growing industries have resulted in the creation of new opportunities for employment. With reference to sports, rapid development in the sports industry resulted in more participants from different backgrounds taking part in sporting events. However, it has since been argued that such opportunities have not necessarily been readily made available to certain groups due to their racial, background and ethnic differences¹³⁵.

In order to address problems involving racial inequality in sports participation, the theories of affirmative action and equal opportunity have been introduced as a means by which to achieve greater equality within the countries analysed. As mentioned in Chapter 1, affirmative action and equality of opportunities are mainly the creation of respective governments to redress the balance of the political past. Sport – albeit considered as an independent entity¹³⁶; - has been affected by the former. The theory of juridification or simply the fusion between the law and sport has therefore been

¹³⁴ Article 7 of the Universal Declaration of Human Rights as proclaimed by the General Assembly of the United Nations in 1948

¹³⁵ See David Brailsford, *British History – A Social History* (The Lutterworth Press 1997) 124 where actions of the sporting establishment tended to reflect racist attitude in its reluctance to accept Ranjitsindji and Duleepsinhji as part of the English Cricket Team.

¹³⁶ Michael Beloff, ‘Is there a Lex Sportiva?’ (2005) 5(3) ISLR
<<http://login.westlaw.co.uk/maf/wluk/app/document?&src=rl&srguid=ia744d0650000012fdbfb3ce22dca1295&docguid=IC3123BA0E72111DA9D198AF4F85CA028&hitguid=IC3123BA0E72111DA9D198AF4F85CA028&spos=11&epos=11&td=15&crumb-action=append&context=8&resolvein=true>>
assessed 5 February 2009. See also Michael Beloff, ‘Is there a Lex Sportiva?’ (2005) 5(3) ISLR 49, 50

created. The theory of juridification¹³⁷ will be highlighted in Chapter 4. For the objective of promoting and alleviating equal racial participation in sports, both theories of affirmative action and equal opportunity were devised.

Whilst it is true that such programmes have assisted historically disadvantaged groups or races to improve their terms of participation, the main concern here involves its suitability and applicability to sports. Whilst issues pertaining to employment, education or housing are relevant to the need for implementation of affirmative action, there is also no exception in sports. This form of activity involves the matter of national or international interest or even issues involving employment and selection criteria to a national team.

It is essential to note that whilst some countries do not expressly include affirmative action and equal opportunity provisions in sports, the concepts have been included as a consequence of implication. In short, these applications stem from the spill over effect from other industries¹³⁸. Hence, this chapter aims to analyse the theoretical or jurisprudential concept of affirmative action and equal opportunity. The following chapter evaluates the reasons behind its implementation, be it expressly or implicitly via a country's legislation. This would then enable us to critically determine the viability of affirmative action, also commonly known as positive discrimination and equal opportunity.

3.1 Alternative Form of Equality in Sports - Principles of Affirmative Action and Equal Opportunity

As mentioned earlier, a citizen of any country deserves to be treated equally, regardless of a person's background which would encompass gender or, more relevant here, matters involving race. It would be a fundamental basic breach of human rights should any person be treated differently from another of a different race¹³⁹. On the contrary, historical past and present social orders have suggested that equality in the

¹³⁷ Juridification is defined as 'a spread of rule guided action or the expectation of lawful conduct in any setting private or public'. See also Richard Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 1-21

¹³⁸ Michael Beloff, Tim Kerr and Maria Demetriou, *Sports Law* (Hart Publishing 1999) 98

¹³⁹ Article 7 of the Universal Declaration of Human Rights

strictest sense would be impossible to achieve¹⁴⁰. As a result, there is a need to alleviate or improve the standard of some disadvantaged groups or races in order to be consistent with those of dominant groupings.

On the surface, both theories of affirmative action and equal opportunity are different concepts even though they may share a similar objective of achieving equality¹⁴¹. Both theories and principles are equally committed towards elimination of racial discrimination and are based on the premise that all races should be given opportunity to excel in their area of preference. In the context of sport, no under-represented groups or races should be subjected to any kind of racial discriminative practice.

The system of affirmative action is mainly based on 'principles of social utility or reparation'.¹⁴² Social utility in the context of affirmative action could mean an attempt to maximise the participation of individuals within a country whilst the term reparation would ensure that the disadvantaged group(s) obtain preferential treatment to address the disadvantages of the historical past¹⁴³. In short, the main objective of affirmative action is to procure distributive justice¹⁴⁴ to the society at large. In a sporting sense, affirmative action seeks to address the problem of racial imbalance when it comes to participation in sports. It is also pertinent to note at this juncture that the concept of affirmative action is also largely associated with the theory of positive discrimination. Arguably, both concepts share a somewhat similar definition and this will be dealt with when considering in depth the definition of affirmative action.

¹⁴⁰ See more in Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 223-225. Also see Sandra Fredman, 'Reversing Discrimination' [1997] LQR 113

<<http://login.westlaw.co.uk/maf/wluk/app/document?&src=rl&srguid=ia744dc3e0000012389e6062339c6b019&docguid=ICCD2AE0E72111DA9D198AF4F85CA028&hitguid=ICCD2AE0E72111DA9D198AF4F85CA028&spos=183&epos=183&td=229&crumb-action=append&context=7>> accessed 15 July 2007. See further in Paul Joseph Kelly, *Utilitarianism and Distributive Justice – Jeremy Bentham and the Civil Law* (Clarendon Press 1990) 122. Such difficulty has also been witnessed in employment case of *Kalanke v. Freie Hansestadt Bremen* [1996] (C450/93) 1All E.R. (EC) 66 (ECJ)

¹⁴¹ L Curzon, 'Dworkin on Equality' (2001) *Student Law Review* 33, 54. Also see Alan Goldman, 'The Justification of Equal Opportunity' in Ellen Frankel Paul et al (eds), *Equal Opportunity* (Basil Blackwell Inc 1997) 88

¹⁴² Richard Delgado, 'Affirmative Action as a Majoritarian Device: Or, do you really want to be a role model?' (1991) *Michigan Law Review* 89, 1224

¹⁴³ *ibid* Delgado. See further Emily Sherwin, 'Reparations and Unjust Enrichment' (2004) 6 *Boston University Law Review* 1443 and Janna Thompson, 'Repairing the Past: Confronting the Legacies of Slavery, Genocide and Caste' (Proceedings of the Seventh Annual Gilder Lehrman Center International Conference, Yale University, Connecticut, October 2005). She suggested that the idea of distributive justice requires that unfairly disadvantaged citizens be compensated by those who have been unfairly advantaged.

¹⁴⁴ See more in John Rawls, *John Rawls – A Theory of Justice* (10th edn, OUP 1990) 61-65

Conversely, the concept of equal opportunity is largely based on meritocracy or justified selection¹⁴⁵. In short, all individuals ought to be judged by their merit and everyone should be afforded an equal chance to participate or to take part in obtaining employment. Only the qualified will therefore be selected. At this stage, it is arguable that the concept of equal opportunity is also based on the principle of social utility and equity¹⁴⁶. Perhaps, this similarity between affirmative action and equal opportunity is based on the theory of social utility which could also be related back to the ultimate aim of achieving equality. Here, questions arise as to the differences between affirmative action and equal opportunity. The main difference however is that the word utilitarianism, in the author's view, is given a narrower meaning in relation to equal opportunity since it would only be used so far as it is practicable to do so.

The above discussion provides an interesting and indeed striking comparison between the theories of affirmative action and equal opportunity. As argued earlier however, both concepts fall into different schools of thought. It can be deduced that affirmative action falls under the concept of social utility as a mean of achieving distributive justice as opposed to the pure utilitarianism concept for equal opportunity as a means of achieving fairness.

3.1.1 Theories of Discrimination Law

3.1.1.1 Distributive Justice and Affirmative Action in Sports

Talents are not distributed equally, so the decision of one person to work in factory rather than a law firm, or not to work at all, will be governed in large part by his abilities rather than his preferences for work or between work and leisure ... These inequalities will have great, often catastrophic, effects on the distribution that a market economy will provide¹⁴⁷

¹⁴⁵ Paul et al (n141) 35-36. See also Norman Daniels where he equated the principles of merit and meritocracy to equal opportunity. Norman Daniels, 'Merit and Meritocracy' (1978) 7 *Philosophy and Public Affairs* 206, 217

¹⁴⁶ Kelly (n140) 216

¹⁴⁷ Ronald Dworkin, 'Liberalism' in Stuart Hampshire (eds), *Public and Private Morality* (University of Cambridge Press 1978) 127

In discovering the view of distributive justice and the notion of equality as propagated by Dworkin, it is essential to note that research and discussions relating to this debate are confined to the area of sports. Distributive justice can be defined as ‘principles designed to guide the allocation of the benefits and burdens of economic activity’.¹⁴⁸ Rawls meanwhile interprets distributive justice as ‘A cooperative venture for mutual advantage (to society)’.¹⁴⁹ In simple terms, the concept of distributive justice is used to ensure that the wealth of a given country should be allocated to all levels of society. In relation to sports however, it does not involve wealth but the opportunity to be selected as part of the national team in international competition. Therefore, the following arguments establishing the theory of distributive justice and affirmative action should be confined to sports and exclude other theories or issues involving economics and morality.

The phrase distributive justice could easily fit into the theory of equal opportunity as opposed to affirmative action. Justice by itself gives an impression where only the best will be selected and able to participate. Arguably however, distributive justice refers to a state of procuring a sense of fairness towards society¹⁵⁰. As a matter of illustration, Dworkin argued that, ‘... people begin with equal resources but end with unequal economic benefits as a result of their own choices’.¹⁵¹ In sports, this implies that every individual is given similar chances to participate but due to historical practices, previously deprived community or racial groups are denied places to participate. Moreover, some racial or ethnic groups have historically been confined to certain employment which only procures low income. Dworkin further recognises:

Some people have special needs, because they are handicapped; their handicap will not only disable them from the most productive and lucrative employment, but will incapacitate them from using the proceeds of whatever employment they find as efficient, so that they will need more than those who are not ‘handicapped’ to satisfy identical ambitions.¹⁵²

¹⁴⁸ Julian Lamont and Christi Favor, ‘Distributive Justice’ *The Stanford Encyclopedia of Philosophy* (2007) <<http://plato.stanford.edu/entries/justice-distributive>> accessed at 14 July 2007

¹⁴⁹ Rawls (n144) 84

¹⁵⁰ *ibid* 84

¹⁵¹ Lamont and Favor (n148)

¹⁵² Hampshire (n147) 127

To enable distributive justice to emerge, Dworkin went further to suggest a ‘hypothetical compensation scheme’¹⁵³ as a means by which to compensate against those who are ‘unlucky in natural lottery’.¹⁵⁴ As a consequence, there is a need to ensure that schemes must be devised in order to address the problems of individuals suffering from unequal economic benefits. The same goes for enabling or increasing the opportunities for individuals from previously disadvantaged groups or races to be involved in sports. As a result, one of the ways to redress the problem is via the theory of affirmative action. This would seek to increase the level of participation of the affected groups. For example, groups which have previously been sidelined would be able to form part of the national team.

In sports therefore, the theory of distributive justice is synonymous with the principle of fairness as opposed to that of pure justice. The notion of fairness is based on treating individuals fairly in the light of previous circumstances whereas justice associates itself with righteousness¹⁵⁵. Ordering a re-distribution of wealth for instance does not include the concept of justice. As a result, it would not be appropriate to mention that justice has been done in increasing the level of participation from a racial group when it is not right to deprive the other participants of their places either. As a result, the principle of distributive justice does have a close relationship with the theory of affirmative action since the former guides the allocation of benefits to society. Similar to distributive justice, the theory of affirmative action arguably channels benefits towards the previously deprived groups by increasing their chances of being selected for the national team.

Dworkin also highlights the ‘important differences between the quota kind of affirmative action program – with places reserved for minorities only – and more flexible plans that make race a factor, but only one factor, in the competition for all

¹⁵³ Lamont and Favor (n148)

¹⁵⁴ *ibid* Lamont and Favor. See also Michael Freeman, *Llyod’s Introduction to Jurisprudence* (7th edn Sweet and Maxwell 2001) 540-548 where Dworkin discussed the ‘envy test’. Dworkin evaluated the ‘brute luck’ suffered by his model participant – ‘immigrant’ and suggested ‘insurance’ as means of protecting the minorities. Also see ‘Distributive Justice – Ronald Dworkin’ (*Distributive Justice*) <<http://www.distributive-justice.com/theory/dworkin-en.htm>> accessed 17 July 2009

¹⁵⁵ For more discussions, see further in Dworkin (n140) 150-183 in relation to ‘Justice and Rights’ and Rawls (n144) 60-89 in relation to ‘The Principles of Justice’. See also Roger Crisp, *Mill on Utilitarianism* (Routledge Philosophy Guidebooks 1997)

places'.¹⁵⁶ In sports, this would be seen as comprising a variety of measures in ensuring the proper distribution of places to certain groups. Based on Dworkin's statement therefore, the first requires the implementation of a quota or percentage of participation opportunities reserved for certain ethnic groups. Secondly, this involves a strict reservation of places for certain ethnic groups and such benefits would not be made available to other racial groups. Finally, there is a need to emphasise benchmarks for certain racial groups in sports while falling short of imposing quotas and other restrictions upon other groups.

The theory of affirmative action and distributive justice is also discussed by Bell. Similar to Dworkin, he shares the view of implementing affirmative action for the benefit of previously disadvantaged ethnic groups. Bell mentioned that, '... affirmative action never deprived them (opponents of affirmative action) of opportunities of benefits'.¹⁵⁷ In this case, he is suggesting a more median approach in implementing the theory of affirmative action rather than a strong or weak measure. On the other hand therefore, there is a need to preserve the right for other ethnic groups to also be involved. In sports, this could be viewed as another way to ensure a balanced participation for all without prejudicing the rights of others.

As Dworkin and Bell both suggest, it could be concluded that the theory of affirmative action does not come with a single interpretation. It appears that there are some variances of affirmative action in delivering fairness when it comes to the issue of racial participation in sports. These variances will be discussed in detail in the next sub-chapter. Despite such differences, the theory of affirmative action would be suitable in procuring justice for certain racial or ethnic groups in improving their rate of participation and chances to be selected to the national team.

¹⁵⁶ Ronald Dworkin, *As a Matter of Principle* (Clarendon Press 1986) 15, 309 in relation to 'Reverse Discrimination – What did Bakke Really Decide?'

¹⁵⁷ David Chappell, 'If Affirmative Action Fails ... What Then?' *The New York Times* (New York, 8 May 2004) <<http://www.nytimes.com/2004/05/08/books/an-essay-if-affirmative-action-fails-what-then.html>> accessed 17 July 2007

3.1.1.2 Utilitarianism and Equal Opportunities in Sports

‘Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do...’¹⁵⁸

Similar to the discussion on affirmative action, not every jurisprudential aspect within utilitarianism will be discussed in depth so as to cover every aspect of different sectors such as economic, trade and commercial means. More importantly, it is worth mentioning at this stage that different authors reserve different analytical interpretations or views of the concept of utilitarianism in relation to the principle of equal opportunity. Therefore, the following theoretical evaluation of utilitarianism represents the author’s sole view and its hypothetical interpretation in the context of sports. At the same time, the evaluation of the principle of utilitarianism only encompasses the subject of equality and disregards the notion of morality.

In summary, the theory of utilitarianism as propagated by Bentham might not reflect the practice of equal opportunity. In contrast, the principle of utility¹⁵⁹ could be considered as conforming to the affirmative action theory as a mean of achieving equality at present as well as in the long run¹⁶⁰. According to the definition of utilitarianism, Bentham expressed that ‘all action should be directed towards achieving the greatest happiness for the greatest number of people’.¹⁶¹ This implies that fairness can only be achieved if everyone is treated as being equal. Thus, affirmative action as a device for improving the standard of living for the underrepresented or underprivileged races would provide a platform for ensuring that equality exists in the long run and, as a consequence, the concept of fairness could then be pursued. We might be ready to concur that such a theory may be applicable primarily in economic or industrial sectors since its full utilization requires every

¹⁵⁸ Jeremy Bentham, ‘An Introduction to the Principles of Morals and Legislation’ in Burns and Hart (eds) (Athlone Press 1970)

¹⁵⁹ See also Bhikhu Parekh, *Bentham’s Political Thought* (Groom Helm 1973) 67 where ‘Utility’ meant that ‘property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness or to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered’.

¹⁶⁰ Delgado (n142)

¹⁶¹ Raymond Wacks, *Understanding Jurisprudence* (OUP 2005) 243

group or race to participate in a country's economy¹⁶². On the other hand, this might not necessarily be the case in sports.

The definition by Bentham could therefore be interpreted differently in sports. In relation to equality, he also emphasised that 'It is for equality so far and so far only as it is practical and practicable ... To push any system to an absurd excess, and then give the abuse as the system itself, what can be more uncandid or inconclusive'?¹⁶³ According to this interpretation, Bentham could be moving away from the concept of total equality, indeed total equality was never a theme within his arguments. He could even be suggesting that other concepts such as affirmative action or positive discrimination should not be encouraged, particularly if the consequences of the actions taken promote the greatest happiness to the greatest number through the exclusion of minority interests. It is clear that equality can only be achieved to a certain extent, and that any attempt to pursue the objective of achieving equality might result in unwarranted exploitation by certain other parties. Referring to utilitarianism and Bentham's general stance, it could be argued that all races or indeed any underrepresented groups should be utilised efficiently rather than fairly. It is clear, however, that only the qualified ones would be able to represent a nation in sport. As a result, such emphasis as given by Bentham could fit into the principle of equalities of opportunities in sports.

This offers the debate an ethical dimension in which two distinct ethical theories can be applied, those relating to deontology and teleology¹⁶⁴. The theory of deontology¹⁶⁵ (or universalism) relates to actions that should be taken regardless of the jurisdiction in question and, as such, relates more closely to equal opportunities as these are enshrined in human rights debates and are thus considered an end in their own right.

¹⁶² Rawls (n144) 60-89 in 'The Principles of Justice'. Also see Wacks (n161) 259-261 where he discussed Rawls' two principles of justice in depth. For further reference, also see Freeman (n154) 523-533

¹⁶³ Kelly (n140) 58. See also Fred Berger, *Happiness, Justice and Freedom : The Moral and Political Philosophy of John Stuart Mill* (University of California Press 1984)

¹⁶⁴ Also known as 'Consequentialist', teleology possesses an 'intention to work towards an end with a particular view to achieve the goal'. For more, see Colin Fisher and Alan Lovell, *Business Ethics and Values – Individual, Corporate and International Perspective* (3rd edn, Pearson 2009) 125

¹⁶⁵ Deontology is formulated around the concept of 'categorical imperative'. Categorical imperative refers to 'A command / principle that must be obeyed, with no exceptions'. If the categorical imperative is conceptually sound we should be able to will all rational people around the world to follow this particular law. This is also known as 'universalism'. For more, see Fisher and Lovell (n164) 109-111

Conversely, teleological ethics are more dependent upon the consequences of actions and so, in this context, remain more complex and indeed contested. There is no single approach. Using the Bentham view of utilitarianism as a key point of reference here, two different assumptions can be presented, both related to the principle of affirmative action. If the participation of minorities in sports is the key objective resulting in national 'happiness' then the practice of positive discrimination may be justified under a teleological ethics. If, however, the overall sporting success of a nation conveys the greater 'happiness' to its population and it can be proved that affirmative action may reduce sporting performance, then equally no action at all and indeed the continued exclusion of under or non-represented groups could also be justified. This debate is consistent with the main themes of this research, namely the impact of equal opportunities and affirmative action in sport across the four chosen jurisdictions.

By illustration, if a football team consists of an uneven number of players representing a different racial composition, it is envisaged that relevant sports bodies would not employ another person from a different race or group just to make up the numbers or for the mere sake of promoting equality in sports. Assuming that the concept of firm equality or even perhaps affirmative action is imposed, this might lead to a likely drop in standard of a nations' sporting level as well as the possible exploitation of events by some quarters that would use the same reason to further their own advantage. In contrast, should there be reasonable restraint on the concept of equality when it comes to sports; it is likely that a nation would perform at a better rate comparatively.

Bentham's concept of equality, together with his definition of achieving greatest happiness fits in well with the concept of equalities of opportunities in sports. Earlier, it was argued that sport involves the matter of national pride as well as representing or reflecting a nation's achievements globally. It is evidently clear that a moment of glory in a country's sport does procure happiness and joy for the people of that country as a whole. Therefore, only the best and well qualified would be selected to represent the respective countries in any sports event.

Although equality is essential in ensuring that no groups (which include underrepresented or underprivileged groups) are being discriminated against, there must be some sort of moderation. This would ensure that the nation or country procures the best results in their sporting activities. As a result of such action, this would then provide a sense of glory and happiness for the people as stated by Bentham. For example, Iraq's victory in the 2007 Asian Cup resulted in a certain level of happiness for the whole country even though the country was still facing internal problems.

Bentham's theory can be compared with Rawls where he stated that, 'The main idea is that society is rightfully ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it'.¹⁶⁶ Whilst it is not argued here that Rawls 'net balance' is necessarily the same as Bentham's 'majority rule' it is nonetheless suggested that his statement might reflect the economic state of a nation, which could also be interpreted in the context of sports. It is interesting to highlight the word 'just' as used by Mill¹⁶⁷. At this juncture, it is vital to differentiate fairness and justice in the context of sports though both are considered as being synonymous. The concept of fairness, mainly used in discussing the principle of affirmative action or positive discrimination refers to the aim to achieve a certain state of equality between the dominant group and other underrepresented groups or races. In contrast however, the concept of justice has been associated with righteousness. Returning to the principle of equal opportunities, the main purpose is to seek a 'just' method of selection rather than a 'fair' method of selection. Hence, it is the former term that is employed in the example of sports.

There does appear to be some similarity between the principles of utilitarianism and equality of opportunities in sports. Although the former is mainly associated with economics or matters in relation to the welfare of a country, the concept of utilitarianism could be described in the context of sports. We have seen that such a concept adopts the concept of justice rather than fairness and this has suited the basic

¹⁶⁶ Rawls (n144) 9

¹⁶⁷ See further in Crisp (n138) 155-162 where Mill ties the notion of justice closely to that of rights. Any case of injustice always involves both 'a wrong done, and some assignable person who is wronged', and justice "implies something which is not only right to do and wrong not to do, but which some individual person can claim from us as his moral right".

foundation behind the principle of equality of opportunities. In addition, if we are to interpret the theory of equality as propagated by Bentham in a literal sense, it could be deduced that due care must be taken in order to prevent the notion of equality being taken too far.

In summary, the concept of utilitarianism and its application to this research is a useful yet complex debate, not least in determining the preferences of the 'majority'. Let us start initially with arguments pertaining to affirmative action. The discussion here centres upon the theme of 'happiness' and how this can be contextualised. On the one hand, the 'happiness' of the 'majority', particularly when applied to the Malaysian and South African jurisdictions, can logically be improved through increased access to participation in sport at the highest level. This assertion, however, needs to be balanced against a parallel argument that, on the other hand, 'happiness' may be derived more clearly through the successes of national sporting teams. It is likely that, under the influence of affirmative action, there may be some dispute between these two issues, in short participant happiness versus national happiness. For example, some would view the imposition of affirmative action as having a potentially deleterious effect on the success of national sporting teams as participants of less ability are elevated to take part in major competitions based upon their previous exclusion rather than on their actual level of skill. Here, the problem becomes one of degree. Do majority populations measure their 'happiness' in this regard through increased access to sports at the top level or do they derive more 'happiness' through the success of their nation in global sporting competition? If it is the former that constitutes the greater 'happiness' then, in this example at least, affirmative action and utilitarianism may concur. If, however, it is the latter, then under the conditions described in the example, 'happiness' may be compromised and the utilitarian argument will remain invalidated.

Secondly, in relation to equal opportunities the issue of utilitarianism remains similarly complex, not least in terms of the predominant focus upon 'minority' inclusion in sports. Here, in contrast to affirmative action, the notion of utilitarianism and its application to equal opportunities, takes on different dimensions. The main tenet of this debate is upon the role of equal opportunities legislation in expanding the 'majority' by offering a level playing field to potential participants from all racial

backgrounds. As will be considered later in this research, equal opportunities favour the creation of enhanced access to sports through the development of special programmes and initiatives to boost representation of minorities, thereby expanding the ‘majority’. At the same time, in theory at least, this increases competition for selection in sports at the national level, raising the overall standards of sports and therefore chances of success. In this case, the utilitarian ethic can be satisfied on both counts, offering greater ‘happiness’ to an expanded ‘majority’ while also increasing the potential for success.

3.2 Definition of Affirmative Action and Equal Opportunities – In depth studies

Having considered the understanding of affirmative action and equal opportunity and its relationship with some jurisprudential thought, it is essential now to evaluate and appreciate the definition, or to find a proper meaning of both affirmative action and equal opportunity. Undoubtedly, there are many different approaches in defining such theories. As a consequence, this area will address firstly, the common definitions of both affirmative action and equal opportunity and thereafter its meaning in relation to sports in particular.

It is vital to emphasise that there are substantial definitions of affirmative action given by members of the legal profession and academics which generally refer to all sectors. The American philosopher, Beauchamp refers affirmative action to ‘Positive steps taken to hire persons from groups previously and presently discriminated against’.¹⁶⁸ Similarly, Bell refers to affirmative action as a ‘commitment to try to alleviate racial disadvantage through means that are legal and in keeping with deeply moral standards’.¹⁶⁹ Bergmann meanwhile gives a broader definition of affirmative action which includes the purpose and the goal of affirmative action. She defines it as:

Planning and acting to end the absence of certain kinds of people – those who belong to groups that have been sub-ordinate or left out from certain jobs and

¹⁶⁸ Tom Beauchamp, ‘In Defense of Affirmative Action’ (1998) 2 Journal of Ethics 143, 143

¹⁶⁹ Derrick Bell, ‘Xerxes and the Affirmative Action Mystique’ (1989) 57 George Washington Law Review 1595, 1597

schools ... Major goal underlying goal of affirmative action is inclusion of “out groups”. The purpose of affirmative action is to reduce segregation by race and sex in the workplace¹⁷⁰

Similarly, the Department of Labor in the United States argued that ‘A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel’.¹⁷¹ Rather, members of radical groups might dismiss the concept of affirmative action as reverse discrimination. As Cahn suggested, ‘Instead of the original discrimination against these people, we now have discrimination for them, but in either case we have discrimination since it treats the irrelevant as relevant’.¹⁷²

As opposed to the theory of affirmative action, equal opportunity can be defined as ‘A structure of opportunities in which one’s racial status has no net causal impact on the value of one’s employment, investment, business and consumption projects’.¹⁷³ Sowell adds further to the definition, ‘Equal opportunity law and policies require that individuals be judged on their qualifications as individuals without regard to race, sex, age and other relevant criteria’.¹⁷⁴ Although this definition is largely associated with the United States, such a legal definition does fall within the meaning provided by the primary statute in the United Kingdom as well. It is designed to be more explicit in order to encompass most of the area, which includes the ‘provision of goods, facilities and services ... and any exercise of public functions; both by public authorities and

¹⁷⁰ Barbara Bergmann, *In Defense of Affirmative Action* (Basic Books, 1996) 7-9. She also highlighted the list of people that should be included as 1. The group is seriously under-represented in an occupation or at a hierarchical level in the work place; 2. The under-represented continues because of present discrimination, or because of current employer practices or habits that effectively exclude members of the group and 3. The pattern of exclusion is unlikely to change in the absence of special effort. 94-95

¹⁷¹ Steven Yates, ‘Affirmative Action: The New Road to Serfdom’ (1990) 40(12) *The Freeman* – Ideas on Liberty <<http://www.thefreemanonline.org/columns/affirmative-action-the-new-road-to-serfdom/>> accessed 25 March 2011

¹⁷² Steven Cahn, *Affirmative Action and the University: A Philosophy Inquiry* (Temple University Press 1993)

¹⁷³ Elizabeth Anderson, ‘Integration, Affirmative Action and Strict Scrutiny’ [2002] *New York University Law Review* 1195

¹⁷⁴ Thomas Sewell, *Civil Rights: Rhetoric or Reality?* (Quill Paperbacks, 1984) 38

private bodies exercising public functions'.¹⁷⁵ In simple terms, equality of opportunity can be termed as equal participation for all without any form of discrimination.

The definitions considered above can be reflected in policies implemented or undertaken by various employment agencies or governmental departments. In fact, the definitions stated are subject to variations according to certain industries or sectors sharing a similar objective. A crucial question however would be its meaning in the context of sports; judged on the basis that only a limited number of sports' organisations have actually attempted to provide a clear definition of both theories¹⁷⁶.

3.2.1 The Sports Factor – Dealing with Various Interpretations within the Theories

For the purposes of this research, it is essential to define affirmative action and equal opportunity within the specific sphere of sports. There is little doubt that definitions or interpretations could easily be derived from the general definitions provided above; but equally clear that different factors that emerged in sports would require further consideration and theoretical thought. In sports, it is a generally accepted convention that only the best are chosen to participate for a country. Since the 20th century however, sports have increasingly become popular at different levels of society and it is inevitable that the word sport has been made synonymous, though indirect, with the terminologies associated with commerce, national or even international pride. Since participation in sports involves and mirrors a country's historical, cultural and racial identity, different countries in theory could devise different methods to satisfy the objective of ensuring equality of participation for its citizens. Specifically, this is relevant in countries possessing multiracial and multi-religious societies.

It is useful to consider the role of sports as a microcosm of society. Eitzen and Sage suggested:

Sport is an institution that provides scientific observers with a convenient laboratory within which to examine values, socialisation, stratification and

¹⁷⁵ Race Relations Act 1976 as amended by the Race Relations (Amendment) Act 2000 (The RRRA) and the Race Relations Regulations 2003

¹⁷⁶ For instance, see the charter in Sporting Equal or Sport England

bureaucracy to name a few structures and processes that also exist at the societal level. The types of games people choose to play, the degree of competitiveness, the types of rules, the constraints on the participants, the groups that do not benefit under the existing arrangements, the rate and type of change, and the reward system in sport provides us with a microcosm of the society in which sport is embedded.¹⁷⁷

Sports could therefore be seen to reflect and mirror the cultural principles of the society in which it takes place. Eitzen's suggestion reiterated the importance of sport because it reinforces its class, race and gender inequalities and provides opportunities for participation. Generally, the above might be viewed as the accepted justification; however it is unfortunate that racism within sporting participation is still prevalent. While sport may be integrative at the higher political levels, it has not been so at the interpersonal levels of gender and race. The repercussion of this would therefore require intervention of discrimination law in order to achieve balance of participation in sport.

The notion that sport is a microcosm of society is ambiguous however. On the one hand, the policies and practices underpinning participation in sports may be seen to mirror other forms of social organisation which are themselves based upon inequalities of opportunity. This reading would locate sports participation without any form of intervention as synonymous with mainstream social organisation. However, the application of equal opportunities and affirmative action interventions provide the view of sport as an idealised microcosm of what society should ideally be rather than what it actually is. As Frey and Eitzen go on to argue 'just as racial discrimination exists in society, it exists in sport'¹⁷⁸ and therefore the application of anti-discrimination policy in both sport and society in general creates a more level playing field in which the prevailing inequalities are reduced and, ideally removed, creating a more inclusive, fair structure for both society and sport. In this case, it could be argued that sport may provide leadership in this regard and that the enhancement of cultural understanding, encompassing a broader acceptance of different cultural

¹⁷⁷ Stanley Eitzen and George Sage in Tim Delaney and Tim Madigan (eds), *Sports: Why People Love Them?* (University Press of America 2009) 19

¹⁷⁸ James Frey and Stanley Eitzen, 'Sport and Society' (1991) 17 *Annual Review of Sociology* 503

attitudes, values and behaviours may ultimately permeate other spheres of life. It needs to be pointed out that existing research provides no valid evidence that participation in sport actually creates any verifiable socialisation effects and that, therefore, the discussion remains open to some speculation. This understanding does, however, provide an impetus for countries to pursue more egalitarian structures of sports participation.

Moreover, it could be argued that sport is inherently discriminatory as participation at the highest levels requires the acquisition of enhanced abilities and skills that only the top performers possess. Once more, this could be viewed as being consistent with other societal norms in which political and industrial leaders are drawn from those individuals possessing superior skill and ability sets. The desire of a country in promoting previously disadvantaged groups or ethnic races to participate in international sports marks a departure from strict adherence to the concept of total equality. Since the key decision on the selection process in sport lies with the government, sports' ministry or even local sports association, it would theoretically amount to racism against the spirit of the Olympic Charter¹⁷⁹. Understandably however, the former will be need to be addressed by short or long term planning in order to address the issue of inequality of participation between races within a country itself. For example, it could be the case where an equal percentage of participation would be afforded to all races when it comes to team selection.

Conversely, sports in some countries could be used as a tool to propagate a successful nation¹⁸⁰. Success in domestic, regional or international sports would highlight the dynamics of that country. In such instances therefore, nothing short of the best would be accepted for the selection process in order to represent a country in sports¹⁸¹. On the other hand, this could provoke a feeling of discontent from certain groups within a country where their interest is scarcely accorded any attention. Thus, to keep and maintain the best while attempting to incorporate the disadvantaged groups or races as

¹⁷⁹ See Olympic.org (n69) Point 4 of the Fundamental Principles of Olympism

¹⁸⁰ For example, see Mervi Tervo, 'Nations and Nationalism – "Sports, 'Race' and the Finnish national identity in Helsingin Sanomat in the early 20th century"' (2003) 8(3) Association for the Study of Ethnicity and Nationalism 335. Also see Hamad Ndee, 'Sport as a Political Tool: Tanzania and the Liberation of Africa' (2005) 22 International Journal of the History of Sport 671-688

¹⁸¹ See Brailsford (n135) 122 where sport has been deliberately used to promote Aryan race in Nazi Germany.

a part of the national sporting team within a country would again require deviation from the general concept of total equality of participation in terms of selection. As a result, the repercussion of the former would invoke the theoretical application of both affirmative action and equal opportunity.

According to Tswete, 'There is nothing absolute about merit. Merit is a relative concept in as far as the government must promote sport with a 'deliberate bias' towards the disadvantaged sections of the population'.¹⁸² It could be summed up by suggesting that affirmative action in sports is a device to profit, benefit or to promote a disadvantaged group(s) or race(s) by increasing their level of participation or involvement in sports, whether at the grassroots, management or at a playing field level. In simple terms, affirmative action could be viewed as a means to improve the participation of members of the disadvantaged group in the country¹⁸³. On the other hand, implementation of such a theory would result in harsh treatment for other groups or races. This makes it a most intriguing concept to understand.

As mentioned earlier, the concept of affirmative action has, or had, been made interchangeable with, the theory of positive discrimination¹⁸⁴. Generally, there does not appear to be much difference between the two. On the other hand, affirmative action is largely associated with legalised force or obligation, meaning that all parties have little option but to adhere to the policy of recruiting individuals who fall under the category of disadvantaged groups or members of the minorities¹⁸⁵. Therefore, a requirement to include a certain number of players from a certain background in the national team would be one of the examples, possibly suiting the situation in both

¹⁸² Kogila Moodley and Heribert Adam, 'Race and Nation in Post-Apartheid South Africa' (2000) 48 *Current Sociology* 51, 59

¹⁸³ See further on Cloete and Cornelius (n 2) 92-93

¹⁸⁴ Positive Discrimination can be described as 'The failure to select the best candidate, the undermining of meritocracy, the negative impact on the beneficiary and the injustice of reverse discrimination'. See Mike Noon, 'The Shackled Runner: Time to rethink positive discrimination?' (2010) British Sociological Association <<http://wes.sagepub.com/content/24/4/728.full.pdf+html>> accessed 24 March 2011. See also Jorg Franke, 'Does Affirmative Action Reduce Effort Incentives? – A Contest Game Analysis' (2010) *Ruhr Economic Papers* 4/10. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618243> accessed 20 March 2011. Franke suggested phrases like 'positive discrimination or preferential treatment as synonymous for affirmative action'

¹⁸⁵ See later in relation to the enforceability of Article 8(5) and 153 of the Malaysian Federal Constitution and Section 9(4) of the South African Constitution of 1996. Article, Section and relevant subsections legitimise discrimination in certain areas.

Malaysia and South Africa; the differentiation being that the members of the majority are being given preferential treatment in comparison to others.

In contrast, it could be argued that positive discrimination is more related to the use of powers of persuasion¹⁸⁶ in requiring the relevant parties to increase the participation of underprivileged groups or members of the minorities. For the purposes of this research, it is important to distinguish the theory of affirmative action and positive discrimination in the United States since the former could refer to the principle of equal opportunity as well as in reference to the members of the minorities¹⁸⁷. It would also be proper at this stage to state that the United States adheres to such a policy, save in exception to matters relating to university or college admission. Some might argue that affirmative action or positive discrimination has been created for the benefit of the majority who were previously considered the underprivileged and underrepresented group of people¹⁸⁸.

This differentiation between the concept of affirmative action and positive discrimination, however slight, has inevitably broadened the scope of affirmative action. Moreover, such concepts are not easy to grasp since different countries such as Malaysia, United States and the United Kingdom for instance, hold individual reservations in relation to the conceptual meaning of affirmative action. For the purposes of this research however, the theory of affirmative action and positive discrimination in sports will be treated as synonymous.

Similar to the theory of equal opportunity, there is little in fact known when it comes to the definition in sports. On the contrary, it would be correct to argue that the area of sport has been absorbed to be considered as part of the definition by implication¹⁸⁹. In

¹⁸⁶ In the United States for instance, 'Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority groups members; ie: positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area'

¹⁸⁷ See later in Chapter 4

¹⁸⁸ See later under Section 9(4) of the 1996 South African Constitution and Article 153 of the Malaysian Federal Constitution for legal definition

¹⁸⁹ In England, see Race Relations Act 1976 as amended, s 1. In South Africa, see Employment Equity Act 1998, s 6 as well as South African Constitution of 1996, s 6. See also general provisions of Malaysian Federal Constitution, Art 8 and Civil Rights Act 1964 as amended, Title VII in the United States

addition, sport is largely associated with the employment sector and this would provide sufficient evidence that the sports industry forms part of the definition. According to Sport England, equal opportunity can be defined as ‘Treating people as individuals and providing them with opportunities on the basis of their skills, talents and qualifications so that they are neither disadvantaged nor denied access on the grounds of their age, disability, ethnicity, race, sex or sexual orientation’.¹⁹⁰ For the purposes of this research, the definition of equal opportunity in sports could be phrased as a device to prohibit any, whether direct or indirect, form of unlawful discrimination at every level of sport, be it at the grass root, playing field or at management level and to encourage and promote fair play amongst individuals. This definition thus covers the entire area of sports with regard to the equal opportunity principle. The first part of the definition would uphold the universal stance of equality in sports while the phrase to encourage and promote fair play denotes the aim of ensuring that the capable ones would be selected for participation.

Definitions provided in the context of sports are no doubt capable of easy and reasonable interpretation and should mirror the general definition of both theories; however, the main question here would be its extent or scope of application. In short, the degree of application for both theories varies and this depends on the method of selection within a country itself. Therefore, it would not be appropriate to summarise that for instance, Country A adopted the theory of strict affirmative action and Country B adheres to the principle of strict equal opportunity. If that is the case for the former, it would be crucial at this stage to determine or perhaps, at least, to draw the boundary between, affirmative action and equal opportunity practices.

In the sports’ industry, the word affirmative action itself could provide different meanings and significance. It could refer to the creation of either strong, intermediate or weak forms of affirmative action. The categorisation of the above share a common goal and that is to achieve some form of ‘equality’ for the disadvantaged races. Equally, the theory of equal opportunity could also be subject to various interpretations. Interestingly, it might refer to creation of strict equal opportunity, assimilative theory (the principle of equal opportunity and positive action) and

¹⁹⁰ Ray Barker, Adam Gledhill, Chris Lydon et al, ‘*BTEC National Sport*’ (Heinemann 2007) 6

primary and secondary theory (The principles of equal opportunity and affirmative action).

Crucially, it is arguable that most of the sub-theories within the main theorisation of affirmative action and equal opportunity are separate and possess a distinct feature. At this preliminary stage however, it is pertinent to appreciate that the sub-theories as mentioned above could well overlap into one another. As a consequence, the next part of this thesis will examine and compare different sub-theories of both affirmative action and equal opportunity and how, in theory, they potentially relate to one another. In short, could it be possible that there is in fact collusion between both main concepts when it comes to sports? Should there be collusion and would this imply that both theories of affirmative action and equal opportunity bear few differences? The answer would lie within the practical application of the law in different countries which will be considered in the later chapters.

(a) Strong Affirmative Action

Strong affirmative action, being synonymous with the idea of reverse discrimination requires the implementation of a quota to certain disadvantaged races or groups. It has been described as ‘giving a preference (or “special consideration”), in hiring or admissions, to members of racial groups which have historically suffered from racial discrimination, in order to achieve greater representation of those racial groups’.¹⁹¹ Reverse discrimination can be defined as ‘A denial of equal protection of the laws and is viewed as discrimination on the basis of race by opponents of racial quota programs’.¹⁹² Argued in some quarters as being unconstitutional and ‘illegal’ per

¹⁹¹ ‘Is Affirmative Action Fair?’ (*Sacramento State*)

<<http://www.csus.edu/indiv/g/gaskilld/SocialIssues14/Affirmative%20Action.htm>> accessed 22 July 2007. See also Francis Beckwith, “The ‘No One Deserves His or Her Talents’ Arguments for Affirmative Action: A Critical Analysis” (1999) 25 *Social Theory and Practice* 53. Beckwith at 54 argues that strong affirmative action ‘involves more positive steps to eliminate past injustice, such as reverse discrimination, hiring candidates on the basis of race and gender in order to reach equal or near equal results, proportionate representation in each area of society’.

¹⁹² See *Parents involved in Community Schools v. Seattle School District No. 1 et al.* [2007] Petition No. 05-908 US Court of Appeals for the Ninth Circuit. <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=05-908>> accessed 21 July 2009. See also Cowan, ‘Inverse Discrimination’ (1972) 33 *Analysis* 10 where he refers reverse discrimination to one of inverse discrimination. Capaldi meanwhile described affirmative action as a ‘manifestation of the bizarre totalitarianism toward which modern liberalism ineluctably leads’. See

se¹⁹³, this form of affirmative action is still being considered as one of the different methods available to bring the participation of a disadvantaged race to parity with the others¹⁹⁴. The phrase ought not to be confused with the notion of total discrimination since the former would have, in theory, to preserve all or the remaining quotas to other races or groups.

A classic example of this form of affirmative action could be derived from *De Funis v. Odegaard*¹⁹⁵. An individual, albeit with better grades or similar grades to other disadvantaged groups, was deprived of a place in the University merely because the allocated places were reserved for blacks and other members of the minorities in the United States. The decision appeared to be harsh and unconstitutional; however, it is considered justifiable as a consequence of attempting to raise the standard of other races.

Strongly enforced affirmative action may require absolute recruitment of members of the underprivileged groups or based on a proportion of the total population¹⁹⁶. Although such events are rare in reality, there are still some in existence. The best possible illustration includes recruiting only individuals who profess the Muslim faith to work in registration or any governmental department that deals with problems concerning welfare. Similarly, governments or even sports governing bodies may impose limitations on any sports association to recruit Malays for the participation of 'silat'¹⁹⁷. The reason could be that the game of silat, which is considered a type of martial art, derives from the Malay Archipelago, and should only be kept within its own race. At this moment however, this loose restriction would correctly be considered as customary.

Nicholas Capaldi, *Out of Order: Affirmative Action and the Crisis of Doctrinaire Liberalism* (Prometheus Books 1985)

¹⁹³ Richard Delgado and Mari Matsuda, 'Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground' (1988) 11 Harvard Women's Law Journal 1, 2-4

¹⁹⁴ Bell (n169) 1596

¹⁹⁵ (1974) 94 S. Ct. 1704. See also *Sweatt v. Painter* (1945) 339, U.S 629, 70 S. Ct. 848

¹⁹⁶ Sacramento State (n191). See also Beckwith (n191)

¹⁹⁷ Also known as 'pencak silat', it is a fighting by using techniques of self defense with its root in the culture of the Malay World or South East Asia Region encompassing Indonesia, Malaysia, Singapore and Brunei Darussalam. See further in Ahmad Sarji bin Abdul Hamid, *The Encyclopedia of Malaysia Sports and Recreation* (Vol. 15, Archipelago Press 2008) 22

A more commonly used method of strong affirmative action would indicate a certain percentage of compulsory participation from a racial group in sports. Compulsory participation in the context of sports would imply that there must be a fixed participation from disadvantaged groups or races¹⁹⁸. It is worth noting that resulting percentages may vary, according to the racial composition of the group or to the extent of merely ensuring that each group or underprivileged group are represented in sports. In other words, this would also commonly refer to the implementation of quotas benefiting a group or race over others. An example is a football team which specifically requires the participation of at least 5 players or 30% from a single race while the remaining players could be selected from any other race. The primary objective of such affirmative action would be to increase, rather than to encourage, proportionate participation in sports. Thus, it could be likened to a situation where weaker athletes are given priority over the better athletes from other racial groups.

The phrase ‘increase’¹⁹⁹, rather than ‘encourage’²⁰⁰ needs to be scrutinized further. In this respect, there is a lack of or no form of consideration or proper steps taken to alleviate the disadvantaged groups. Rather, this suggests that the government or sporting bodies are only interested in increasing participation of a group of a particular race benefiting from such a scheme of affirmative action without judging strictly on merit. Moreover, strong affirmative action would also imply that encouragement is a secondary matter since what matters most is quantity rather than quality. To them, this is affirmative action as spelled out by Bell, which is treated as legal and in line with basic moral standards. In sports, as a result, it would be politically incorrect to mention that ‘there is no mystique in affirmative action ...’.²⁰¹

The issue above does not seem to pose any harm to a country, given that it is trying to assist underprivileged groups. In fact, it is foreseeable that it would forge a better understanding in terms of racial relations in a multiracial society, although it would

¹⁹⁸ Sacramento State (n191). This view also stresses ‘equal results’ (or at least some goal or pattern of employment that ought to be achieved) by using timetables, goals, or quotas as criteria by which to judge whether one has achieved fairness. See further in Beckwith (n191)

¹⁹⁹ For example, see *Minister of Finance v. Van Heerden* (2004) 12 BLLR 1181 CC which suggested that Constitutional Equality Provisions extend far beyond the workplace and aimed at transforming the entire South African society of which sport represents a microcosm by increasing and achieving equity.

²⁰⁰ See later in relation to the theory of ‘positive action’

²⁰¹ Bell (n169)

also be fair to argue that this theory is merely a façade. Moreover, this would not, in reality threaten the overall productivity of a country.

In sports, on the other hand, it might create ‘harm’ to the sporting standard of a country. Would it be right to impose strong affirmative action for the sole purpose of achieving equality in sports, be it at grassroots, playing field or at the management level? It could be argued that sports, unlike any other forms of industry, should not be subjected to such experiments. By simply increasing the involvement of one particular race at the expense of the other races, there is no doubt that governmental or sports bodies may pride themselves in growing the input of that particular race. On the other hand, there is a price to pay. It is likely that strong affirmative action could result in a gradual decline of the sporting standards of a country. Some quarters might overestimate the risks involved, however, from the author’s observation; this would result in a pre-determined disaster for the future of a country’s sports.

(b) Intermediate / Medium Form of Affirmative Action

If the theory of strong affirmative action demands a certain level of individual participation, intermediate or medium affirmative action signifies the need to give attention to the skilled underprivileged races or groups²⁰². Whilst this theory might resemble the former (strong affirmative action) in terms of increasing the level of participation of a deprived race, the crucial difference here lies in the area of selection. Instead of accumulating a group or race merely for the sake of making a statistic, this form of affirmative action demands ‘justice’ at a certain level²⁰³. Moreover, this would reduce some forms of desegregation and encourage healthy competition between the races to excel.

Dworkin²⁰⁴ has sought to differentiate two separate concepts. Firstly, he claims that everyone has the right to treatment as an equal and secondly, right to equal treatment. The former suggests that everyone must be treated with similar respect to anyone else. As an illustration, every individual has the right to formal education at primary and

²⁰² Sacramento State (n191)

²⁰³ Sacramento State (n191)

²⁰⁴ Dworkin (n140) 230

secondary school levels. When we refer to the right to equal treatment however, it is different in a way in which only certain disadvantaged groups or races are given preference over the others. To exemplify this in sports, one may have not have an equal right to sport, since it is not so essential in comparison with access to formal education.

In sports, as the theory suggests, preference would still be given to an individual from the disadvantaged race if they share a similar qualification or skill to another individual from another race. However, where the sports bodies are not able to find a suitable candidate from the disadvantaged race, they would search for another individual from the similar race rather than sacrificing success for the sake of participation. Another alternative would be to reach out to the qualified and skilful minority group, rather than waiting for them to apply.

It would seem that a medium form of affirmative action aims to preserve, to some extent, the element of equality, albeit in a qualified way. While any form of inequality would not be tolerated, on the contrary, there is some kind of additional ‘protection’ afforded to members of the minority or in the case of some countries, the majority. As discussed above, this will ensure that participation of an underprivileged group or race retains parity with the ones of other communities. In some instances, participation of athletes would reflect the size or proportion of each race.

In comparison with the strong method of affirmative action, the latter would appear to be less discriminative in nature, although some are not prepared to concur²⁰⁵. Dworkin’s argument on ‘justice’ might suit this category well. In contrast with Bell, Dworkin argues that ‘If justice demands equal justice for all, the denial of such treatment to any individual on the basis of race, sex, colour, ethnicity or national origins is wrong’.²⁰⁶ His statement could be interpreted thus: while equality is essential, one would not be able to set aside any past injustices committed towards the members of the disadvantaged groups. As a consequence, it could be argued that

²⁰⁵ For examples, see Delgado in ‘Affirmative Action as a Majoritarian Device: Or, do you really want to be a role model?’

²⁰⁶ Curzon (n141) 54

justice (additional privilege) is a necessity in order to ensure that such 'equality' occurs.

To quote an example, countries such as Malaysia have benefited from this kind of programme in a theoretical sense. While affirmative action has benefited and developed the indigenous population and the native Malay population to a respectable level, the government maintains the status quo that everyone, regardless of race, should be treated equally²⁰⁷. This ought not be misunderstood as being entirely discriminatory, but as a means to realise Malay and indigenous populations as well as an individual's potential. It is important to bring the Malays to a certain level deemed acceptable by the government and all races, since they have been subjected to a historical dilemma under colonial rule. The above discussion mirrors Dworkin's view concerning equality, where he claims that 'Government must treat all its citizens as equal in the following sense; political decisions and arrangements must display equal concerns for all ... however, struggle for an equal society cannot wait further upon of revolutionary objective ... It is necessary to effect important changes now'.²⁰⁸

A medium form of affirmative action leaves behind an impression that this is a model for countries urgently needing a solution to address problems concerning racial mismanagement. In theory, this would also benefit sports programmes in countries exercising affirmative action. First of all, this ensures that no one would be excluded from gaining the opportunity to participate in sports. While the disadvantaged groups have the chance to gain equality with the other races, the latter would still continue to be afforded a chance to participate in sports, provided they met the required criteria of skills. Secondly, this encourages national unity among all races. Previously underprivileged groups would not harbour a sense of deprivation and hatred towards the others and though the other races might not share the same view, some form of equality could be achieved in sports participation. On the other hand, the theory would always remain as it is unless it could be put into practice. This view will be looked at in Chapter 6.

Variation of Affirmative Action

²⁰⁷ Malaysian Federal Constitution, Art 8(1)

²⁰⁸ Curzon (n141) 54

It is imperative to take into consideration that strong and medium forms of affirmative action does not necessarily remain constant over time. Rather, it may be that these schemes would be retracted once a certain percentage of participation from disadvantaged groups has been achieved. For instance, if a target of 30% set by the government of a country has been met, affirmative action would have ceased to exist on a temporary basis or for an indefinite period until there is a review about the need to reinstate such policies. In fact, it is of interest to note that some countries do provide for some leeway, although such provisions are not specifically stated in the legislation or constitution but rather as a means of ‘social contract’²⁰⁹.

The above argument re-affirms Dworkin’s view, which supports affirmative action or positive action in a qualified manner where he stated that ‘it [affirmative action] is never intended, in the long run to reinforce an individual’s privilege’.²¹⁰ It is true that there must be some form of limitation on such practices of affirmative action. If we are to take account of this view, this would provide a different complexion for sports as well. While it would at least guarantee involvement of certain underprivileged races or groups, other races would not be deprived of any opportunity to participate. On the contrary, the theory of ‘qualified affirmative action’ has not been proven as yet. Thus, the application of such a practice remains vague until a precedent is set by a country or its legislation.

Another controversial variation of affirmative action could take place for the benefit of the majority²¹¹. The theory of affirmative action has largely been devised to safeguard the position of ethnic minorities or other underrepresented groups in a

²⁰⁹ Social Contract is considered as ‘An agreement among the members of an organised society or between the governed and the government defining and limiting the rights and duties of each’. Weirich meanwhile describes a ‘social contract’ governs the basic of society. See further in Paul Weirich, ‘Exclusion from the Social Contract’ [2010] 4 Politics, Philosophy and Economics

²¹⁰ Curzon (n141) 54

²¹¹ See also Susan Borque, ‘Peru: Affirmative Action for the Majority’ (*Education Resources Information Center (ERIC)* May 1985)

<http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED249304&ERICExtSearch_SearchType_0=no&accno=ED249304> accessed 26 July 2007. See also Mahendra Reddy, ‘Affirmative action policies and poverty alleviation in Fiji: An examination of post-coup policies and programmes’ (*Australian National University* 1 June 2004) <<http://devnet.anu.edu.au/online%20versions%20pdfs/60/1660Reddy.pdf>> accessed 26 July 2007

country²¹². However, depending on the nature or circumstances of a country, the reverse could occur. In Malaysia and South Africa for example, the theory of affirmative action has been introduced to assist the Malays and South African blacks in improving economically as a consequence of a previous deprivation of status.

Finally, it may be that affirmative action might only benefit a disadvantaged group within the same race or ethnic group. For example, Country A which adapts to the theory of affirmative action might wish to give preference to the lower income earning groups in order to ensure that they would be afforded opportunities to improve their standard of living comparable with their higher income earning counterparts in a country. In sports, this could imply preferential treatment in terms of affording financial resources to the group, for example, residing in rural areas.

(c) Weak Form of Affirmative Action

We could deduce that strong or medium forms of affirmative action have one similar characteristic – preferential treatment. Weak affirmative action shares the same vision as the others but the main difference lies in the implementation of policies at localised rather than at the national level. While strong and medium forms of affirmative action do seem to impact on the country on an overall basis, the weaker form of affirmative action primarily targets individual corporations or companies. The only real similarity shared between the weaker and intermediate form of affirmative action perhaps lies in the nature of ‘persuasion’, meaning that parties are required to give consideration to underprivileged groups or members of the minorities²¹³.

This could occur where sports’ bodies or organisations single out participation of a particular race or underprivileged race simply because they are not considered ‘suitable’ to take up such employment. However, the particular disadvantaged groups or races would be given incentives or fringe benefits in order to fight for a place within the national team. The weaker form of affirmative action would also impose severe fines for breaches, whereas any breaches of the medium or stronger form of affirmative action would be deemed unconstitutional and be subjected to action in the

²¹² For instance, the United States

²¹³ Sacramento State (n191)

law courts²¹⁴. Pojman refers to weak affirmative action as ‘such measures as the elimination of segregation, widespread advertisement to groups not previously represented in certain privileged positions, special scholarships for the disadvantaged classes...’.²¹⁵

In addition, such affirmative action could also be seen via implementation of agencies appointed by governmental bodies as watchdogs to oversee that all races, in particular the underprivileged groups, obtain similar opportunities to participate with the other races. In the context of sports, an enquiry could be undertaken in relation to a particular sport should it fail to incorporate other members of the minorities and this should ascertain the reason behind such lack of involvement. Upon identification of such problems, schemes and programmes would be tailored to attract participation in sports. This would encourage future participation of other races which could bring out the quality of hidden talents currently being overlooked. As a consequence, the weaker form of affirmative action does not exhibit the element of ‘force’ in comparison with the stronger and medium form of affirmative action, but a rather more subtle approach in reinforcing the participation of a race in sports.

A good illustration of the weakest form of affirmative action could be derived from the abstract of the constitution of Singapore, which states:

The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.²¹⁶

This does not give any implication that the government would exercise such functions by enforcing affirmative action in favour of the ethnic Malays in the state. However,

²¹⁴ Sacramento State (n191)

²¹⁵ See Louis Pojman, ‘The Moral Status of Affirmative Action’ (1992) 6 Public Affairs Quarterly 181. Also note the different interpretation given by Salinas. Weak or ‘soft’ preferential treatment is where when minority and majority applicants are equally qualified; use group membership as a deciding factor.

²¹⁶ ‘Constitution of the Republic of Singapore’ (*Singapore Statute’s Online*) <http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-CONST&doctype=CONSTITUTION+OF+THE+REPUBLIC+OF+SINGAPORE%0A&date=latest&method=part&sl=1> accessed 29 July 2010

such provision is aimed at ‘persuading’ relevant parties to give consideration to the Malays in relation to their involvement in sectors as highlighted in the Constitution.

Looking from a different angle, the weak form of affirmative action in sports could be implemented at a more localised sports or club level. In comparison with the above arguments, which primarily refer to the implementation of policies at the highest level, i.e. the government, this form of affirmative action only refers to the means of increasing or alleviating local participation from members of the minority as well as underprivileged groups within sectors of the local community group. This involves sports associations or clubs in a particular country giving preference to one racial group or a member of alumni merely because the association or club is controlled by a certain group or race.

To illustrate such a claim, nearly all athletes in Malaysia, prior to independence, were being financed by local sports clubs²¹⁷. It would be the same for most of the countries at that time, although there is no concrete evidence to prove this. In practice, however, much of this concept would not survive in the current century, since all sports governing bodies, associations and even local clubs are subject to the legislative process. The process of juridification, as explained in the earlier chapter would wipe out such remaining practices sooner rather than later.

Even if the implementation of strong and intermediate forms of affirmative action benefited a particular group, the government might impose or reserve some ‘additional’ benefits for certain ethnic or tribal groups, which would be treated as synonymous, or largely associated, with the main group. In South Africa for instance, there are many tribal groups including the Nguni (Comprising the Zulu, Xhosa, Ndebele and Swazi people), Sotho-Tswana who includes the Southern, Northern and Western Sotho (Tswana people), Tsonga and Venda.²¹⁸. Despite their differences in customs and local practices, they are categorized as black South Africans. At this stage, it is imperative to note that other ethnic groups who suffered discrimination under apartheid are commonly considered to be ‘black’ for the purpose of racial

²¹⁷ See ‘The History of Participation’ (*Olympic Council of Malaysia (OCM)*)
<<http://www.olympic.org.my/web/>> accessed 28 July 2009

²¹⁸ ‘South African’s People’ (*South African Government Information*, 5 July 2010)
<<http://www.info.gov.za/aboutsa/people.htm>> accessed 12 February 2011

integration in South Africa. These include people of Chinese, Pakistani, Indian and Malay descent and so-called coloured people, including those of mixed race as well as descendants of the Khoi and the San peoples. In common with the fate of localised sports clubs or associations, this form of weak affirmative action would have ceased to exist at the present time due to its impracticality as well as the consequence of the juridification of law in sports.

However, it is equally important to highlight such examples in order to demonstrate the possibility of such practices that existed in the past and persist in the present. For instance, Botswana is one of the few countries in Africa that affords protection to the underprivileged groups in the country such as the 'Tswana' tribe but not the 'Wayeyi' or other undesignated tribes²¹⁹. Although this example might not be relevant in a sports context, it is important to note that such practices form part of affirmative action. In sports however, these tribal or ethnic groups are considered to be the same without any differentiation.

As a result, the weaker form of affirmative action does not confine itself to policies implemented by sub-governmental bodies. Rather, it is largely associated, though not in the form of definite precedent, with localized sports clubs as well as with tribal factions. It is essential to note that even if the weaker form of affirmative action is still largely popular with the localized sports clubs or associations; such practices would have been overshadowed by the subsequent racial policies or legislation which mirrors the national agenda of a country. Thus, it would be correct to mention that strong and intermediate forms of affirmative action will continue to exist at the expense of the weakest form of affirmative action.

(d) Strict Equal Opportunity

The theory of strict equal opportunities which could also be known as 'pure meritocracy', only permit the best and most skilful to take part in any events organised nationally or internationally. Daniel for instance relates this to 'The real

²¹⁹ Chieftainship Act, s 2 and s 15(4)(e) 1966 Constitutions created an exception to the general anti-discrimination rule under 1966 Botswana Constitution, ss 3 and 15. See further on Charles Manga Fombad, 'The Unconstitutional Protection Against Discrimination in Botswana' (2004) 53 International and Comparative Law Quarterly 139

meritocrat, one who thinks a person should get a job if he or she is the best available person for that job'.²²⁰ In terms of selection however, this concept allows equality in terms of participation. In other words, no races or underrepresented groups could be prevented from participating. For example, phrases such as 'open for application' or 'all are encouraged to apply' suggest that every eligible citizen is entitled to apply. On the other hand, only the suitable ones would obtain the employment. In this context of strict equal opportunities, members of the underrepresented communities, groups or races are selected not because of unfair treatment or being deprived of any employment, but rather due to their capabilities to perform.

In a literal sense, strict equal opportunity might not be discriminative in nature since no races or groups would be singled out from participating. Nonetheless, it could be viewed from another angle as possessing a limited element of discrimination. Prior to the given example, it is pertinent to note that the most qualified are the winners²²¹ the main reason being individuals from different backgrounds possess different personalities and abilities. As an example, it has been argued that ethnic Chinese or Jewish people possess natural, inherent qualities, skills and talent(s) when it comes to business, commercial or money lending industries.

Let us assume hypothetically that an ethnic minority or members of underrepresented groups in China wish to apply for a senior position in one of the commercial industries. It might be that his chances of obtaining employment would be lower than other fellow Chinese as a result of equal opportunities. Hence, the principle of equalities of opportunities could be categorised as an 'evil' and discriminatory doctrine in the eyes of the minorities or members of the underrepresented groups. They could continue to pursue another job; however, they would continue to face strong competition from all angles. Here, it is vital that we are not attempting to discard other groups or races from such opportunities. Moreover, it is not the view of

²²⁰ Norman Daniels, 'Merit and Meritocracy' (1978) 7 *Philosophy and Public Affairs* 203, 210. He also suggested that for pure meritocracy, overall efforts or rewards are proportional to merit. Merit is construed as ability plus effort. See also Rawls (n144) in *Theory of Justice* at 107 where he argues that meritocracy 'follows the principle of careers open to talents and uses equality of opportunity as a way of releasing men's energies in the pursuit of economic prosperity and political domination'.

²²¹ See further John Stanley, 'Equality of Opportunity as Philosophy and Ideology' (1977) 5 *Political Theory* 61. Stanley argued on the effects of strict equal opportunity as 'increasing disparity between the able and accomplished men who know and understand the complex workings of modern society and those who are ignorant of these workings'.

the author that members of the underrepresented groups in China are not being employed by any industries at all. On the other hand, such an example is significant to mark out the possible faults associated with the concept.

The concept of strict equal opportunities theory in sport has also been employed in some countries though the application might overlap or vary with other categories of equal opportunity. Similar to other areas of employment, education or industrial activity, only the best in that particular sport would be allowed to participate. Others will continue to have an equal chance of taking part; however, he or she might not be selected due to unsuitability.

The application of strict equal opportunity could be considered as limited although countries such as the United States and the United Kingdom possess some kind of resemblance to such theories albeit with some variances. The reason being that this category of equal opportunity might result in some underrepresented groups or races being left out altogether on a 'perpetual basis'. For example, the game of basketball in the United States is primarily dominated by ethnic black communities. As a consequence, strict equal opportunity might deprive any groups from getting involved in the game of basketball unless he is ethnic black or possessed of exceptional quality that could match the fellow blacks. In summing up, strict application of equal opportunity would, on basic probability, remain a theory in the context of sports although there always remain risks of countries overlapping into the former.

(e) The Principle of Equal Opportunity and Theory of Positive Action – The Assimilative Theory

While the principle of strict equal opportunity is stipulated as having only the best and most suitable, the assimilative theory of equal opportunity and positive action (hereinafter known as an assimilative theory) could be said to form the middle ground of all possible categorisations of equal opportunity. Under the concept of assimilative theory, much of its practices would remain substantially similar, save for some exceptions. Conversely, the differentiation could be considered to be a fine one. As

discussed briefly, this practice can be demonstrated in the United Kingdom²²² in virtually every sector. In contrast with the strict equal opportunity approach, the assimilative theory agrees with the principle that the underrepresented, underprivileged groups or members of the minorities are given equal chance to take part. On the other hand, the main underlying difference is that these groups are encouraged to participate and given additional incentives to take part.

As mentioned previously, the phrase positive action is not synonymous with the term positive discrimination since the latter refers to the theory of affirmative action. Positive action, on the other hand, has been defined as a 'less drastic option and designed to help and encourage disadvantaged groups to compete equally with advantaged groups ...'.²²³ In short, it could also be referred 'To a coherent set of measures aimed at setting up real equality'.²²⁴ Therefore, positive action does not compel employers to take in any members of underrepresented groups or races but it does encourage the disadvantaged groups or races to compete with others within specific programmes and schemes. Controversially, it might be that the incentive design and schemes vary from one sector to the other. One thing for certain however, there are such schemes in existence in the United Kingdom when it comes to the area of sports.

In football for instance, the FA introduced the 'Football Development Strategy 2001-2006'²²⁵. This strategy does provide some objectives to encourage the ethnic minorities in the United Kingdom to be involved in the game of football. Details of this plan will be considered later, however, the basic structure of such a plan is to review the involvement of Asian participation in the game as well as to implement and encourage development programmes in order to make the game more attractive to members of such minorities.

²²² Consider Sex Discrimination Act 1975, s 1 and Race Relations Act 1976 as amended, s 1

²²³ Daniel Malamatenious, 'Discrimination - Redressing the Balance' (2003) 153 NLJ 1181

²²⁴ 'The Meaning of Positive Action' (*Centre for Partnership and Equality*)

<http://www.cpe.ro/english/index2.php?option=com_content&do_pdf=1&id=21> accessed 28 July 2008

²²⁵ See further on 'Football For Disable People' (*The FA.Com*) <http://www.thefa.com>; 'Football for Disable People',

<<http://www.thefa.com/GetIntoFootball/GetIntoFootballPages/Disability%20Football.aspx>> accessed 30 July 2007

The above example is a clear indication of positive action taken by a sports body, in this case the Football Association of England, in encouraging the participation of ethnic minorities in football. An important note to observe here is that positive action does not ensure the members of the underrepresented groups or races actually being selected. In reality, the development plan or any other incentives are designed to increase their chances of being selected for sport's participation at a higher level rather than to ensure participation itself.

The assimilative theory could be considered as a means by which the underrepresented groups or members of the minorities are able to improve their chances when it comes to the selection process or criteria. However, the only possible drawback of this theory would be its practicality in the area of sports. Since sport involves national pride and glory, it is imperative that the government or any sports bodies or organisations would only select the best for the country. On the positive side however, this would encourage more members of the underprivileged groups or ethnic minorities to be involved in national sports and thus, procure benefits for the country in terms of its sociological aspect.

(f) The Principle of Equal Opportunity and Theory of Affirmative Action – The Primary and Secondary Theory

Prior to understanding this concept, it is vital to note the differences between the assimilative theory and the primary and secondary theory which have been discussed briefly above. The principle of equal opportunity and the theory of affirmative action (hereinafter known as the primary and secondary theory) give primacy to the concept of equalities of opportunities²²⁶. Similar to the strict concept of equal opportunity, only the most suitable and qualified candidate would be selected for participation. The crucial difference on the other hand, lies within the 'addition' of affirmative action theory. This theory might result in possible variations with other earlier concepts which have been discussed.

²²⁶ Civil Rights Act 1964 as amended, Title VII. For example, also see statement of non-discrimination by Missouri State University. 'Equal Opportunity Publication Policy' (*Missouri State University*, June 2007) <http://www.missouristate.edu/assets/equity/BOG_Resolution_-_Equal_Opportunity_Publication_Policy_updated_91506.doc> accessed 30 July 2010

This does not imply ‘automatic’ inclusion of affirmative action, however, as the latter would only be put into operation should the situation require such an intervention²²⁷. Justice O’Conner summarises the usage of affirmative action in the United States. He suggested:

An affirmative action might be valid, but only if it furthers a legitimate remedial purpose and implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammes the rights, of innocent individuals directly or adversely affected by a person’s racial preference.²²⁸

The degree of such interference may not be visible but it would be employed to balance the racial participation in a particular sport or for the entire subject areas of sports. As a consequence, the theory of affirmative action would only play a secondary role in relation to this concept. Equally, it must be emphasised that this theory should not be confused with the earlier evaluation of relationships between the principles of equality of opportunity and affirmative action per se.

This theory might be favoured by countries possessing various and different ethnic or racial compositions. Such arguments are not certain but it could be a device to ensure that every citizen receives a fair share of participation in different sectors of the country, which in this case includes sports. The former argument might reflect some degree of similarity with the concept of equality and it might even be interpreted as a separate branch of equality. Loosely, it could even have a certain degree of resemblance with the concept of intermediate forms of affirmative action (it could also be considered to be a reverse of this theory). In addition and as a matter of comparison, the sole application of affirmative action would not solve the problem in our given example since it would not be possible to satisfy certain groups while neglecting the others.

As a matter of illustration, it is useful to create a hypothetical situation to assist in evaluating this concept. As an example, a country which is composed of fifteen

²²⁷ See later in relation to the legislation in the United States

²²⁸ See further in *Adarand Constructors v Peña* 55 US 200 (1995)

different racial groupings, including underrepresented communities or underprivileged groups, endeavours to include every single group in sports participation. The 'primary theory' would ensure that only the best athletes and participants are selected for representation. On the other hand, should the proportion of participation only be derived from one single group, the government or sports bodies might take some actions such as necessary intervention to guarantee some places for the able participants from other racial compositions. For that reason, the secondary theory would then come into play. At the same time, it is worthwhile noting that this does not simply guarantee participation for every single race since the primary still takes precedent over the secondary theory.

To a certain extent, the United States adopts this theory although it would be immature to come to a conclusion that this is the total case. It is interesting to note a primary difference between equal opportunities practice in the United States and the United Kingdom. No doubt the United States adheres to the theory of equal opportunity; on the contrary, the federal government does adopt affirmative action or positive discrimination as part of their national plan to combat discrimination and creating opportunities for its citizens to obtain employment. The word 'citizens' is made in reference to the members of the minorities, underrepresented or underprivileged groups.

As a concluding remark for this theory, it is perhaps the most difficult theory to grasp since it has some inter-relationships with other theories as discussed previously. On the contrary, the only common understanding in relation to this theory lies with the fact that the principle of equal opportunity takes precedent over the theory of affirmative action in any case. In such a case, it would equate to Rawls' earlier suggestive theory that '*just*' should preside over the notion of fairness, or indeed that justice should be achieved through fairness.

3.3 Theory of Affirmative Action and Equal Opportunity on Collision Course?

If consideration is given to the above analysis, the theories or concepts of affirmative action and equal opportunity are not easy terms to understand. It could be deduced

that affirmative action could be considered to be synonymous with positive discrimination. Moreover, affirmative action in sports has the tendency to benefit the underprivileged races or groups. However, some provisions provide for the benefit of majority groups within the population. Largely associated with many definitions and interpretations, in different sectors or sports, the main question remains whether there are any limitations to this theory.

Affirmative action can be branded as being 'fair', however at the expense of some races or groups. The principle of equality of opportunities on the contrary, is largely associated with the principle of fairness. Strictly, this term strives for equal participation, judging by ones' merits rather than emphasising the process of selection. As a consequence, this ought not to be confused with the terminology of 'achieving fairness' in the context of affirmative action. To summarise in simple terms, there seems to be a clear demarcation between these concepts.

Earlier, it was argued that there are separate interpretations for both affirmative action and equal opportunity. At this stage however, it could also be summarised that the sub-theories between affirmative action and equal opportunity do have certain overlaps. Therefore, it is equally vital to assess some possible similarities between both concepts. In relation to the weakest or most subtle form of affirmative action, it is argued that there is no direct or indirect interference exerted by the central government or legislative bodies. On the contrary, any policies introduced or implemented would be sub-delegated to the local government agencies in which they would then attempt to encourage the participation of minority groups or races. Broadly speaking, this would only act as a tool of persuasion. In this case, it refers to the underprivileged groups, any members of the society who have been subjected to previous forms of discrimination or oppression, members of a country's racial minority or anyone who is covered under a country's racial legislation.

Crucially, the Assimilative Theory under the general heading of equality of opportunity also works along the same lines as the above. In countries such as the United Kingdom and in particular England, which is increasingly made up of many different sets of racial composition, the government needs to find ways to improve the living standards as well as the participation of minority groups in various sectors. As a

consequence, the principle of equality of opportunities²²⁹ was implemented and remains in practice today. While the government aims for equality at all levels, they have given incentives and encouragement to the members of the underprivileged groups or any minority groups to participate in sports.

Both weak affirmative action and assimilative theories (Equal Opportunity and Positive Action) do not imply that such racial groups are being given preferential treatment per se however, their plight is highlighted and employers are reminded to take such applications into consideration. In other words, this does not guarantee free admission into any employment but ensures that their applications are being looked into at the very least. Obviously, qualified candidates will gain entry on an equal footing with the others. Again, it is essential to note that there is no form of 'legal obligation' on the part of the local government agencies or any employers to take in such groups and minority races as stated but rather, it serves as a matter of 'persuasion' for them to consider when taking in employment applications from all members of the community.

When we apply the above theory into sports, all athletes or participants will be given equal consideration however; the under-represented or underprivileged groups or race will be given encouragement to participate. This could range from creating different schemes or projects targeting the particular race and would then attempt to develop their talents. While the government will continue to pursue or procure equal chance to all other races, utmost consideration needs to be given to the applicants from the under-represented background or even from the minority groups or races.

In comparison, we could deduce that the weak affirmative action and assimilative theory also have something in common. Broadly, the discussion above created a hybrid of the theory of affirmative action and equal opportunity. While we could conclude that both of these terms are interchangeable to a certain extent, it is equally accurate to summarise that these similarities only occur through different political stances, policies or legislations adopted by different countries. At this stage, it could be summarised that both of these theories tilt in favour of an equal opportunity

²²⁹ In the United States, principle of equal opportunity could be likened to the terminology of affirmative action.

approach. At the same time however, it is important to appreciate that there are some reservations that do not coincide with the theoretical approach taken by strict equal opportunity.

If weak affirmative action and assimilative theory could be argued along the same lines, it could be argued with reference to both medium affirmative action and the primary and secondary theory (theory of equal opportunity and affirmative action). As mentioned previously, the medium form of affirmative action does not strictly adhere to the concept of increasing the level of participation for the sake of statistics alone. Arguably however, there is a sense of urgency in requiring the ultimate participation of groups or races that benefit under this affirmative action scheme. On a positive note, the medium form of affirmative action still preserves some form of qualified equality to groups that do not generally benefit from this scheme. It could be suggested that the status quo in relation to equality would be maintained should all means of attempting to find individuals from a particular group become exhausted.

The basic characteristics of medium affirmative action sit well with the primary and secondary theory. Although the latter affords primacy to equal opportunity, affirmative action may be deployed where there is a need to ensure the participation of minority groups. However, there may be a slight or fine distinction between these theories. It may be argued that medium or intermediate forms of affirmative action edge towards the primary well being of some races and to a lesser extent, the principle of equality of opportunity.

We have seen the discussion in theory as to how both medium affirmative action and primary and secondary theory work in sports. It is worth reiterating at this juncture that medium affirmative action would, in theory, afford more chances for the disadvantaged groups or races to be selected in comparison with the former. Along with the above discussions, it would be appropriate to suggest that primary and secondary theory would make its presence felt when it comes to a tie breaker situation. In other words, this occurs where both participants are of a similar calibre and ability and the participant who hails from the previously disadvantaged group will be selected.

Therefore, the theory of medium affirmative action would lean towards the objective of affirmative action while the primary and secondary theory could occupy the middle ground between both the theories of affirmative action and equal opportunity. At this stage, it is quite clear that there are indeed overlaps between both theories. Specifically, the sub-theories themselves provide a fascinating exploration of new possible variations within two supposedly distinct features of affirmative action and equal opportunity. In sports where skills are required, the scope and applicability of the above theories are no doubt uniquely comparable with some other fields or professions.

To summarise, both affirmative action and equal opportunity are in theory different. On the contrary, however, there appear to be clear differences when it comes to the possible interpretations of the various sub theories as evaluated above. The theories of medium and weak affirmative action, together with assimilative theory and primary and secondary theory could have potentially opened up new dimensions for both theories of affirmative action and equal opportunity. Therefore, it would be appropriate at this stage to conclude that there is by no means any certainty in terms of definition when it comes to embracing such concepts.

3.4 Conclusion

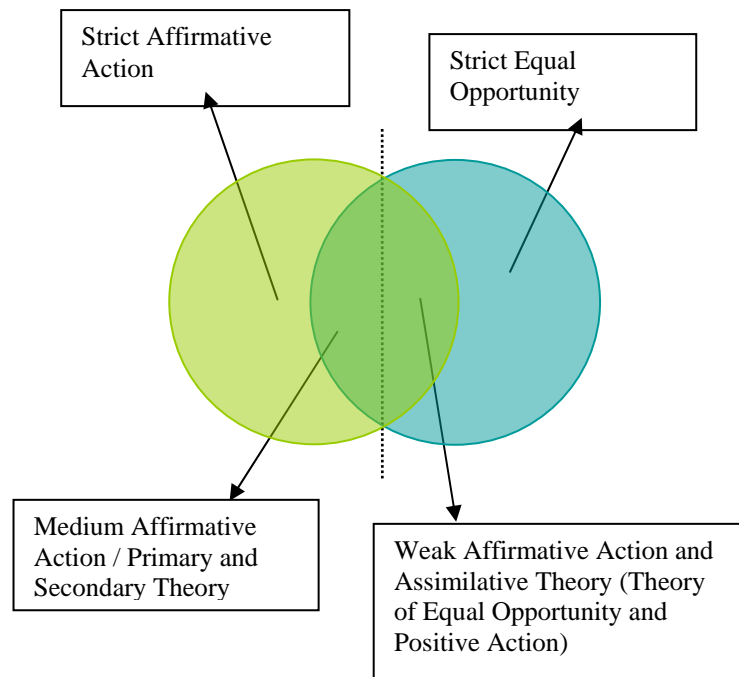
The concept of equality when it comes to participation in sports is undoubtedly not as straightforward as envisaged. Owing to the political past of certain countries which have resulted in degradation of certain ethnic groups or races, treating all citizens simply as equals could result in actual inequality when it comes to chances of participating in sports. Therefore, the theories of affirmative action and equal opportunities have been brought forward to address this problem. Although both affirmative action and equal opportunity work differently and in general are distinct concepts, both theories strive to aim for equality for all races within a country.

In the context of sport, no underrepresented groups or races should be subjected to any kind of racial discriminative practices. On the other hand, there is one distinct difference between the two. If affirmative action demands some form of action to preserve the rights of the underprivileged groups or races, the principle of equality of

opportunity does not. The latter's foundation is largely based on 'meritocracy' or 'justified selection'. In other words, all individuals ought to be judged by merit and everyone should be given an equal chance to participate or to take part in obtaining employment. Only the qualified, on the other hand will ultimately be selected.

The primacy for adopting affirmative action in theory is not designed to undermine the other races or communities, however, but to alleviate or improve the standard of the other underrepresented or underprivileged races irrespective of the degree of its implementation. This has been propounded in the jurisprudential works of Dworkin or Bentham as discussed earlier. Dworkin was in principle supportive of affirmative action policy to a certain extent in order to redress the issue of inequality while Bentham was of the opinion that equality can only be achieved by choosing the most able ones from all sectors of the population. In sports, this results in affording more opportunities to the previously disadvantaged groups or races that have been subjected to unequal treatment in the past. Affording more opportunities in this context could imply that they would be given enhanced incentives to take part and be given additional consideration when it comes to the selection procedure in sports.

Chart 1: Sub-Theories of Affirmative Action and Equal Opportunity



In sports, the theory of affirmative action and equal opportunity is subject to different types of categorisation as mentioned above. This can be highlighted through the ven diagram above. The main hypothesis is centred on the fusion between both theories. Arguments which depict affirmative action and equal opportunity theory as two separate entities need to be reviewed. Therefore, it could be concluded at this stage that the theory of weak affirmative action is mainly reflective of the theory of equal opportunity. Equally, the primary and secondary theory tend to have a large influence on affirmative action although the principle theory lies with equal opportunity.

If it is difficult to adapt to pure equality in sports, the theories of affirmative action and equal opportunity which are meant to provide a solution to the former do possess various interpretations of their own. Since all countries vary according to individual historical perspectives, the issue is not simply about applying either the theory of affirmative action or equal opportunity strictly. Rather, it is more a case of adapting the suitable variations of both theories in order to achieve a political solution; primarily to resolve the matter of racial inequality while avoiding any form of racism towards other races that do not benefit from the solution itself. As a result, this has raised new issues. Could it be argued that both affirmative action and equal opportunity theories do not exactly mirror its true purpose? Additionally, why would

variations or sub-theories within the general theories of affirmative action and equal opportunity exists?

In conclusion, the principle of equality of opportunities gives a more direct definition and is not subjected to various interpretations in comparison to the theory of affirmative action. As analysed above, however, there are many different branches of equal opportunity which, for instance, include the application of affirmative action. Despite such differences, this principle is largely based on the principle of meritocracy. In other words, only the best and most suitable candidate will be selected as part of the country's selection criteria for participation in sports.

At this stage, it could be deduced that politics do play a role in shaping a country's legislative policies of affirmative action and equal opportunity. The next chapter therefore aims to analyse the extent of how internal politics within a country shape the implementation of both theories of affirmative action and equal opportunity in sports.

Chapter 4 – Sports and Discrimination: Historical and Political Context

4.1 Introduction

The previous chapter established the jurisprudential theories underpinning the notions of equality. Having done this, it is now essential to establish a political context in which legal responses to racial discrimination in sports have evolved within each of the selected jurisdictions. As will become evident within this chapter, affirmative action and equal opportunities in sport do not exist in isolation but are part of wider formulations of national law, reflecting the different political orientation of the countries under review and, by implication, reflecting their specific historical experiences. Moreover, the application of legal responses to racial discrimination have not been limited to instances of sporting participation but have emerged instead as the extension of the recognition of broader social inequalities in society that have become manifested also in sports. As will become evident below, it is important to recognise that the different countries selected have adopted a variety of approaches for challenging racial discrimination in sports and that these reflect their broader political agendas. Therefore, it is crucial within this chapter to understand the extent to which internal political successes may, or may not lead to external sporting success. This chapter also considers some of the wider and more general issues relating to the application of politics within international sports.

4.2 Politics of Affirmative Action and Equal Opportunities

4.2.1 Political background of Malaysia, South Africa, England and the United States

The following section will consider the brief political background of the four chosen countries and ascertain the extent to which politics within each country has subsequently shaped the approaches taken in the implementation of affirmative action and equal opportunity policies in general and specifically in the area of sports. This chapter has been split into two separate sub-chapters – firstly, Malaysia and South

Africa and secondly, England and the United States. It is important to recognise that these countries, given its different societal development and social settings, have taken different approaches in dealing with the issue concerning inequality which eventually resulted in Malaysia and South Africa embracing affirmative action as a means to achieve equality while England and the United States adopted the equal opportunity approach in combating race discrimination.

4.2.1.1 Malaysia and South Africa

Under colonial rule in Malaysia, the British used the Divide and Rule principle²³⁰ in governing the country. The primary aim of this approach was to enable them to govern the country with ease, while attempting to prevent any substantial form of assimilation between the three main races in Malaya – the Malays, which includes any other indigenous population, the ethnic Chinese and ethnic Indians. Malays were primarily concentrated in the agricultural and fisheries industries, the ethnic Chinese were in control of most businesses and commercial sectors while the ethnic Indians were mainly involved in estate plantations and in some cases, acted as doctors or lawyers²³¹. To a certain extent, this approach ensured that these races remained disunited and as a result prevented any sense of nationalism to emerge that could threaten the British interests in Malaya. The concept of Malay supremacy or ‘Ketuanan Melayu’ was irrelevant since at the time, most ethnic Chinese and Indians did not see themselves as Malayan²³². They still treated China and India as their home country even though some ethnic Chinese and Indians were actually born in Malaya. For instance, a 1930 report prepared by the British Permanent Under-Secretary of State for the Colonies reported that, ‘the number of non-Malays who have adopted Malaya as their home is only a very small proportion of the whole population’.²³³

Unlike Malaysia where the ethnic Chinese and Indians regarded their ancestral birth place as their homeland, the early Dutch and some English settlers regarded South

²³⁰ See further Sri Rahayu Ismail, ‘Ethnic Relations in Malaysia: Problems and Prospects’ (*World Civic Forum* 2009) <http://www.wcf2009.org/program/down/049_S5-I06-3_Zaid_Ahmad.doc> accessed 8 September 2009

²³¹ *ibid* World Civic Forum

²³² Ye Lin Sheng, *The Chinese Dilemma* (East West Publishing 2003) 26-27

²³³ Hwang In-Won, *Personalized Politics – The Malaysian State under Mahathir* (Institute of Southeast Asian Studies 2003) 24

Africa as their home²³⁴. As a consequence, they settled and started to exert political control over South African affairs. South Africa's constitution dates from nearly half a century earlier than the one adopted in Malaysia. The first ever constitution, the South African Act 1910 was enforced when the Unified Colonies of Cape Colony, Natal, Orange River Colony and Transvaal, formed part of the Dominion, alongside Australia, New Zealand and Canada within the British Empire²³⁵. The effect of the constitution marked the beginning of the age of suppression and discrimination against South African blacks and other coloured people. The Constitutional Court in South Africa described this as, 'A deeply divided society characterised by strife, conflict, untold suffering and injustice which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.²³⁶

The enactment of the 1910 constitution was 'heavily biased' and acted as a justification for the segregation and discrimination of the South African black and coloured communities from the whites. Scores of discrimination related laws were passed. Within a year, the Native Labour Regulation Act (No.15) of 1911 made it a criminal offence for Africans, but not for whites, to break a labour contract²³⁷. The most notable of such laws can be found under the Natives Land Act (No.27) 1913²³⁸ which effectively removed substantial rights from the African blacks in acquiring any freehold land in South Africa. The blacks, constituting two-thirds of the population, were restricted to mere a 7.5% of the land while the whites, making up only one-fifth

²³⁴ Rita Byrnes, 'The Voortrekker Republics and British Policies' (*Country Studies*, 1996)

<<http://countrystudies.us/south-africa/13.htm>> accessed 11 August 2009

²³⁵ 'The Union of South African Act 1909' (*South African History Online*, June 2006)

<<http://www.sahistory.org.za/pages/library-resources/official%20docs/sa-act-1909.htm>> accessed 12 April 2011

²³⁶ In Re: Certification of the Constitution of the Republic of South Africa 1996; 1996 (10) BCLR 1253 (CC) at para. 13

²³⁷ Generally, the Act severely restricted the movement of African workers from one area to another.

See further on 'Segregation 1924-1948' (*South African History Online*, June 2006)).

<<http://www.sahistory.org.za/projects/grade12/lesson3/unit1-descrim-legislation.htm>> accessed 12 April 2011. See also other examples such as the Dutch Reformed Church Act 1911 which prohibited Africans from becoming full members of the church and The Mine and Works Act (No. 12) 1911 which restricted Chinese communities from applying for mining jobs in skilled areas monopolised by whites.

²³⁸ See also Native Affairs Act 1920 and subsequent Native (Urban Areas) Act 1923 which empowered to declare African worker, 'idle, dissolute or "disorderly" and have them departed to the Reserves'.

of the population, were given 92.5% of the land in South Africa. The implementation of this Act also prohibited any blacks from working on 'white' designated land²³⁹.

After the Second World War, a sense of nationalism increased dramatically around the world²⁴⁰, forcing the British and the French to give independence to their former colonies. The fear was felt by the leaders of the South African government who implemented further legislation in favour of the white communities. Besides disallowing any mixed-marriages between the coloured communities and the whites, provisions were created to implement apartheid²⁴¹ which made it nearly impossible for anyone to remove any discrimination clause from the Constitution²⁴² and subsequent statutory law was created. In a South African context, apartheid was defined as, 'An official policy of racial segregation formerly practised in the Republic of South Africa, involving political, legal and economic discrimination against non-whites'.

Perhaps the most striking legislation was that of the Population Registration Act 1950 where all residents of South Africa were to be classified as Whites, Coloureds (as a result of mixed marriages), or Asians; which encompasses the ethnic Indians, Malays and Chinese communities and Blacks, whom are primarily known as Bantus. All citizens were issued with identity cards from the National Registration Department. This new scheme assisted in identifying categories of different races and assisted also in fixing salary scales for the respective races. In sports, Vorster, the then Prime Minister of South Africa began openly to interfere in sports. The government issued a Proclamation, known as the Group Areas Act 1965 which prohibited any mixed sports or even mixed audiences, except by permit. Prior to 1965, segregation in South African sport was organised by custom and not governed by any specific laws. Even where permits were granted, the organisers were required to separate spectators by

²³⁹ Country Studies (n234)

²⁴⁰ Matthew Ferraton, 'World War II and Deconolisation – Rise of African Nationalism in the Post-Second World War Era' (*Suite101:Online Magazine and Writer's Network*, 16 December 2009) <http://african-independence.suite101.com/article.cfm/world_war_ii_and_decolonization> accessed 27 March 2010

²⁴¹ Country Studies (n234)

²⁴² See different analogy between Israel and South Africa. 'Israel is not an Apartheid State' (*Jewish Virtual Library*, 2009) <http://www.jewishvirtuallibrary.org/jsource/History/Human_Rights/Israel_&_apartheid.html> accessed 8 September 2009

race and provide separate facilities for different race. Vorster's view on racial integration in sport was 'Conducive to friction and disturbance'.²⁴³

In contrast to South Africa, the period leading to the introduction of affirmative action in Malaysia was relatively peaceful. The defeat suffered by the British in Malaysia during the Second World War changed the political complexion of the country considerably. Malay nationalism grew and under the Federation of Malaya plan which lead to independence, 'special rights' would be given to the Malays and other indigenous groups in Malaya. As a consequence, vital question emerges as in the justification for creating the 'Orwellian theory' which suggests that 'all persons are equal, but some are more equal than others'.²⁴⁴ Malays, as argued in the Harvard Law Journal in 'Constitution of Malaya',²⁴⁵ needed protection against discrimination since they had been an economically depressed community and would be subjected to a state of inferiority if such protection was not afforded to them. Accordingly, the Malays were entitled to special privileges.

The Malays would have preference in relation to the areas of education, land quotas and other certain sectors of public services²⁴⁶. In the area of education for instance, bursaries, scholarships and educational grants would be allocated to the Malays in order to improve their standard to that of other races in Malaya. In the public sectors²⁴⁷, the rule generally was that no more than one quarter of entrants would be non-Malays. In relation to 'special rights', Malays and other indigenous people residing in Malaya would be recognised as 'sons of the soil' more commonly associated with the term 'bumiputra'.

²⁴³ Douglas Booth, 'Hitting Apartheid for Six? The Politics of the South African Sports Boycott' (2000) 38 Journal of Contemporary History 477, 480

²⁴⁴ Daniel Taylor, 'An Oxfordshire Tomb' (The Orwell Prize, 2003)

<<http://www.theorwellprize.co.uk/the-award/works/djtaylor1.aspx>> accessed 10 August 2009

²⁴⁵ 'Constitution of Malaya' (1959) 5 Harvard LJ 205, 770-772

²⁴⁶ See Federation of Malaya Agreement 1948, Clause 19(1)(d) where 'The High Commissioner will safeguard the special position of the Malays and the legitimate interests of other races in Malaya'

²⁴⁷ The definition of 'Public Sectors' excluding the police force and army. For more, see 'Federation of Malaya Constitutional Proposal' (*Malaysian Chinese Association*, April 2004)

<<http://www.mca.org.my/English/HistoryArchive/Pages/FederationofMalayaConstitutionalProposals.aspx>> accessed 11 August 2009

Under the proposed Article 8(2), it was suggested that ‘There shall be no discrimination on the grounds of race, descent ... relating to acquiring, holding or disposition of property or carrying on any trade, business or profession’. Under Article 8(5), there was an exception to the application of the proposed Article where it was mentioned that ‘This Article does not invalidate or prohibit any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula or reservation of a reasonable proportion of suitable positions in the public service’.²⁴⁸ The ‘special rights’ of the Malays have since been recognized.

It is safe to conclude that affirmative action practices have subsequently taken place in Malaysia. It was the intention of the federal government to improve the life of the Malays and other aboriginal communities in Malaysia since they only controlled 1.5% of the country’s national income as opposed to the ethnic Chinese whom owned 22% of the country’s equity while foreigners owned the remaining percentage in 1970. Thus, the National Economic Policy (NEP) was introduced and the ratio of ‘30:40:30’ was adopted where it was envisaged that the Malays and aborigines groups would achieve the target of 30% of the country’s equity, 40% for other races while the remainder would be for foreigners²⁴⁹. Despite such developments, nothing was mentioned specifically in relation to sport. In fact, Malaysia still took part in major sporting events, notably the British Commonwealth Games in 1970. Notwithstanding any differences between races in Malaysia, the athletes performed well although they failed to deliver any medals to the country.

The period of apartheid in South Africa was officially dismantled in 1990. Serious attempt to challenge the legitimacy of apartheid began in the 1960s, supported by external pressure from neighbouring countries. The decolonisation of Angola and Mozambique from Portuguese rule and the fall of the white rule of Ian Smith in Southern Rhodesia throughout the 1960s and late 1970s pressurised the South African government into make changes. These were considered to be important events as Angola and Mozambique embraced Marxist theories, which strongly denounced the

²⁴⁸ Karam Chand Vohrah, Philip Koh and Peter Ling Sie Wuong, *Sheridan and Groves on The Constitution of Malaysia* (5th edn, Malayan Law Journal 2005)

²⁴⁹ Jomo Kwame Sundaram, ‘The New Economic Policy and Interethnic Relations in Malaysia’ (*United Nations Research Institute for Social Development*, 1 September 2004) <[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/A20E9AD6E5BA919780256B6D0057896B?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/A20E9AD6E5BA919780256B6D0057896B?OpenDocument)> accessed 10 September 2007.

apartheid system. Limited reforms took place throughout the 1980s; where coloured and Asian communities acquired rights; however this failed to impress the African black community.

In the context of South African sports however, the dismantling of apartheid took place much earlier. The direct interference by the government in introducing the Group Areas Act prompted the United Nations General Assembly to call upon all States and international organisations to suspend sporting exchanges with South African sports bodies which practiced apartheid. Due to series of protests²⁵⁰ and campaigns to exclude South Africa from the international scene, Koornhof, the Minister of Sport finally acknowledged sport's role in international relations. He admitted that 'Play and sport are strong enough to cause political and economic relations to flourish and collapse'.²⁵¹ Nixon echoed similar sentiment, 'In a 1977 survey, white South Africans described the lack of international sport as one of the three most damaging consequences of apartheid'.²⁵² The notion of 'multinational sport', initially introduced in 1970, allowed black sportspeople to compete against white South Africans and this was extended to club level participation. By 1976, Koornhof crucially announced that codes could conduct racially-mixed trials to select representative national teams on the basis of merit. This approach enabled individuals such as Matthews Batswadi to be part of the athletics team in 1977²⁵³, Errol Tobias, the first black player to be selected to the Springbok rugby team in 1981 and Avril Williams and Chester Williams followed in 1984 and 1993 respectively.

Finally, under continued intense internal and external pressure, former South African president F.W de Klerk officially abolished apartheid in 1990 and held open elections, resulting in a victory for Nelson Mandela. He became the first black leader after 34 years of South African independence from Great Britain. The independence of the new South Africa also marked a new beginning for sport in the country. In evaluating

²⁵⁰ For instance, the Springbok tour to Britain in 1969 and Australia in 1971 proved a disaster because of public demonstrations. In 1970, Britain cancelled the proposed cricket tour when Afro-Asian countries threatened to boycott the Commonwealth Games. In 1974, a proposed Springbok tour of New Zealand had to be aborted because of public opposition and threat by India and African countries to boycott the Commonwealth Games.

²⁵¹ Booth (n243) 480

²⁵² Rob Nixon, 'Apartheid on the Run: The South African Sports Boycott' (1992) 58 *Transition* 66, 75

²⁵³ Booth (n243) 481

whether interracial sport and its politics contribute to the demise of apartheid, O'Meara stated, 'Racially-mixed sport undoubtedly contributes to Afrikaners' discarding their racial ideology ... and certainly made it easier for de Klerk to act (in dismantling apartheid)'.²⁵⁴ While sport was limited to segregated participation up until the mid-1970s, adaptation of the new constitution embraced the concept of equality would promote or encourage involvement of other underrepresented races and communities in South Africa. As a result, this gave birth to the principle of affirmative action in the modern South Africa. When the British and Irish Lions Rugby Union team toured South Africa in 1997, there was not a single black player representing South Africa during the test series which South Africa lost 2-1. In contrast, there were six black players in the Springbok team for each of the tests during the 2009 British and Irish Lions tour which South Africa won 2-1.

4.2.1.2 England and the United States

Similar to both Malaysia and South Africa, it is essential to understand the political background and history behind these two nations and the reasons behind their implementation of equal opportunities legislation. The political background highlights the significant political events and sports related events which contribute to knowledge underpinning the introduction of equal opportunities in England and the United States.

The United States has struggled with the issue of race and diversity since its foundation as a nation or its discovery by European settlers. Native Americans were subjected to violent dispossession and subsequent economic development was based on black slave labour forcibly brought from the African continent. In contrast to the situation in England, the 'debate about equal opportunity began a lot earlier in the United States and was led with great intensity'.²⁵⁵ The passing of the Fourteenth Amendment of the Civil Rights Act 1868 to the US Constitution effectively overruled Dred Scott's case²⁵⁶ and provide equal citizenship rights to blacks and other minorities in the country. The introduction of Civil Rights Act 1875 reinforced the

²⁵⁴ Nixon (n252) 78

²⁵⁵ Michael Werz and Julie Margetta, 'Affirmative Action in the United States' (*Heinrich Boll Stiftung*, July 2010) <http://www.migration-boell.de/web/diversity/48_2621.asp> accessed 4 April 2011

²⁵⁶ *Dred Scott v Sanford* 60 U.S. 393 (1857)

equal protection clause further by guaranteeing all citizens; regardless of colour and race, entitlement to the same treatment in any public accommodations²⁵⁷. This however was overshadowed in *Plessy v. Ferguson*²⁵⁸ where states could impose segregation so long as they provided similar facilities for all. The decision in *Plessy* resulted in the concept of 'separate but equal' treatment and the narrow interpretation of the law has since resulted in unequal treatment between different races and communities across the United States.

Sports however were not excluded from the application albeit not specifically mentioned in the Act. For example, the ruling enabled some African Americans such as Pollard and Marshall to play in the American Football league, the difference being that they were confined to the semi-professional leagues and were denied access to join the professional leagues. In addition, inherent prejudice among the sports' bodies, associations and establishments against the members of other ethnic groups could be recognised²⁵⁹ where, 'A superior athlete ... unless he be black, a recent immigrant, or too crude in social demeanor, could expect a little difficulty in finding a club that would grant him membership'.²⁶⁰ Despite this, it could be argued that one of the earliest motivations to end the concept of unequal status between individuals involved the achievements of Jesse Owens and other Afro-American competitors in the 1936 Summer Olympics in Berlin where they obtained 6 gold medals which actually accounted for 83 of the United States team's overall 167 total points²⁶¹ to which La Guardia, then Mayor of New York quoted their achievements as 'that all Americans should be proud of'.²⁶²

In contrast with the position in the England, immigration on a larger scale only began after the Second World War although 'there has been a significant presence of diverse

²⁵⁷ See Ashwini Deshpande, 'Affirmative Action in India and the United States' (*The World Bank*, January 2005)
<http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative_Action_India_Ashwini.pdf> accessed 3 April 2011

²⁵⁸ 163 U.S 537 (1896)

²⁵⁹ Brailsford (n135) 54

²⁶⁰ Jon Entine, *Taboo – Why Black Athletes Dominate Sports and Why We're Afraid to Talk About It* (Public Affairs Publication 2000) 141

²⁶¹ Entine (n260) 142

²⁶² Entine (n260) 187

ethnic minority groups in Britain throughout recorded history'.²⁶³ Politically, colour did not play much part when it comes to sport in England. The implementation of the Aliens Act 1905 and the Aliens Registration Act 1914 in England were intended to restrict employment in any matters involving the civil service and did not include sports' participation²⁶⁴. On the contrary, famous sportsmen like Ranjitsindje and Wharton were prevented from playing cricket and football respectively for the English national team²⁶⁵. Unlike South Africa in particular, discriminatory practices in the exclusion of ethnic minorities from participating in sports emanated from sports' organisations rather from government legislation²⁶⁶. An initially small migration increased during the 1950s to the United Kingdom with a substantial flow from the West Indies, India and Pakistan²⁶⁷. This continued to peak sharply before the first ever immigration controls were imposed in 1962²⁶⁸. As a result, the immigrants brought in new cultures that seemed alien to the English public. The large influx of ethnic minorities into England and Wales forced them to find new employment as part of their survival in a new country. Glass commented:

Many migrants to 1950s Britain became concentrated in manual occupations and low-paid shift-work ... (although) the educational attainment of most newcomers was quite high and probably marginally higher than the average in Britain. They faced discrimination on the labour market, in housing and were even denied access to leisure facilities.²⁶⁹

²⁶³ Nick Kimber, 'Race and Equality' in Pat Thane, Tanya Evans, Liza Filby et al. in *Equalities in Great Britain 1946 – 2006* (The Equalities Review, March 2007) <<http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>> accessed 30 March 2011

²⁶⁴ 'Aliens Act 1905 and 1919', (*Exploring 20th century London*) <<http://www.20thcenturylondon.org.uk/server.php?show=conInformationRecord.35>> accessed 14 August 2007. The Acts ensured that 'leave to land' could be withheld if the immigrant was judged to be 'undesirable' by falling into one of the four categories: - (a) If he cannot show that he has in his possession ... the means of decently supporting himself and his dependents ..., (b) If he is a lunatic or an idiot or owing to any disease of infirmity liable to become charge upon the public rates ..., (c) If he has been sentenced in a foreign country for a crime, not being an offence of a political character..., OR (d) If an expulsion order under this Act has been made.

²⁶⁵ See Jack Williams, *Cricket and England – A Cultural and Social History of the Inter-war Years* (2nd edn, Frank Cass 2003) 15-16

²⁶⁶ Brailsford (n135) 122

²⁶⁷ Steve Fenton, *Ethnicity – Racism, Class and Culture* (MacMillan Press Limited 1999) 204

²⁶⁸ C. Brown, 'Ethnic Pluralism and Public Policy' in *Ethnic pluralism in Britain: the demographic and legal background* by Glazer N and Young K (eds) (Aldershot 1986) 34-35

²⁶⁹ Ruth Glass, *The Newcomers: The West Indians in London* (Allen and Unwin 1960) 55

However, the second half of the 20th century witnessed a wind of change. In this respect, it is essential to highlight key political motivations in introducing anti-racial discriminatory legislations. Since the Second World War, the concept of equality was one of the key themes leading to the formation of the UN Charter (subsequently United Nations Universal Declaration of Human Rights) and a basis for the foundation of the European Community Groupings to ensure freedom from discrimination on account of religion, race, colour and national origin. While the Declaration served as a main platform for promoting equality amongst all races in the United States and England, internal political development within the countries started to take shape as well. The discussions might not appear to have had any direct impact when it comes to sport but on closer observation, they did have an indirect effect on the industry. Although the Declaration did not necessary imply enforcement in both England and the United States, it did however require some form of obligation from all member states to adhere to the Declaration. Any attempt therefore to prevent any person or individual from exercising their right to participate or being selected on the basis of their race would be against the Declaration.

Re-integration of sports in the United States started to take shape after the Second World War. The Double V Campaign²⁷⁰, started by the black and white integrationists, was aimed at promoting equality across the United States. Achievements accomplished by black communities with reference to sports made both white and black groups realise that it was in their common interests to promote such successes as symbolic of American opportunity. Evidence of integration in sports became clearer and to quote an example from the former owners of Boston Red Sox baseball team, Walter Brown, 'I don't give a damn if he's colored, stripped, plaid or polka dot. Boston takes Chuck Cooper of Duquesne'.²⁷¹

While members of the minorities started to make inroads into major sport such as basketball, baseball and American football, the court in *Brown v. Board of Education*

²⁷⁰ Double V Campaign was designed to linked victory over the racist doctrine of Nazis to victory over white racism at home. See further in 'These Men developed the Double V Idea' (*Smithsonian National Air and Space Museum*) <<http://www.nasm.si.edu/blackwings/hdetail/detailbw.cfm?bwID=BW0034>> accessed 16 August 2009

²⁷¹ 'Charles 'Chuck' Cooper Biography – Played for West Virginia State College and Duquesne, formed friendly relationship with Celtics Players' (*Brief Biographies*) <<http://biography.jrank.org/pages/2339/Cooper-Charles-Chuck.html>> accessed 8 September 2009. See also 'Walter A. Brown Bibliography' (*Naismith Memorial Basketball Hall of Fame*) <<http://www.hoophall.com/hall-of-famers/tag/walter-a-brown>> accessed 8 August 2009

of Topeka²⁷² played its part in creating vital steps to abolish remnants of segregationist policy. The Supreme Court held that the notion of ‘separate but equal’ applicable to citizens of the United States was unconstitutional. Repercussions of this decision elicited instant reaction across the entire country, where it marked the beginning of the end of segregation in the south and broadened the scope of assimilating various communities at school or college level in the north. This also paved way for members of different communities to gain entrance into high schools, colleges and universities. Such opportunities would enable them to participate in sports at a tertiary education level where they indeed started to make progress and prove themselves as worthy for selection to represent their respective educational institution. The rise of participation and selection of members of different communities, and in particular the black community was, as quoted by Wooden, ‘attributed to their ambitions to pursue for the best’.²⁷³

With domestic and external pressures growing, the government introduced the Civil Rights Act in 1964. The introduction of Civil Rights Act 1964 reaffirmed the commitment made by President John Kennedy in eliminating all forms of racial discrimination while treating all citizens as equals. It is however, vital at this stage to stress that while the implementation of the Act had some impact amongst other sectors in creating obligations for sports associations in the States to accept participants from all races, it still did not see sport as one of the tools to unite the nation.

In England, the government brought in Race Relations Act in 1965 as part of new legislation introduced to prevent racial discrimination in public places²⁷⁴. However, the Act excluded areas that most concerned migrants such as employment, housing, credit and financial facilities. Moreover, sport was not included as part of the process and hence, participation of athletes from other communities were virtually non

²⁷² *Brown v. Board of Education of Topeka* (1954) 347 U.S 483. The decision in Brown overruled the decision in *Plessy v. Ferguson*

²⁷³ Entine (n260) 231

²⁷⁴ Racial Discrimination was to be a criminal offence, punishable by maximum fine of £100, if ‘practised in hotels, public houses, restaurants, theatres, cinemas, public transport and any place of public resort maintained by public authority’. See further in Alan Lester and Geoffrey Bindman, *Race and Law in Great Britain* (Longman 1972). Also see ‘1965: New UK Race Law ‘Not Tough Enough’ (*British Broadcasting Corporation*, 2007) <http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_4457000/4457112.stm> accessed 19 August 2010

existent. Some of the key findings initiated by the Political and Economic Planning reported 'Widespread discrimination in employment, housing and services on the basis of colour ... with employers expressing concern that 'coloured' people would put them at a competitive disadvantage'.²⁷⁵ Continued influence from other European countries and the United States forced the British government to recognise that racial discrimination at all levels must be abolished and that every individual should be treated equally. With the introduction of the Race Relations Act 1976 a decade after the implementation of the previous Act, the idea of equal opportunity was finally realised. Ever since, participation of ethnic minorities had increased steadily in different areas. In English sport, the Act could be viewed as a driving force although the 'occasion almost passed without notice'²⁷⁶ when Viv Anderson became the first black player to play for the English national football team in 1978²⁷⁷ and in 1993, Paul Ince became the first black player to captain England. Since then, England has managed to produce many talents who took the country to a different level in sport.

One major conclusion can be drawn from the above observation. It is true that racial prejudice and stereotyping still occurs and remain prevalent; however, more opportunities have been afforded to the minorities in order to progress in sports. At the same time, it is vital to appreciate that although no concrete evidence exists to illustrate the real political motivation behind the anti-racial discriminatory legislations in sport alone; such a conclusion may still be drawn from the political development within the country itself and the image it portrays to other relatively new independent countries.

4.2.1.3 Summary

Malaysia and South Africa have adopted the theory of affirmative action or positive discrimination in order to address the issue of inequality to certain ethnic or racial groups. Previously, the participation of these groups have largely been confined or segregated to a certain field and to the extent of preventing the former from taking part in the management of a country. Therefore and based on the historical

²⁷⁵ David Smith, *Racial Disadvantage in Britain* (Penguin 1977)

²⁷⁶ '10 Key Moments in UK Race Relations' (*British Broadcasting Corporation*, 2009)
<<http://news.bbc.co.uk/1/hi/uk/1517672.stm>> accessed 5 April 2011

²⁷⁷ 'Viv Anderson – First black footballer to represent England' (*100 Great Black Britons*) Available at
<http://www.100greatblackbritons.com/bios/viv_anderson.html> accessed 21st August 2009

background of the country where the majority have been discriminated against, affirmative action was used in order to re-establish parity between the main ethnic group as well as the other minority races.

While South Africa's adoption of the affirmative action principle only occurred little more than a decade ago, Malaysia then known as the Federation of Malaya had assumed this concept immediately following her independence in 1957. Both countries have progressed since this time with Malaysia aiming to become a fully industrialised nation by the year 2020²⁷⁸. In the context of sports, both countries have continued to produce natural talents to shine at an international level. Such successes have added to the country's image, not only as possible economic giants, but also as powerhouses in sports. In particular, the participation of previously deprived groups has increased thus enhancing the concept of attaining equality of participation at the national level.

Unlike both South Africa and Malaysia, direct racial discrimination in England and the United States began much earlier. With reference to South Africa, such events took place during the early 20th century especially upon attainment of independence. In contrast, discriminatory events commenced actively during the 17th century in the USA. This was a time where racial discrimination was equated with the notion or term slavery.

England and the United States have come a long way to embrace the theory of equality of opportunities where it was only up until the 1960s that the British authorities recognised the need to afford equal treatment to its citizens regardless of race, colour and nationality. Similar events occurred in the United States where the first ever legislation affording equal protection to various races and communities was introduced in the 1960s, although the modern history of the States only started in the late 17th century with independence. Similarly, the sports' industry has also undergone tremendous changes in terms of participation. Opportunities are afforded to other races and previously deprived groups when it comes to selection for their respective teams.

²⁷⁸ 'The Way Forward – Vision 2020' (*Vision 2020*) <<http://www.wawasan2020.com/vision>> accessed 22 August 2007

Sustainability of these successes in sports largely reflected the government's policy to ensure that the primary legislation or secondary legislation in a country remained under constant review. At the same time, it was not necessary to demand such changes if it continues to procure benefits for the country generally. For instance, Malaysia had created some provisions benefiting the natives of the country which include the indigenous people as well as the Malays. It is without doubt that the level of participation by the Malays has increased tremendously since the formation of Malaysia as an independent state. A similar development can also be observed in South Africa where minority groups have benefited greatly under the affirmative action policy. The affirmative action and equal opportunity principles have been incorporated into every sector including sports. As a consequence, it is a proud moment for these young and democratic countries to showcase their achievements in sports; especially where such countries are made up of various racial compositions from different backgrounds and ethnic origins.

4.3 Sport as a Political Agenda

This section will consider the relationship between politics and sports and specifically the political influence that has helped to shape sporting participation. According to Lord Killanin, 'Everything in our lives is governed by political decisions. We have varying degrees of freedom, but that freedom is obtained by political decision. What we in sport and the Olympic movement need is the interest and support of politicians, not their interference'.²⁷⁹ The statement was made after the invasion of the Soviet Union into Afghanistan in December 1979. This prompted the withdrawal of the United States and some other countries from participating in the 1980 Summer Olympic Games in Moscow. Despite pleas from various international sports organisations, international politics have taken precedent over sports. In fact, politics have been inseparable from the modern Olympic Games since the decision was taken in 1894 to revive the Games in their modern format. Similar themes would be repeated during the 1984 Summer Olympic Games in Los Angeles which was subject to a Soviet boycott. Other examples would include the dispute between the 'Two

²⁷⁹ Hill (n59) 120. 'The Moscow Games of 1980'

Chinas’²⁸⁰ as well as the exclusion of South Africa from international competition. In addition, there was a boycott of the 1976 Olympic Games by African countries who protested against the participation of New Zealand in the Olympic Games after the New Zealand All Blacks rugby team toured South Africa in 1976²⁸¹. These are some important examples that can be used to illustrate the issue of political intervention in sports.

No longer considered independent, it is clear that both politics and sports have intersected. Until the present day, sports have also been utilised to foster closer ties between enemy countries which is also loosely defined as sports diplomacy. Other countries have engaged in sports for illegal means. The focus of this area of research, however, should be narrowed down to national or domestic politics and its effects on sport. This includes the participation of East German athletes during the Olympics. In order to illustrate the capability of East Germany against other countries, many athletes were given excessive drugs and prohibited substances to win medals for the country²⁸².

The intrusion of politics has enabled politicians to use sport as an event to advance their objectives. According to Houlihan, there are three different forms of political intervention in sports. Firstly, there is a need for political involvement to control or outlaw particular sports which are considered barbaric or simply known as ‘blood sports’. Secondly, sports can be seen as a means of improving or increasing military preparedness. Finally, state involvement in sport would facilitate social integration²⁸³. Social integration could cover a different range of policies and these include the integration of various ethnic groups or races. While these three forms of political intervention still remain relevant, the role of a state in facilitating social integration is perhaps one of the biggest challenges for any country. For the purposes of this

²⁸⁰ *ibid* 40-45

²⁸¹ ‘On this day 17 July – 1976: African Countries Boycott Olympics’ (*British Broadcasting Corporation* 2011)
<http://news.bbc.co.uk/onthisday/hi/dates/stories/july/17/newsid_3555000/3555450.stm> assessed 9 February 2011

²⁸² Entine (n260) 305-316

²⁸³ Barry Houlihan, ‘Politics and Sport’ in Jay Coakley and Eric Dunning (eds), *Handbook of Sports Studies* (Reprinted SAGE 2010) 216

research therefore, concentration will only be given to political involvement in promoting racial participation in sports within a country.

The term 'sports' is ubiquitous and has been associated with national and international competition. At a national level, competitors from different racial compositions strive hard to make it to the international level where they will then be the country's representatives. Even though Malaysia and South Africa adopted affirmative action while the United States and England applied the concept of equal opportunity, the main objective of such implementation is to ensure equality exists for all races or previously deprived groups. As mentioned, politics always play a major role in shaping the destiny of sports participation within a country. Therefore, affirmative action and equal opportunity could be seen as a political tool by ruling politicians to further the country's sporting image to the rest of the world.

There are two distinct repercussions by utilising sports as a political agenda when it comes to right to participate. To some countries, representation of nations' participants could be used to elevate a sense of racial pre-eminence in sports or to increase the number of participants from previously disadvantaged ethnic groups. For example, prior to the Second World War, Germany had been propagating the sense of pride in the Aryan race in every sector including sports participation. At this time, the Aryans had been made to believe in their invincibility against the other races or ethnic groups. Such culture resulted in the advancement of demographics when it came to racial classification of populations. Therefore, this resulted in the exclusion of other racial or ethnic groups from sports participation in Germany. As a consequence, we must accept that in most countries, the sports' industry has since been part of national policy formulation, in which representatives of a nations' athletics remain their primary concern.

The adoption of affirmative action theories by South Africa and Malaysia could therefore be seen as one of the measures taken to elevate a sense of a specific racial pride in sports. Since affirmative action affords more rights to specific ethnic groups, the politicians would view this as a success in increasing the rate of participation in sports. This also creates a sense of belonging and inclusion since the Malays and the indigenous peoples are native to the country. Importantly, this would also be an

opportunity to illustrate the group's capabilities internationally. In addition, improving the rate of participation of specific groups could also bring them on to an equal footing with other races which might have previously been dominant in the sport within the country itself. The role of politicians in forwarding the theory of affirmative action in sport also promotes social cohesion while projecting the image of being a successful multiracial country.

Another feature of this discussion would be the use of sports as a political factor to ensure only a single race is dominant within a country. This is synonymous with the theory of strict affirmative action where nearly all preferences are afforded to one particular ethnic group. Similar to the example of Nazi Germany, sports have been politicised to the extent that direct racial discrimination occurs against the other ethnic racial minorities. The concept of purification and the glorification of the Aryan race resulted in other ethnic groups being sidelined. This illustrates yet another example in which politicians have meddled in sports to further their own political objectives.

The institution of apartheid in South Africa is yet another example of local politicians utilising sports for their own agenda. The segregation of the majority of South African blacks was meant to demonstrate the supremacy of white athletes in sports and in particular, rugby and cricket. This does not mean that other South Africans were not permitted to participate; however, their participation would be confined to local and not international participation²⁸⁴. In this case, it could be deduced that such a measure may be considered as a strict affirmative action measure against the participation of local South African blacks as well as other coloured communities.

Secondly, politicians could utilise sports as a means to project the success of the nation in the field of sport in general. Perhaps the most notable example would involve sports' athletes from the United States and former Soviet Union and other developed nations. The desire to be the greatest sporting country in the world prompted massive funding, intensive investment and the introduction of specialist academies. For instance, Australia came close to employing Ekkart Arbeit, a former

²⁸⁴ See more in Peter Osborne, '*Basil D'Oliveira – Cricket and Conspiracy: The Untold Story*' (Little Brown Publication 2004) 2-11

East German doper as a coach²⁸⁵. As Hoberman quoted, 'Both the American and Russian presidents like to be portrayed in sports gear on television and in pictures. This sends out signals about strength of character and the health of their athletes'.²⁸⁶ The success of the nation could spur nationalistic feeling amongst fellow citizens in a country and create a sense of unity within the general population. In addition to funding, only the best athletes would be considered for participation. As a means of projecting the positive image of a country when in an international sporting competition, this notion is rather dismissive of attaining equal racial participation in international sports.

As opposed to affirmative action, the theory of equal opportunity mainly concentrates on having the best and most talented athletes to procure the success of a country in sports. In the case of England and the United States, it is true that every race or ethnic group is afforded an equal chance to take part; however the ultimate objective would not guarantee equal selection for all ethnic groups. Therefore, the theory of equal opportunity is heavily concentrated on delivering the best possible result for the country rather than ensuring a balanced team selection from all ethnic groups.

In addition, the introduction of equal opportunity could be used by politicians to heal racial gaps between the dominant and ethnic minorities, create new dynamic inter-relations and structural changes between various ethnic groups within a country. As mentioned earlier, although the most capable would only be chosen to represent their country in sports, this could be utilised as a measure to encourage other racial groups to become involved. Indirectly, equal opportunity could also be considered as redemption for previous injustices towards the minorities. The open door policy would undoubtedly encourage more ethnic groups to discover their potentials in sports and to be considered for selection in their respective national teams.

The main objective behind the adoption of equal opportunities theory is to project a successful multiracial country where every citizen shares similar values in giving their best for their country. The repercussion of this could increase new nationalistic

²⁸⁵ Karen Balling Radmer, 'When Sports Becomes a Political Tool' (Sport and Development) <www.sportanddev.org/data/document/document/173.pdf> accessed 23 August 2007

²⁸⁶ Ibid Sport and Development

feeling towards the nation and procure more success in its sports. In short, sports could therefore be seen as a means of assisting the process of nation building and discarding the segregationist concept which used to haunt such countries in the past.

As a conclusion, the politics of affirmative action and equal opportunity in these four countries play a very important role in shaping the demography of racial participation in sports. In both cases, this could ensure political success for the politicians. In relation to Malaysia and South Africa, these countries would witness more participation from previously disadvantaged ethnic groups and undoubtedly assist in achieving fairness in terms of selection to the national team. The same goes for both England and the United States. The concept of equal opportunity is intended to ensure that these countries remain competitive in any international sporting competition. This helps in projecting the image of the country as one of the powerhouses of sport.

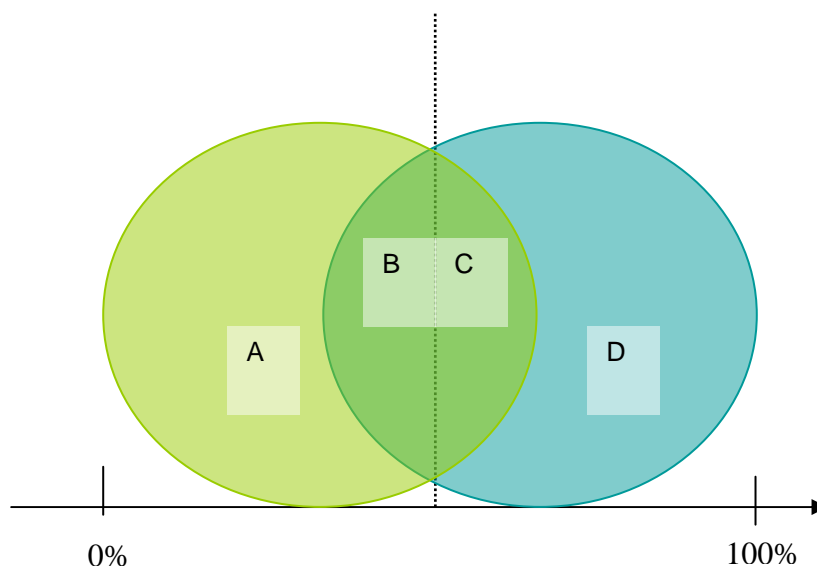


Chart 2: Rate/Chances of Participation for Ethnic Minorities

Legend:

A: Strict Affirmative Action

B: Medium Affirmative Action and Secondary Theory

C: Strict Equal Opportunity

D: Weak Affirmative Action and Assimilative Theory

The above chart illustrates the extent to which the politics of affirmative action and equal opportunity could affect the rate or chances of participation for certain racial or ethnic groups who do not benefit from the practice of affirmative action. In theory, countries that implement affirmative action could witness reduced chances of participation from certain ethnic groups and an increase from the other groups which benefit directly from the scheme. Similarly, the theory of equal opportunity would afford more opportunity for ethnic minorities to be selected for sporting teams. Based on the ability and skills of an individual, this is different to affirmative action which is centralised on issues regarding race and ethnic background.

On the contrary, such successes could come at a price. While politicians could utilise sports as a means to achieve their respective objectives, there is still another issue to consider. The theory of affirmative action might be successful in ensuring a fairer or increased participation for one ethnic group; however, it would be equally hard to achieve continuous sporting success at the same time. Similarly, countries might be able to achieve triumph in sports but at the same time, the success would be at the expense of ensuring equal racial participation and selection in sport. The next area will therefore explore and evaluate the role of politics of affirmative action and equal opportunity in procuring sporting success.

4.4 Internal Political Success and External Sporting Success within Countries

It has now been established that the political background of a country plays a huge role in sports. Since sports are subjugated by local politics, this would certainly affect the right of participation for some groups. As has been explored, the theories of affirmative action and equal opportunity create two separate alternatives as a means of affording more rights to previously disadvantaged groups and other ethnic minorities to be represented in sports. Either way, both theories seem to provide a satisfactory outcome in ensuring a balanced involvement for all races. The main question however is whether such an accomplishment could come at a cost of depriving others the right to be involved in, as well as, successes in sports.

The theory of affirmative action adopted in some countries might be celebrated as an achievement in improving the involvement of specific groups that benefited under the scheme. To the politicians, they have achieved internal political success in redistributing the rate of participation for all races in the country. While other races would still be selected to participate for their country, more concerted efforts would be given to previously deprived or disadvantaged groups. In countries such as Malaysia and South Africa therefore, this would undoubtedly increase the rate of ethnic Malays and black South Africans involved in sports. On the contrary, the theory of affirmative action has resulted in some reduction in selection for some races. Even though it could be justified based on a country's historical past, constant continuation of the theory of affirmative action could also deliver harm to the country in the long run.

Therefore, internal political success would result in possible racial discrimination against other ethnic groups in terms of selection to the national team. More importantly however, internal political success in implementing affirmative action may result in a deterioration of, or worsening standard of sport in a country. This would result in a feeling of discontent or lack of confidence by the locals towards the national sports team. There remains this possibility in the future although it would not be correct to conclude this at the moment. As a result, wider participation from specific ethnic groups in a country would be deemed irrelevant since the country would have lost the quality which is required to excel in sports at an international level. Inclusion of athletes or participants from ethnic groups which benefited under affirmative action might, however, be a celebrated success in the politician's aim of promoting sports to them. On the contrary, this could affect a country's sporting success as well as potentially reducing the participation of other ethnic groups.

In contrast, the theory of equal opportunity emphasises achieving the best by selecting the best talent available from diverse backgrounds. While all races would be given an equal chance to be considered, meritocracy would ensure that only the most capable would stand an opportunity to represent the country in any international competition. This could project a nation successful in sports and increase its image as one of best in the region or the world. Take England and the United States as a matter of illustration. Both countries remain very competitive in sports and their general outings in Olympic

Games illustrates that they are elite sporting nations²⁸⁷. As a result, the theory of equal opportunity ensures increased chances of external sporting success which arguably, is not the case with the theory of affirmative action.

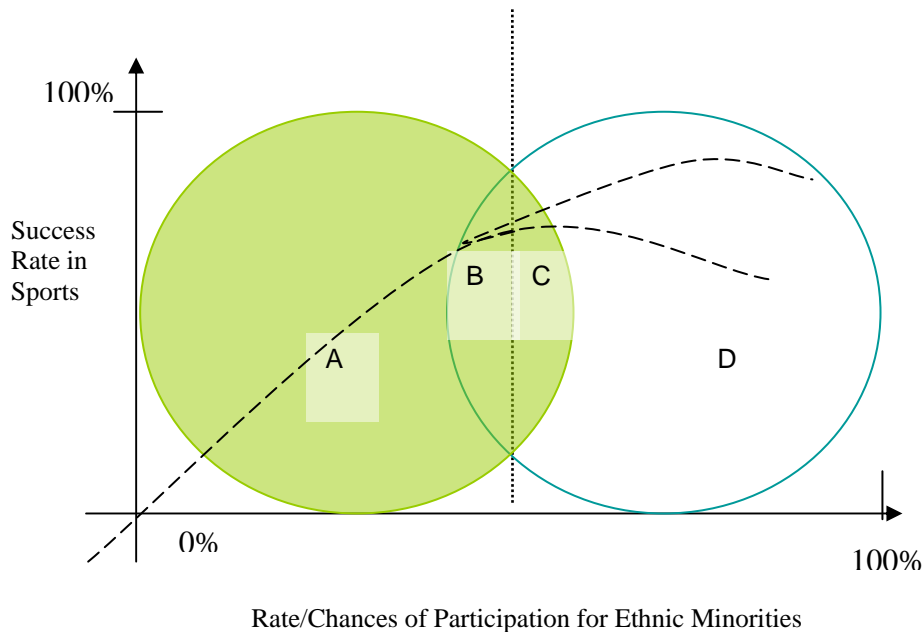
On the other hand, the will of the politicians in projecting an image of external sporting success could equally come with an adverse result. Unlike the theory of affirmative action, equal opportunity does not ensure a chance for all races and ethnic groups to be selected. Even though equal opportunity allows everyone to be involved and to take part, certain ethnic groups would not be represented or be selected. In theory therefore, external sporting success in this sense does arguably come at the expense of internal political success in getting every individual to be represented in the country.

In theory, it would not be possible for any country to satisfy both internal political success in increasing the rate of participation and external sporting success. From the evaluation, the theory of affirmative action could be used to achieve internal political success within a country whereas the theory of equal opportunity is seen as a measure to project external sporting success. Either way, a similar conclusion could be drawn from the above as it appears that both concepts of affirmative action and equal opportunity do have adverse effects.

While affirmative action could be portrayed as one of many measure to improve the rate of participation by some ethnic groups under the scheme, this could also result in other races losing their opportunity to be selected as part of the team. Crucially, the theory of affirmative action could also be seen as a major obstacle in preventing the development of sports while hindering the successes in major sporting arenas. Equally, although the theory of equal opportunity enables every individual regardless of race, colour and creed to take part, the selection process would be mainly based on merits. In other words, certain ethnic groups would not be represented in the team since they would not be considered as good enough to earn a place by value.

²⁸⁷ See later in Chapter 7

Chart 3: Rate/Chances of Participation for Ethnic Minorities and Success Rate in Sports



Legend:

- A: Strict Affirmative Action
- B: Medium Affirmative Action and Secondary Theory
- C: Strict Equal Opportunity
- D: Weak Affirmative Action and Assimilative Theory

This can be illustrated through the chart above. The success rate differs between theories of affirmative action and equal opportunity. In theory, it appears that the success rate in sports would be limited if the affirmative action measure becomes too strict. It is envisaged that affording privileges to certain ethnic groups would result in lesser sporting talents being identified and selected. As the chart moves towards equal opportunity, this may result in a higher success rate in sports. The concept of equal opportunity would enable more talented athletes or participants to be identified and contribute to the growth of the country's sports.

In conclusion, the political background of a country could directly or indirectly affect the rate or chance of participation of certain ethnic groups in sports. In some cases, the theory of affirmative action is only intended to assist in raising the standard of living for previously disadvantaged groups and does not include sports. However, the

political effects surrounding a nation would affect sports as well. In contrast, some countries have identified sports as one of the areas where the theory of affirmative action would have prevalence. Either way, the repercussions of this would certainly result in a declining rate of participation for ethnic groups which fail to benefit from affirmative action schemes. On the contrary, the theory of equal opportunity appears to give different results in comparison to affirmative action. More chances would be afforded which in turn may ultimately improve the success rate in sports. The rate or chances might vary, however, according to the degree of political interference. Having established the role of politics in sports the next chapter will consider and compare various legislations within the chosen jurisdictions and their closer relationship in sports.

Chapter 5 – Comparative Legal Studies and Analysis of Anti-Racial Discriminative Law and Regulations in Sports

5.1 Introduction

The inter-relations between politics and sports have been established to a point where sports' participation by any individual is greatly influenced by the legislation adopted within different countries²⁸⁸. Differing political circumstances in Malaysia, South Africa, England and the United States have resulted in these individual countries taking diverse stances in ensuring the equal participation of athletes comprising of various ethnic backgrounds. The theories of affirmative action and equal opportunity have therefore been included within the respective legislations to promote the rights and benefits of all races. As mentioned earlier however, both theories of affirmative action and equal opportunity assume a variety of forms²⁸⁹. These theories have also established the possibility of how the politics of affirmative action and equal opportunity²⁹⁰ could affect the rate of participation by various ethnic groups in sports.

In addition to the theories and the role of politics in sports, this chapter aims to evaluate and consider the relevant anti-racial discriminative legislation in the chosen countries. Malaysia and South Africa have taken the medium form of affirmative action in increasing the rate of participation for the ethnic groups that benefit under the scheme as well as in improving the status of other groups which can be classified as previously disadvantaged. In contrast, both England and the United States rely mainly on application of the theory of equal opportunity. For the purposes of this research, it is essential at this stage to consider relevant sporting regulation and its effect upon the major legislation in the event of conflicts.

²⁸⁸ See Chapter 4

²⁸⁹ See further in Chapter 3

²⁹⁰ See further in Chapter 4

5.2 Comparative Legal Studies between the Law and its Relationship in Sports

The evaluation of the law and its relationship to sports has been split into two different sections to facilitate an easier understanding for this chapter. The first section compares laws and conducts legal analysis on countries adapting to the principle of affirmative action while the second part concentrates on the relationship between the law and sports in countries adopting the principle of equal opportunity. A short summary will follow once the respective evaluations have been undertaken for each country.

5.2.1 Malaysia and South Africa – Front Runners in Affirmative Action

For the purposes of this research, focus will only be given to the relevant Articles as provided under the Malaysian and South African Constitution and associated legislation. The Constitution represents the highest form of law in both countries. As a result, any legislation that is inconsistent with the words and meanings of the Constitution will be set aside. Both Malaysia and South Africa share certain similarities in that both countries apply the theory of affirmative action in favour of the majority rather than of the minority²⁹¹.

Previously, sports participation in both countries was open to everyone. In South Africa however, this open access was restricted in 1948 with the enactment of the Population Registration Act 1950 resulting in the segregation of certain communities, removing the rights of blacks to participate in any form of international tournament²⁹². According to the former Prime Minister of South Africa, Verwoerd, ‘Sport has no special magic that exempts it from the list that covers birth, procreation and death’.²⁹³ If his statement is to be judged from a rightist point of view, which

²⁹¹ Allison Murhpy, ‘Affirmative Action in a Deeply Divided Society: Lessons from SA from Malaysia’s Successful Redistribution Policies’ (*All Academic Incorporated*, 1 September 2005) <http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/0/4/0/pages40408/p40408-10.php> accessed 10 March 2011

²⁹² Country Studies (n234)

²⁹³ Colin Tatz, ‘Race, Politics and Sports’ (*LA 84 Foundation*) <<http://www.la84foundation.org/SportsLibrary/SportingTraditions/1984/st0101/st0101c.pdf>> accessed 10 March 2011

prohibits any form of assimilation, then it would mirror the emphasis on continuing segregation for an indefinite period of time. As a consequence, it would be correct to conclude that racial policies surrounding the area of sports had, at that time, been incorporated as part of the wider political system.

Prior to the commencement of the new South African Constitution in 1993, which was subsequently revoked by the 1996 Constitution, South African sport was considered a 'localised event'²⁹⁴; since the nation was mostly barred from any form of international participation. For instance, they were prevented from participating in the 1957 African Cup of Nations due to the policy of sending an entirely white team to the event rather than assimilating black players into the squad. A widespread ban by international sports organizations as well as international bodies like the United Nations and the Commonwealth in the 1960s further confined South Africa to a status of isolation. This period of isolation also witnessed many talented sportspersons, such as Basil D'Oliveira, Zola Budd and Sydney Maree, leaving their country of birth in order to excel and compete at the highest levels elsewhere²⁹⁵. This restriction was in place until the birth of the new South African Constitution.

Participation rights for Malaysia, on the other hand, were confined to those who could afford to play sports. Although there is no hard or concrete evidence, the participation of any Malayan athletes was largely funded and sponsored by local sports guilds and clubs²⁹⁶. In fact, it is worth noting that some athletes even raised their own finance just to participate in the British Empire and Commonwealth Games of 1950. The first ever participation of Malaya in the 1950 British Empire and Commonwealth Games in Melbourne procured 2 gold medals for the country. Earlier, in their first ever inaugural competition, the Malayan badminton team had tasted their first international success when they beat the United States in the Thomas Cup final. Even during the drafting of the constitutional proposals for Malaya, sport was not considered to be part of the deliberations.

²⁹⁴ Tatz (n293)

²⁹⁵ Steve Cornelius, 'Levelling the Playing Field: Affirmative Action in Sport in South Africa' [2002] ISLJ 2

²⁹⁶ Olympic Council of Malaysia (n217)

5.2.1.1 The Constitution's View on Equality

The Federal Constitution of Malaya effectively came into being as the supreme law upon independence on 31st August 1957. The legislation pertaining to discrimination related issues was formally enshrined under Article 8, which was then known as the Federation of Malaya until 1963. Under Article 8(2) of the Federal Constitution, 'there shall be no discrimination against citizens on the ground only of religion, race, descent, or place of birth in any law relating to acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment'.²⁹⁷ Article 8 was further amplified under Article 12 which stated that there shall be no discrimination in any educational institution maintained by a public authority and in particular, the admission of pupils or students or the payment of fees²⁹⁸. The implication of this Article expressly prohibits any type of discriminatory practices in Malaysia.

Similar provisions could also be found within the 1996 South African Constitution which was enforced in 1997²⁹⁹. New provisions affecting areas concerning discrimination and equality were created together with other provisions designed to ensure benefits to all races in South Africa. Under Section 9(4) of the Constitution of the Republic of South Africa 1996, 'no person may unfairly discriminate against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic, or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.³⁰⁰ The above provision mirrors the general application of Section 9(1) where 'every citizen in South Africa is equal before the law and has the right to equal protection before the law'.³⁰¹

²⁹⁷ 'Law of Malaysia – Federal Constitution' (*Attorney General's Chambers Malaysia*, 2007) 21
<[http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20(BI%20text).pdf)>
> accessed 3 September 2007

²⁹⁸ Ibid. Attorney General's Chambers Malaysia 24-25

²⁹⁹ 'Constitution of the Republic of South Africa 1996' (*South African Government Information*, 2007)
<<http://www.info.gov.za/documents/constitution/1996/index.htm>> accessed 3 September 2007. The Constitution of the Republic of South Africa 1996 was approved by the Constitutional Court on the 4th of December 1996 and took effect on the 4th of February 1997 replacing both the 1983 (Tricameral) Constitution and 1993 Interim Constitution. For more on the 1993 Interim Constitution, refer to
<<http://www.info.gov.za/documents/constitution/93cons.htm>> accessed 3 September 2007

³⁰⁰ Ibid South African Government Information.

<<http://www.info.gov.za/documents/constitution/1996/96cons2.htm>> accessed 3 September 2007. See further in Cornelius (n295)

³⁰¹ South African Government Information (n285)

Therefore, both the Constitutions of Malaysia and South Africa provide for equality between citizens. The construction of this Section was largely influenced by the discrimination provisions in the United States and Malaysia. In South Africa, Section 9 has removed all direct discriminatory legislations which were in force during the years of apartheid. In interpreting this Section, it would appear that everyone should be granted fair, equal rights to participation in sports and that no one should be excluded from participation due to his or her race, ethnicity or background.

However, the general equality application of Article 8 of the Malaysian Federal Constitution and Section 9 of the South African Constitution of 1996 is subject to Article 8(5)(c) of the Malaysian Federal Constitution as well as Section 9(5) of the South African Constitution of 1996. In Malaysia, Article 8(5) stated that, ‘This Article does not invalidate or prohibit ... any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation ... of a reasonable proportion of suitable positions in the public service’.³⁰² The definition of aboriginal was to include the aborigines of the Malay Peninsula. This wording however would not include the Malays. It is vital to note that all Articles as highlighted above are equally applicable to North Borneo (known as Sabah at present), Sarawak and Singapore³⁰³ upon the accession of these states to form the Federation of Malaysia in September 1963, although the latter was granted autonomy in areas concerning immigration and labour issues.

The application of Article 8(5)(c) can be read together with Article 153 of the Federal Constitution. Article 153 provides that it is the ‘responsibility of the Yang Di-Pertuan Agong or His Majesty the King of Malaysia to safeguard the special position of the Malays and natives of any of the States of Sabah or Sarawak and the legitimate interests of other communities’.³⁰⁴ This reference to the ‘legitimate interests of other communities’ indicates that there are limits to constitutionally valid discrimination

³⁰² Attorney General’s Chambers Malaysia (n297)

³⁰³ Accession of Singapore as part of the Federation in September 1963 lasted for nearly 2 years. On the 9 August 1965, Singapore left the Federation to become a separate and independent republic within the British Commonwealth.

³⁰⁴ Attorney General’s Chambers Malaysia (n297). See Article 153(1) Malaysian Federal Constitution

under Article 153 of the Federal Constitution, thus opening up the possibility of judicial review of particular policies. Even if it is considered to be discriminatory, it is beyond reasonable doubt that Article 153 legalized the affirmative action practices in Malaysia. In addition, the Article also emphasised the need for the reservation or allocation of certain quotas for Malays and aborigines in the operation of any trade or business. Similar provisions were also given to the Malays when seeking positions in the federal public service, scholarships, and other similar educational or training privileges³⁰⁵.

In South Africa, Section 9(5) of the 1996 Constitution provided an exception to the general prohibition of discrimination. The Section emphasised that ‘any discrimination is unfair unless it can be established that such discrimination is fair’.³⁰⁶ On one hand, this provision might suggest that it is a form of discrimination. On the other hand, such a statement might not suit the purpose of the definition since Section 9(5) maintains the need for equality in a qualified way. To scrutinize this issue further, the above Section adopted affirmative action practices. Comparatively, exceptions exhibited under Clause 5 of the Section do not make any difference to Article 8 exceptions under the Malaysian Federal Constitution. While everyone ought to be treated equally per se, there may be instances where one group, be it an underprivileged group, ethnic or racial, would be given preference over others.

Application of Section 9(5) of the South African Constitution of 1996 is supported by Clause 2 of the similar Section. The trajectory of Section 9(2) mainly aims at promoting the achievement of equality. Hence, one of the ways to achieve the objective would be to bring all races to the same level as those provided under the statute. It is interesting to note that Section 9(2) uses the phrase ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories or persons, disadvantaged by unfair discrimination may be taken’.³⁰⁷ In a literal sense, this could mean reverse discrimination in favour of the blacks over the whites. On the contrary, it is generally taken as the underrepresented or

³⁰⁵ Attorney General’s Chambers Malaysia (n297)

³⁰⁶ South African Government Information (n299)

³⁰⁷ South African Government Information (n299)

underprivileged groups or races being given preferences over the others which does not amount to any strict interpretation of discrimination.

Both Section 9(5) and (2) of the Constitution of the Republic of South Africa of 1996 must be read together in conjunction with Section 36(1) which refers to the limitation of rights. In short, the former could be equated to the exception of the general application under Section 9. Under Section 36(1) of the Constitution, it provides that 'fundamental rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.³⁰⁸ Thus, this Section serves to limit the applicability of Section 9(5) and (2) of the Constitution. Therefore, unfair discrimination, as stated under Section 9(2) could only be decided upon by judging the nature and extent of the limitation, the relation between the limitation and its purpose and other pertinent circumstances. The repercussion of this would be to ensure that no one could use the Section as a tool of abuse against other parties. In *President of the Republic of South Africa v. Hugo*³⁰⁹, it was suggested by the Supreme Court that the factors that would or could justify interference with the right to equality under the limitation clause should be distinguished from those relevant to the enquiry as to whether there has been unfair discrimination under the quality clause.

In sports, it could be the case that more South African blacks or potential athletes are admitted to sports academies to reflect the proportion of the total population of the country. Section 9(2) of the 1996 Constitution supported the justification under Section 36, arguing that equality could only be achieved if efforts were taken to protect the interests of the groups disadvantaged during the apartheid era. To summarise, both Section 36 and Section 9(2) of the 1996 Constitution could be compared to Article 153 of the Malaysian Federal Constitution. On the other hand, Section 9(2) must always be read within the context of Section 9 as a whole. Therefore, this provision provides a justification for the applicability of Section 9(5)

³⁰⁸ South African Government Information (n299) Also see De Waal et al 187-215

³⁰⁹ [1997] (4) SA 1 (CC) 1997 (6), BCLR 708 (CC)

of the 1996 Constitution. As a consequence, equality would be ‘*set aside*’ in certain situations in order to promote and pursue a democratic society³¹⁰.

However, similar questions arise in relation to the Section’s specific application to sports. These Sections are primarily endorsed or introduced for the common area of employment, housing or education. For example, Section 29 of the 1996 Constitution provides a list of factors to take into consideration when it comes to the subject matter of the advancement of education. Amongst others, it provides ‘... the need to redress the results of past racially discriminatory laws and practices’. Under Section 26 which relates to housing, it is explained that everyone has the right to housing but that the ‘state must take reasonable legislative and other measures ... to achieve progressive realization of this right’.³¹¹ For that reason, the strict and main objective of the South African constitution focuses on the area which is considered basic and vital towards the building of the new South African nation. Theoretically, it would be correct to summarise that sport has been included as a result of implication in the South African example rather than being guided by any form of legal rules or legislation.

On the contrary, the constitutional provisions under Section 9 extend far beyond the workplace and ‘are aimed at transforming the entire South African society of which sport represents a microcosm’.³¹² The release of the White Paper on Sport and Recreation in South Africa entitled ‘Getting the Nation to Play’ emphasized the need for Section 9 of the South African Constitution to remove any obstacles to equality in sport and to promote it.³¹³ Therefore, it appears that the wording of Section 9 does have strong implications for sports although the main and sub-provisions of the Constitution do not specifically include sports. One of the main aims of the White Paper is to address ‘The imbalances between advantaged, predominantly urban communities and the disadvantaged and largely rural communities’.³¹⁴ Conversely, Article 153 of the Malaysian Federal Constitution was mainly confined to

³¹⁰ South African Government Information (n299) See more on <http://www.info.gov.za/view/DownloadFileAction?id=98327> accessed 6 September 2009. The new Constitution of the Republic of South Africa of 1996 has since been amended several times, the last being the Constitutional Sixteenth Amendment Act in 2009

³¹¹ South African Government Information (n299)

³¹² Cornelius (n295)

³¹³ ‘White Paper – Getting the Nation to Play’ (*Sport and Recreation South Africa*, 2007)

<http://www.srsa.gov.za/WhitePaper.asp> accessed 8 September 2008

³¹⁴ *ibid.* Sport and Recreation South Africa

employment in the civil service and while quotas were generally allowed as per the provision under the Article³¹⁵, it remained as a theory, the main reason being that the then Prime Minister of Malaysia, Tunku Abdul Rahman adopted laissez-faire policies. As a consequence, any sort of affirmative action practices in Malaysia were kept to the minimum.

In comparison to South Africa therefore, what were the implications of such Articles in sports? As the theory stands, sport should have nothing to do with the political development of a country since the latter was primarily involved in improving the economic and social aspects of the country³¹⁶. On the other hand, practicality seems to preside over theory. As a consequence, it is essential for us to consider the implication of the law in the area of sports. Prior to the Federation of Malaya Agreement 1948 and immediately after, sports remained as a separate and independent entity, free from any form of political intervention³¹⁷. The lack of any interference from the federal government enabled sports in Malaysia to flourish since only the best were selected to participate in any sporting events held internationally. Essentially, matters in relation to sports were mainly the responsibility of the British Colonial Office in London. The main focus, as mentioned above, had been in regard to matters pertaining to national language, national religion as well as special rights afforded to the Malays in several other sectors.

Even after the enactment of the Malaysian Constitution post-independence, Article 8 still did not cover sport. Matters in relation to public services, the allocation of Malay reserved land, issuing permits or licenses for the operation of certain businesses and scholarships and bursaries as forms of aid for educational purposes did not strictly encompass sport³¹⁸. With the establishment of the Malayan Olympic Council (MOC) in 1957 (thereafter OCM after 1963), the status quo of Malayan sports remained unchanged. Moreover, the founding of various sports bodies or association such as Football Association of Malaya (thereafter Football Association of Malaysia (FAM)), Badminton Association of Malaysia (BAM) and others did not specifically impose

³¹⁵ See provisions under Article 8 of the Malaysian Federal Constitution

³¹⁶ See earlier in Chapter 3

³¹⁷ There is no specific provision which includes sport under the 1948 Agreement.

³¹⁸ See earlier in relation to the interpretation of Articles 8, 12 and 153 of the Malaysian Federal Constitution

any restriction on racial participation based on the proportion of the overall population in Malaysia.

On the other hand, rising tensions between various races in Malaysia began to raise serious questions about the adequacy of such rights or privileges afforded to the Malays. Continued propagation of the ‘Malaysian Malaysia’ concept and some racially inflammatory remarks made by the former Prime Minister of Singapore, Lee Kuan Yew (then Chief Minister of the State of Singapore) that demanded equality between races resulted in a strained relationship between the Malay, Chinese and Indian communities in Malaysia. Moreover, Indonesia’s internal problems between the pri-bumi (equivalent to the term ‘bumiputra’ in Malaysia) and ethnic Chinese contributed to Malay distrust of the ethnic Chinese. Suspensions between these races were increasing and the notion of a common nationality aiming to unite these races seemed to evaporate. In addition, it would be fair to mention that most of the Malaysian athletes at this time were ethnic Chinese and Indians³¹⁹. Despite attempts by the federal government at every level to ease the feeling of discontent among the population, the inevitable occurred.

5.2.1.2 Strengthening Legislation on ‘Equality’ – Affirmative Action Supplements

Racial clashes involving Malays and other races in Malaysia in 1969 added political leverage to the provisions under Article 153 of the Malaysian Federal Constitution. A notable effect of the 1969 riots was Article 153 whereby the notion of ‘special privileges’ was extended to tertiary educational institutions³²⁰. Since this incident, the government introduced the Constitutional (Amendments) Act more commonly known as ‘Rukuntetangga Amendments’ in 1971 which altered the complexion of the Malaysian Federal Constitution. The government re-asserted its position in relation to affording special privileges to the Malays and other aboriginal groups. No individuals would be allowed to question such rights being afforded to the former and everyone was prohibited from raising the issue or questioning the legitimacy of Malay as a national language. Additionally, the right to bursaries or scholarships was extended to

³¹⁹ See charts later in Chapter 6

³²⁰ Article 8(A) of the Malaysian Federal Constitution

tertiary education for the Malays³²¹. Under this new ‘impossible’ requirement to amend the Federal Constitution³²², the act of questioning ‘special rights’ or ‘special privileges’ conferred to the Malays constituted an offence under the Sedition Act 1948 amended in 1971³²³.

The position of promoting affirmative action in South African sports accelerated faster in comparison to that in Malaysia. Post adaptation of the Republic of South African Constitution of 1996 proved to be a testing ground for sport. Barely a year after the implementation of the 1996 Constitution, the National Sports Council and South African Sporting Authorities requested all sporting associations in the country to adopt the principle of fixed quotas and reservations to the generally underprivileged and underrepresented groups and races³²⁴. It was envisaged that the future of sport’s officials and participants in South Africa should be three quarter black due to the country’s demographic structure. Despite such pressure, the suggestion was not implemented as part of any new legislation governing the area of sports. The main argument presented was that it would result in another form of reverse direct discrimination against the members of the minority, meaning in this case the whites. Rather, it has since become a custom or practice that every sports in South Africa should at least grant or allocate some slots to the blacks and other underrepresented communities or races in South Africa.

Within two years of the introduction of the new South African Constitution, the government enacted the Employment Equity Act 1998. In comparison with the

³²¹ Leon Comber, *13th May 1969 – A Historical Survey of Sino-Malay Relations* (2nd edn, Graham Brash Ltd 2001) 80-81

³²² New rules would require two thirds’ parliamentary majority, before they could be adopted or amended or repeal.

³²³ Under Section 3(1)(e) and (f), sedition occurs when a person ‘promote feelings of ill-will and hostility between different races or classes of the population of Malaysia’ or ‘To raise question, directly and indirectly of any real or potential matter, right, status, position, privilege, sovereignty or prerogative established and protected by the provisions of the Federal Constitution.’

Section 4 of the Sedition Act specifies that anyone who ‘does or attempts to do, or makes any preparation to do, or conspires with any person to do’ an act with seditious tendency, such as uttering seditious words, or printing, publishing or importing seditious literature, is guilty of sedition. It is also a crime to possess a seditious publication without a ‘lawful excuse’. The act defines sedition itself as anything which ‘when applied or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as having a seditious tendency’. See further in Attorney General’s Chambers Malaysia.

³²⁴ Richard Chappell, ‘Race, Gender and Sport in Post-Apartheid in South Africa’ (2005) 8(4) *The Sport Journal* <<http://www.thesportjournal.org/article/race-gender-and-sport-post-apartheid-south-africa>> accessed 11 September 2010

Rukuntetangga Amendments or other legislative provisions in Malaysia as highlighted below, the main objective of the 1998 Act was to achieve equity by 'promoting fair treatment through the elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment'.³²⁵ Crucially, this had more far reaching impact for sport. This was provided for under Section 13 of the Act. Moreover, Section 15 also provided an obligatory duty on sports governing bodies or any designated employer to implement affirmative action policies that would ensure equitable representation in all occupational categories. The result would enable the National Sports Council and South African Sporting Authorities to exercise their intention to reserve a proportion of places for certain designated groups. According to Cloete, this meant that 'all levels of employment from administrative, support and coaching staff to players must reflect equitable representation'.³²⁶

New policies taken by the South African Sports Confederation and Olympic Committee (SASCOC), which was formed in November 2004, reflects to a certain extent the South African Constitution. While they recognized the need to unite and commit to a system based on principles of fairness and equal opportunity, the former also recognized the need to redress the issue of imbalance as a result of apartheid. As part of the Charter: 'Towards Equity and Excellence in Sport – 2005-2014: A Decade for Fundamental Transformation and Development',³²⁷ they confessed of the need to dismantle the legacy of apartheid, inequality, disparity and under- development. Thus, the aim was seen to promote equitable participation at all levels.

The most recent legislation in South Africa has direct applicability to the nations' sport. The National Sport and Recreation Amendment Act 2007 amongst others

³²⁵ Section 13(1) of the Employment Equity Act 1998 provides that 'Every employer must, in order to achieve employment equity, implement Affirmative Action measures for people from designated groups in terms of this Act'.

Sub-section 2 of the Act provides that 'A designated employer must consult with its employers as required by Section 16'; 'Conduct an analysis as required by Section 19'; 'Prepare an employment equity plan as required by Section 20' and 'Report to the Director General on progress made in implementing its employment equity plan'. See further in South African Government Information (n285)

³²⁶ Cloete and Cornelius (n2) 92

³²⁷ Moss Mashishi, 'Towards Equity and Excellence in Sport' (SASCOC, 30 August 2005)

<<http://images.supersport.co.za/Towards%20Equity%20&%20Excellence%20in%20Sport.doc>>
accessed 14 September 2007

provide that the Minister could intervene in any sports' dispute. Section 13(5) and (8) of the 2007 further states that the Minister could intervene 'In any dispute, alleged mismanagement, or any other related matter in sport or recreation or any other related matter in sports'.³²⁸ This includes any non compliance with guidelines or policies issued in terms of Section 13 or measures taken to protect or advance persons or categories of persons disadvantaged by unfair discrimination. As a result, South Africa has taken proactive steps towards enforcing affirmative action practices in sports.

In contrast, the affirmative action programme in Malaysia has taken a relatively slower approach. It was the introduction of the Second Malaysian Plan (Rancangan Malaysia Ke-Dua), which coincided with the introduction of the NEP that had some indirect implications for sports. With the plan, the government aimed to create a Malay commercial and industrial community through what was called 'wholly owned enterprises and joint ventures.' The former would result in the government '... limiting access of the Chinese and Indian population to universities, public jobs and public money, but would also actively intervene in the economy to give (Bumiputra) a bigger piece of business action'.³²⁹ The adaptation of such policy was in line with the main objective of the plan which was to ensure handicaps faced by the Malays were overcome.

Since then, the area of sport has been incorporated, though not as a specific part of the NEP. As discussed, sport is not covered by the new policy, which in theory would imply that its independence remains intact. On the other hand, reality proves to be different. The concept of juridification resulted in the law interfering into the sporting sphere. This occurred due to a variety of reasons. Firstly, there remains a strong relationship between employment, contractual issues and sport. In order to be member of any sports academy or school, it is beyond doubt that 'race' will be considered prior to being accepted. In addition, sport is, to a certain extent, associated with the commercial or business aspects of a country. The ever growing importance, and glamour of, sport would undoubtedly result in the former being considered as one of the principal inclusions of the sector in the NEP (thereafter known as National

³²⁸ South African Government Information (n299)

³²⁹ Asma Abdullah and Paul Pedersen, *Understanding Multicultural Malaysia* (Pearson 2003) 44

Development Policy (NDP) in 1990-2005 and the New Version of National Economic Policy in 2005-2020).

Secondly, the implementation of the Second Malaysian Plan and other subsequent plans had major implications in relation to University admission policies. It is essential to note that Universities, as educational institutions in a country, have played an important role in creating sport academies within the organizations³³⁰. Alteration of quotas or ratios for university admissions in Malaysia, which theoretically stood at 67:33 (67% for Malays and aborigine groups and remaining 33% for other Malaysian ethnic racial groups), would create an instant change to the demographics of participation in sport. Practically however, one report in 2005 revealed that Malays and aboriginal groups in fact had formed nearly 75% of the total admission to the Universities in Malaysia³³¹. The repercussion of this could result in the government missing out on potential and capable sports persons; because of such attempts to reach the said target for university admissions. Potentially, this would also cause many other talented athletes or sports persons to seek experience overseas.

Thirdly, political adjustments in a country always play a role in altering the status quo of all sectors and industries. Unfortunately, the sports industry remains one of these. The aftermath of the May 13th incident as well as the introduction of the NEP in 1970 created new legislations and by-laws, which even though not related to sports, had some influence upon it. For instance, the formulation of Akta Lembaga Kemajuan Ikan Malaysia 1971 as amended (Malaysian Fisheries Development Act 1971), Akta Lembaga Padi dan Beras Negara 1971³³² (National Paddy and Rice Act 1971) and Akta Perbandaran Pembangunan Bandar 1971³³³ (National Urban Development Act 1971) were intended to alleviate or improve the standard of living for Malays in general.

³³⁰ 'Dasar-dasar Kerajaan Malaysia – Tinjauan Menyeluruh' (Policies of the Malaysian Government – A Complete in depth Overview), (*Jabatan Kerja Rakyat*)
<<http://rakan.jkr.gov.my/cawangan/Cjalan/documentation/documentation/PTK/DasarKerajaan.pdf>>
accessed 20 September 2007

³³¹ Leanne Goh and Gavin Gomez, 'All those with CGPA of 4.0 get to study medicine' (*TheStar Online*, 25 June 2005) Available at
<<http://thestar.com.my/news/story.asp?file=/2005/6/25/nation/11321972&sec=nation>> accessed 25 August 2007

³³² Repealed and replaced with Lembaga Padi dan Beras Negara (Successor Company) Act 1994

³³³ Repealed and replaced with Perbadanan Pembangunan Bandar (Successor Company) Act 1996

At the same time, it could also be interpreted that these Acts were created for the benefit of Malays and other aboriginal groups in Malaysia. As stated under the National Urban Development Act 1971, the primary objective would be to promote and undertake urban development projects in certain areas of Malaysia with an aim to achieve an equitable distribution of opportunities among Malays and various races in the fields of commerce and industries, housing and other activities³³⁴. The repercussions of new legislative provisions would indirectly lure the Malays and other underrepresented groups in Malaysia to adopt a theory that all other sectors would soon be covered by and that they would receive advantages over the other races in Malaysia.

With reference to sport, the National Sports Council of Malaysia Act 1971 as amended (Akta Majlis Sukan Malaysia 1971) was implemented with a view to improving and standardising the nation's sporting activities. This is embedded in the main objective in which the Council would engage in the development of sports within and outside Malaysia; where international co-operation could stimulate the development of the country. Amongst other provisions, Section 4(2) of the 1971 Act provides that 'The Council shall have the power to require governmental departments, governmental and non-governmental agencies dealing in sports to submit reports regarding their activities'³³⁵ to the Council.

Thus, bodies ranging from the FAM and the State Sports Council to small localized clubs such as the Penang Swimming Club would be covered. In a literal sense, this provision did not require any parties to adhere to affirmative action practices. On the other hand, standardisation of sporting activities and organizations in a country could imply a step towards the monitoring of every sports association, guild and club in Malaysia in terms of participation by Malays. Even though no concrete evidence could be deduced, however, the basis for such an interpretation is largely based on social contract between the government and its citizens. The social contract could be derived and connected to the post May 13th incident, where the government had

³³⁴ Section 3(b) of the National Urban Development Act 1971

³³⁵ Attorney General's Chambers Malaysia (n297)

created a blanket provision disabling any citizen to doubt any policies conferring additional fringe benefits to the Malays and other aboriginal groups.

Arguably, the implementation of legislation in favour of affirmative action involving sports in South Africa occurred due to massive oppression against the blacks during the apartheid period. Chappell³³⁶ in 2005 suggested that the legacy of apartheid in South Africa had deprived townships of a sports infrastructure, and that they remained under-resourced in terms of sporting facilities. Further to his case study, he observed that children in a coloured school played netball on a tarmac area; some patch of green for them to play cricket yet lacking in the apparatus to practice their skills. From such an observation it is almost certain that the law, albeit not directly applicable in the area of sport, would seek to protect groups that were directly affected under the apartheid era. Thus, unless there were changes in the political, social and economic conditions, a situation of alleviating the status of sport as an entity for all races in South Africa, in particular for the black population, would not materialize. In contrast, the ethnic Malays were not subjected to violence and oppression in Malaysia. Therefore, it was more concerned with deprivation of opportunity since these groups were economically disadvantaged in the past.

Upon equating the application of affirmative action policies to sports via the NEP, it is vital to re-visit and assess the practical application of Article 8 of the Malaysian Federal Constitution and other relevant sub-Sections. Though the example given might not be relevant to sport, it will nonetheless provide us hindsight on its applicability to sports' related issues if it arises in the future. Despite the contrary view as provided in the literal interpretation of Article 8, the real application guarantees that a person of the same class should be treated the same as another person in the same class³³⁷. To simplify this, a Malaysian of Chinese descent will be treated equally as regards to other ethnic Chinese and possibly ethnic Indians, however a separate class applies in relation to the Malays and aboriginal groups.

³³⁶ Chappell (n324)

³³⁷ See Kevin Y.L Tan, Li-Ann, Thio, *Tan, Yeo and Lee's Constitutional Law in Malaysia and Singapore: Positive Discrimination under the Constitution* (2nd edn, Butterworths 2007) 769

In *Datuk Haji Harun bin Haji Idris v. Public Prosecutor*³³⁸ Lord President Suffian asserted that ‘Equality provision is not absolute ... It does not mean that all laws must apply uniformly to all persons ... Discrimination is permitted within Clause 5 of Article 8’.³³⁹ The above decision provides a clear precedent in that, to bring an action for discrimination, it appears that the Malays do have the ‘upper hand’ in comparison with ethnic Chinese and Indians. On the contrary, there is a note of caution that we ought to observe, as at the same time, Judge Suffian stressed that when interpreting Article 8, there must be a ‘careful discrimination based on classification’. Clearly, the application of Article 8 of the Federal Constitution could be viewed as out of proportion, thus causing floodgate arguments to emerge if not scrutinized properly.

The NEP’s tenure came to an end in 1990 yet doubts remain as to its practicability. Despite lobbies for substantial scrapping of the affirmative action policies, the government introduced a NDP³⁴⁰. The former reflects largely on the predecessor and thus, the status quo in relation to the special position of the Malays and aborigines remained unchanged. In addition, the subsequent Malaysia Plan, which is conducted every 5 years, still emphasized national progression while stressing the need to maintain benefits for the Malays and other aboriginal groups in Malaysia. Sport too, progressed with such policies, the only difference being that the application was not spelled out as part of the Malaysian Plan³⁴¹ nor through the NDP. Notable differences emerged however, with more sports clubs and schools being introduced to tap in to the talents of Malaysians. The only legacy left by the introduction of such policies is the fact that Malays and aboriginal groups are given additional ‘benefits’ in terms of their participation in sports.

5.2.1.3 Conclusion

³³⁸ [1977] 2 Malayan Law Journal, 155, 165

³³⁹ Vohrah, Koh and Ling (n248)

³⁴⁰ The Malay share of the economy, though substantially larger, was not near the 30% target according to government figures. In its review of the NEP, the government found that although income equality had been reduced, some important targets related to overall Malay corporate ownership had not been met. See further in ‘Dasar-dasar Kerajaan Malaysia – Tinjauan Menyeluruh’ (n330)

³⁴¹ The main purpose of the Malaysian Plan is to assess, project the economic growth in Malaysia for the next 5 years. Although not a precedent per se, the Plan’s implementation is flexible and could be subjected to change to meet the current need.

In conclusion, both Malaysia and South Africa do have much in common in relation to their respective racial legislation and policies. As analyzed, Section 9 of the Republic of South Africa's Constitution of 1996 and Article 153 of the Malaysian Federal Constitution provide provision for the protection of any underrepresented and underprivileged groups or races. As a result, disadvantaged groups, especially the African blacks, would benefit from affirmative action or positive discrimination theory, which is in their favour. In addition, ethnic Malays and other underrepresented groups or bumiputras in Malaysia would continue to receive more 'assistance' in the sports' industry as a result of the 'spill-over' effect of the NDP.

There is little difference (if any, it would be a difference in nature) between the concepts of endorsing preferences to one group or race over the other in South Africa. Such remarks have been supported by the fact that the economic gap between the underrepresented or underprivileged groups or races and the other groups is considered to be too wide. As a consequence, any legal or constitutional application in addressing these problems had undoubtedly affected the area of sport in South Africa.

On the other hand, there could be a slight difference when it comes to indirect applicability in sports. In Malaysia, it has been the case where every step to include participation among underrepresented or underprivileged groups has occurred by means of implication. Until the present date, there have been no specific policies devised which specifically cover the area of sport. In addition, it is considered more of an understanding that the natives, as in the Malays, should be given more opportunities to participate in sport. In contrast to South Africa, the latter exhibits forms of willingness to incorporate part of sport into the wider social agenda. Although such an aim might not be enforceable by means of introducing separate legislation, however, all sport associations in South Africa are required to allocate places for the communities whom had previously suffered under the apartheid era.

Such evaluation could produce a two tier effect for both countries in the long run. It could be the case that some form of certainty could be achieved and monitored by introducing quotas and reservations in South Africa. As for the case of Malaysia, there would be a risk of the system being subject to abuse due to the prevailing approach of implication. As a consequence, a different approach in promoting

participation or selection of previously underprivileged groups would produce a different result and this will be discussed later.

In conclusion, it appears that Section 9 of the Republic of South African Constitution of 1996 would be used as a basis for guidance by sport federations in South Africa to promote and encourage the members of black communities and other minority groups to participate and be involved in sports. Sport in Malaysia however had been left relatively unaffected and untouched by legislative developments and events surrounding the period of post independence until the present day. Undeniably, this is one of the industries where all races are still allowed to progress. However, changes in political circumstances, such as the alteration or amendments to the Malaysian Federal Constitution or NEP will nevertheless, however slightly, affect how sporting industries are governed in Malaysia. While it is wrong at this juncture to conclude that affirmative action policies have taken this toll in Malaysian sports, care ought to be taken since racial issues are still regarded as one of the primary obstacles preventing citizens from all over the country to regard themselves as 'Bangsa Malaysia' or the Malaysian Race.

5.2.2 England and the United States – Champions of Equal Opportunity

In comparison to both Malaysia and South Africa, the United States and England have long histories when it comes to the implementation of racial policies. The position in the United States is more complicated in comparison with the position in England. Immigration of various communities or races had occurred well before the Proclamation of Independence in the United States. Since then, continued immigration resulted in the federal government introducing new legislative provisions in order to restrict new settlers from arriving into the country. In contrast to this, the situation in United Kingdom and England in particular, is one in which immigration is considered a new challenge since new communities and races only made their way to England in numbers after the end of Second World War³⁴². Thus, this section will

³⁴² 'RaceUK – Short History of Immigration' (*British Broadcasting Corporation*, 2007)
<http://news.bbc.co.uk/1/hi/english/static/in_depth/uk/2002/race/short_history_of_immigration.stm>
accessed 10 October 2010. See also in Chapter 4

attempt to examine various legislations in both countries and their relative implications when it comes to sports.

England and Wales are two of the countries in the world that do not possess any type of written constitution³⁴³. Therefore, statutes govern the behaviour of its citizens. In sport, there is no definite Act introduced specifically to ensure equal participation of ethnic minorities. In addition, the term 'race' only came into England and Wales in the early 19th century, defining people according to their physical characteristics³⁴⁴. On the other hand, the issues surrounding sport are closely related to the principles of employment law. The first ever legislation created to combat any kind of discrimination practices can be found under the Sex Disqualification Act 1919³⁴⁵. However, this provision failed to achieve its objective as it only covered gender discrimination.

The breakthrough however came when the RRA 1965 was implemented in order to prohibit racial discrimination with reference to employment related issues³⁴⁶. The above Act repealed the Aliens Act 1905 and its subsequent legislative amendments. Originally, the welfare of minority groups fell upon the National Advisory Committee for Commonwealth Immigrants (NACCI)³⁴⁷. The Act covers prohibition on discrimination based on the grounds of colour, race, ethnic or national origin of the applicant. In contrast however, the application of the 1965 Act was limited to prohibition in public places such as hotels or restaurants. Interestingly, the ban did not cover shops from refusing to serve the minorities which implied that the introduction of the former was still subject to criticism. Early legislation was considered inadequate and did not cover a wider range of areas such as the sports industry.

³⁴³ Nicola McEwen, 'The UK Constitution: Governing the UK' (*British Broadcasting Corporation*, 2007) <http://news.bbc.co.uk/1/hi/programmes/bbc_parliament/2561719.stm> accessed 10 October 2010

³⁴⁴ John Solomos, *Race and Racism in Britain* (2nd edn, London MacMillan 1993) 8-9

³⁴⁵ The Act provides that 'A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society'

³⁴⁶ See Lester and Bindman in Chapter 2.

³⁴⁷ Established in March 1964 with representatives of the Commonwealth Immigrants Advisory Council, the National Council of Social Service and the Institute of Race Relations to establish voluntary liaison committees in areas where immigrants had settled which received both local and central funding.

This prompted the government to introduce the Sex Discrimination Act in 1975 and the RRA 1976 a year after. For the purposes of this research, however, emphasis will be given to the applicability of the RRA 1976 in regulating types of discrimination based on race and colour. The Commission for Racial Equality (CRE), previously known as the NACCI and subsequently Community Relations Commission was also established in order to monitor and assist the ethnic minorities in England and Wales to secure employment while discouraging discriminatory practices by employers within an establishment³⁴⁸. In addition, discussions will also consider the new Equality Act 2010 which was implemented in October 2010.

This can be seen to contrast with the position in the United States, where abolition of slavery provoked an instant need for additional provisions to safeguard the positions of other races in the States. As a result, the Civil Rights Act 1875 was the first ever legislation produced in order to combat racial discrimination. The Act provides that ‘every citizen, regardless of race, color, or previous condition of servitude, is entitled to the same treatment in public accommodations’.³⁴⁹ The definition of public accommodations was to include theaters, restaurants and public amusement. Even though the Act was deemed to be too restrictive, its practical application was ruled illegal by the Supreme Court as unconstitutional when attempts were made to use the Act to regulate private matters.

Repercussions of ruling the 1875 Act illegal resulted in decades of direct racial discrimination against other races, communities and immigrants. However, the continued struggle in search of justice resulted in the introduction of the Civil Rights Act 1964³⁵⁰. The 1964 Act with some subsequent amendments provided a new framework regulating the area of racial discrimination and still continues to play an integral part as one of the driving forces in ensuring that equality between citizens in the United States could be achieved.

³⁴⁸ See further ‘Caribbean Studies Black and Asian History – Records of the Commission for Racial Equality and Predecessors’ (*CASBAH – Caribbean Studies and Black and Asian History*); <<http://www.casbah.ac.uk/cats/archive/138/PROA00002.htm>> accessed 15 October 2009

³⁴⁹ ‘The Civil Rights Act of 1st March 1875’ (*Center for History and New Media*) <<http://chnm.gmu.edu/courses/122/recon/civilrightsact.html>> accessed 1 October 2009

³⁵⁰ ‘The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission’ (*The National Archives*) <<http://www.archives.gov/education/lessons/civil-rights-act>> accessed 2 October 2009

Implementation of RRA 1965, which was subsequently substituted by the 1976 Act (Now Equality Act 2010) and CRA 1964 respectively in both England and the United States, seemed to have addressed problems with reference to matters involving racial discrimination. Some questions, however, still remained. While the constitution in Malaysia showed little interaction with the area of sport as opposed to the ones in South Africa, do England and the United States share similar characteristics with the former or a balanced application in sports? At this stage, it is interesting to draw an analogy as to how the legislative interpretation from both England and the United States would impact on the sporting industry. Importantly however, it is vital to discover the main purpose of the objective of the Act and its meaning.

5.2.2.1 Towards a Common Goal in achieving Legislative Equality

In relation to England, the RRA 1976 as amended was created to eliminate discrimination in employment in all sectors. Due to the nature of this research, evaluation will be restricted to the area concerning sport. Section 1(1)(a) of the 1976 Act provides that, 'A person discriminates against another if on racial grounds he treats that other less favourably than he treats or would treat other persons'.³⁵¹ In short, the provision of the Act prohibits any form of direct discrimination against any citizen and this is non-justifiable. The word 'racial' has been defined under Section 3(1) of the RRA 1976 to mean 'colour, race, nationality or ethnic or national origin'.³⁵² In order to invoke the application of the Act, it is necessary for potential claimants to satisfy the 'but for test' rather than looking into the mental state of the alleged discriminator.

A relevant example can be illustrated through the case of *Singh v. The Football Association Limited*³⁵³ where Singh was dropped from the Football League's National List of Referees. It was held that the employer had committed direct racial discrimination by generating a racially stereotypical concept that the claimant, by virtue of his background, would not be a top performing referee. Thus, 'but for' the

³⁵¹ 'Race Relations Act 1976 as amended' (*Office of Public Sector Information*, 2008)
<http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1976/cukpga_19760074_en_1> accessed 27 September 2009

³⁵² *ibid.* Office of Public Sector Information

³⁵³ (2001) ET Case Number 5203593/99

employer's racial stereotyping; Mr. Singh would have stood a chance of being made eligible to referee in any professional football match. It would however be difficult should the tribunal be required to look into the mental state of the discriminator. Similarly, Section 1 was applied in *Hussaney v. Chester City Football Club and Kevin Ratcliffe*³⁵⁴. The court held that by making reference to his race together with disturbing words undoubtedly amounted to blatant discrimination and Hussaney was awarded compensation by the tribunal.

The above provision is strengthened by Section 1(1)(b) of the 1976 Act which prohibits any form of indirect discrimination. Subsection 1(b) is primarily involved in determining 'practices that are fair in form, but discriminatory in operation'.³⁵⁵ Citing an example, it would be the case where a group of participants comprising other races are afforded equal chance to take part; but subjected to different standards of qualification as opposed to the other. At this stage, it is equally vital to take into consideration some amendments or changes with reference to the RRA 1976 since the accession of the United Kingdom into the European Union means that they must have regard to the application of European law. Prior to 2003, the application of RRA 1976 mirrors the application of Article 39 of the European Community Treaty which provides for the elimination of any form of discrimination with regards to employment. Article 39 was later improved by Article 13 of the Treaty of Amsterdam which requires member states to take concrete steps to combat any forms of discrimination.

With the introduction of the Racial Equality Directive³⁵⁶ in 2003, Section 3A of the RRA 1976 as amended was implemented. Amongst other provisions, this Act recognises and gives definition to the meaning of racial harassment. In theory, the implementation of this Act would indicate that it is not necessary for a claimant to show direct discrimination *per se*, but, legislative interpretation of Section 3A would enable the claimant to commence an action where he or she is subjected or exposed to any act of intimidation, violation of dignity, degradation or even humiliation. In

³⁵⁴ Unreported, IT Case No. 2102426/97

³⁵⁵ Gardiner, James and O'Leary (n5) 558

³⁵⁶ Council Directive 2003/43/EC. See also earlier provisions on Race Relations Act (Amendment) 2000

addition, Section 3A equally applies to discrimination in education, goods and services, housing, social security and advantage³⁵⁷.

In October 2010, the Equality Act³⁵⁸ was introduced in order to advance ‘A series of substantive and far reaching legal changes’ and issues concerning socio-economic inequalities including housing, education, health and other matters associated with socio-economic disadvantages. The idea of the Equality Act was first mooted in the Labour Party’s 2005 election manifesto commitment, aiming to bring together various strands of equality legislation and create a fairer society, outlawing discrimination on various prohibited grounds. Harman, then the Minister for Women and Equality stated, ‘Equality ... is one that draws on everyone’s talents and abilities and is not blinkered by prejudice ... only if we have fairness and equality will people really be considered on their individual merits, free from discrimination and unfairness’.³⁵⁹ The main purpose of the Act is to:

Make a case for a single Equality Bill (Now Act) on the grounds of simplification and rationalisation of the law, advocating a mix of statutory modifications, self regulation and market based incentives as a basis for addressing inequalities which had proved resistant to legal intervention.³⁶⁰

It was clear that the Act was needed following an increase in discrimination claims and prior to the 2010 Act, there were nine major pieces of discrimination legislation, around 100 statutory instruments setting out connected rules and regulations and thousands of pages of guidance and statutory codes. This, as Monaghan suggested was needed ‘to reflect a gradual and progressive shift in the legislative approach to

³⁵⁷ Office of Public Sector Information (n351)

³⁵⁸ The main European Directives affecting domestic discrimination legislation are: Council Directive 2000/43/EC (Implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origins; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation. Also see Article 157 of Treaty on the Functioning of the European Union.

³⁵⁹ HC Deb 11 May 2009, vol 492, cols 553-596. Harman in cols 560-561 also stated: ‘Bill will allow employers to take action to make their workforce more diverse and representative of the communities they serve when selecting between two equally suitable candidates. The Bill would also allow positive action to be used to address the lack of black and Asian representation ...’.

³⁶⁰ Deakin and Morris (n22) 527

addressing inequality’³⁶¹ as well as to ‘harmonise discrimination law, and to strengthen the law to support progress on equality’.³⁶²

The 2010 Act would result in the existing RRA and other separate discriminatory provisions being abolished. Instead, the 2010 Act would consolidate the previous discrimination law (which included age, disability, sex, race, religious and belief) into a list of nine protected characteristics. Effectively, the issue concerning racial discrimination in sport is now protected under the new provisions of the Act. For instance, Sections 1(1)(a) and (1)(b) of the 1976 Act is now governed by Sections 9, 13, 14 and 19 of the 2010 Act. Section 9’s definition of the word ‘racial’ is similar to that used in Section 3 of the RRA; however, the Minister, under the new law, is empowered to add ‘caste’ to the definition of race. Section 13 relates to direct discrimination and it is essential to note that the Section also applies to other categories as defined under Section 4. Indirect discrimination is now governed under Section 14 which allows a person to commence an action ‘If, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of these characteristics’. Previous legislation only allows for claims alleging discrimination because of a single protected characteristic.

Compared with the situation in Malaysia and South Africa, some might be puzzled about the Acts’ applicability to the sports industry since there are only limited cases involving racial discrimination in English sports. Despite such an assertion, it is clear that all these Sections are equally applicable to sports. Even though the above Acts of Parliament do not explicitly mention sports, it is on the basis of understanding that any discriminatory act, be it gender or race, would be included. Thus, to discriminate against an individual by denying him or her a place in the team on the basis of criteria highlighted under the 1976 Act will justify a claim for racial discrimination. The cases of Singh and Hussaney seem to have justified the applicability of the Act in relation to race related matters. In addition, such a position is also reiterated by non governmental organizations such as the Commission for Racial Equality (EOC),

³⁶¹ Karen Monaghan, ‘The Equality Bill: A Sheep in Wolf’s Clothing or Something More?’ [2009] European Human Rights Law Review 1

³⁶² Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (Cmd7431, June 2008) Chap. 16

which has just recently assumed the new role under the Equality and Human Rights Commission (EHRC)³⁶³. The main objective of the Commission is to assist in eliminating any forms of racial discrimination while ensuring that individuals that might be affected or subjected to any acts of discrimination are addressed and redressed.

Interestingly, it is vital to appreciate that the CRE, under its initiative, has widened its influence to Sporting Equals³⁶⁴ and Sport England³⁶⁵. Incorporation of both bodies has effects upon the applicability of RRA when it comes to sports. Moreover, the creation of such bodies assisted in encouraging participation from all sectors of communities and races in sports. With the 2010 Act, sports have been included. Although the Act allows separate sporting competitions to continue to be organised for men and women³⁶⁶, sports bodies may however be subjected to the new Act if there is profound evidence of racial discrimination within the organisations or associations. For example, British Cycling in the latest statement of intent mentioned, 'British Cycling is responsible for ensuring that no applicant, employee, member or volunteer receives less favourable treatment on the grounds of a protected characteristic'.³⁶⁷ Other national sports governing bodies such as the RFU and the FA have specifically subscribed to the new Act. This issue will be considered in depth in the next chapter.

Legislative provisions in the United States would require attention since some provisions do make reference, albeit not explicitly in relation to the area of sport. On the other hand, the application and coverage of the Act could arguably be considered synonymous to the English position. The proposed Act was mentioned for the first time under the Kennedy administration, which aimed to take affirmative action to ensure that hiring and employment practices were free from any racial bias. As

³⁶³ Equality and Human Rights Commission (EHRC) came into force on the 1 of October 2007 by assimilating Commission for Racial Equality (CRE), Disability Rights Commission (DRC) and Equal Opportunities Commission (EOC). See more in EHRC website; www.equalityhumanrights.com.

³⁶⁴ Sporting Equals exists to promote ethnic diversity across sport and physical activity. Established in 1998 by Sport England, in partnership with the CRE, Sporting Equals is now an independent body.

³⁶⁵ Sport England creates sporting opportunities in every community by focussing on growing and sustaining participation in sport and improving talent development.

³⁶⁶ Equality Act, s 195(1)

³⁶⁷ 'British Cycling: Equality Policy' (*British Cycling*, December 2010)

<http://www.britishcycling.org.uk/zuvvi/media/bc_files/policies/British-Cycling-Equality-Policy.pdf>
accessed 31 March 2011

mentioned earlier, the introduction of the CRA 1964 ended decades of segregation between races and communities. More importantly however, the main objective of the Act was to eliminate any forms of racial discrimination and to introduce the Commission on Equal Employment Opportunity in any employment related matters.

The Civil Rights Act of 1964 objective is to:

Enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.³⁶⁸

For the purposes of this research, focus will only be given to issues in relation to racial discrimination in sports. To summarize, the 1964 Act provides for the elimination of any discrimination of any kind based on, amongst others, race, colour or national origin.

Under Title II of the 1964 Act and specifically Section 201, it provides that ‘every citizen is entitled to full and equal enjoyment of the goods, services, facilities, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, colour ... national origin’.³⁶⁹ Within the definition of Section 201(a)(3), public accommodation includes sports arenas, stadiums or other places of exhibition. While it is imperative to appreciate that this is not directly relevant to sports participation, this nonetheless suggests that every person in the United States, regardless of his or her race or national origin, has the right to be present in the above mentioned facilities and entitled to take part in sports activities. Other than this, the provision, if we are to consider in light of other Sections

³⁶⁸ ‘Document Number: PL88-352 - Civil Rights Act 1964’ (*U.S Department of State*) For the entire text of the Act, see <<http://usinfo.state.gov/usa/infousa/laws/majorlaw/civilr19.htm>> accessed 12 October 2007

³⁶⁹ ‘Title II of the Civil Rights Act 1964’ (*United States Department of Justice*) <<http://www.usdoj.gov/crt/housing/title2.php>> accessed 15 October 2009

below, would illustrate the overall consequences when it comes to the area of sports. The application of Section 201 must be considered together with Section 203 of the Act which basically provides that no individual, in exercising his or her rights under Section 201 should be subjected to any forms of intimidation or coercion.

If Title II relates to the enjoyment of facilities without any form of racial discrimination, Title VII of the CRA 1964 as amended by the CRA 1991 refers to provisions prohibiting any forms of discrimination based on race, colour, sex, religion or national origin³⁷⁰. In comparison with the other jurisdictions of Malaysia or South Africa, Title VII's provision is extensive and aims at covering all possible gaps. Under the provision, it is not permissible for any employer to racially discriminate when it comes to hiring, firing, delivering compensation, transfer, promotion, recruitment, use of facilities, fringe benefits or matters pertaining to pay.

Put simply, Section 703 of the Act provides that any attempts to refuse³⁷¹, or to limit or to segregate or to classify³⁷² any individual due to his racial background would justify an action under discrimination. The scope which constitutes the definition of racial discrimination covers all areas as highlighted under Title II and the English provision of RRA 1976 as amended. In *Cross v. Board of Education of Dollarway, Arkansas*³⁷³, assertions that the white community was not ready for a black coach and the failure of the school board to consider Cross's application was held to be discriminatory. Moreover, Title VII of the 1964 Act also empowers the United States Equal Employment Opportunities Commission (EEOC) to ensure that every individual in the States is entitled to equal access to employment opportunities.

In sports, the application of Title VII is extended to address racial harassment involving black athletes and other minorities although the Act does not specifically mention the word as being part of it. According to Williams, the sports industry in the

³⁷⁰ United States Department of Justice (n369). See further in <<http://www.usdoj.gov/crt/emp/faq.php#vii>> accessed 15 October 2009. Title VII 'prohibits discrimination in employment on the basis of race, sex, national origin and religion. It is also unlawful under the Act for an employer to take retaliatory action against any individual for opposing employment practices made unlawful by Title VII or for filing a discrimination charge or for testifying or assisting or participating in an investigation, proceeding or hearing under Title VII'

³⁷¹ Title VII, Section 703(1)(a) of Civil Rights Act 1964 as amended

³⁷² Title VII, Section 703 (2) of the Civil Rights Act 1964 as amended

³⁷³ E.D. Ark. 1975

United States ‘was to find a “model citizen” athlete who would cope with the racially hostile environment ... [and] athletes have been expected to behave as model citizens, even when confronted with severe racial abuse’.³⁷⁴ In *Cox v. National Football League*³⁷⁵ for instance, Cox was fined for directing two obscene gestures towards the fans after he was subjected to ‘an intense barrage of racial abuse’³⁷⁶. Since then, the sporting industry has taken measures to address this problem. At present, any harassment which is ‘sufficiently severe or pervasive that could have effect on or alter the conditions of employment and create an abusive working environment’ may be seen to violate the law³⁷⁷.

Should both Title II and Title VII of the CRA 1964 as amended be considered together, it is possible to evaluate that no individual, on the basis of his or her race, can be excluded from using any sporting facilities such as stadiums or any other forms of sporting entertainment or be prevented from being employed in any capacity as a sportsperson, be it in amateur or professional. In short, there is a two tier effect as a consequence of such implementation. Evaluation of the CRA 1964 would not be complete without analysing the application of Title VI of the 1964 Act and Title IX of Educational Amendments Act 1972.

Title VI of the CRA 1964 as amended provides that there must not be any discrimination when it comes to participation in activities or federally assisted programmes³⁷⁸. The criteria for establishing racial discrimination would be the same as per highlighted above. The terminology of ‘federally assisted programs’ can be termed similar to the phrase ‘project financed with federal monies’. Under this ambit, it includes any building project that has received any grants or monies from the federal government which could simply include any building or road works. In addition, the wording of this Act could include the theme of sports related programmes at college or universities level in order to improve the participation of other members of minorities in the United States. As a consequence, sports

³⁷⁴ Phoebe Williams, ‘Performing in a Racially Hostile Environment’ (1996) 6 *Marquette Sports Law Journal*, 287

³⁷⁵ 889 F. Supp. 118, 119 (S.D.N.Y 1995)

³⁷⁶ Williams (n357)

³⁷⁷ See *Meritor Sav. Bank, FSB V. Vinson* 477 U.S 57, 65-66 (1986)

³⁷⁸ United States Department of Justice (n352). ‘Title VI of the Civil Rights Act 1964 as amended’ <<http://www.usdoj.gov/crt/cor/coord/titlevi.php>> accessed 16 October 2009

development or projects which aim at encouraging or supporting the members of the public to participate in sport would fall under such a category and any racial discrimination will be forbidden under the Act.

Title IX of the Educational Amendments of 1972 was enacted by President Nixon eight years after the main provisions of CRA 1964. Title IX states that ‘No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...’³⁷⁹. The term Federal Financial Assistance shares a similar interpretation as above under Title IX. In general, Title IX only protects individuals against elements involving gender discrimination and is not based on age or race.

Initially, it was unclear whether Title IX would have any applicability in sport³⁸⁰. Any college level athletes and physical education programmes which received funding were obligated by Title IX to refrain from gender discrimination. The overriding objective of this Title is to afford participation opportunities to female athletes while ensuring that the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. In a literal sense, Title IX could be viewed as discriminatory against men since it might affect revenue producing sports such as American Football and Basketball. Several senators, including John Tower and the NCAA had tried to either press for amendments or challenge the legality of Title IX but without much success³⁸¹. One such attempt involved the Tower Amendments³⁸² that would exempt revenue producing intercollegiate sports such as men’s football and basketball from Title IX coverage.

Title IX requires institutions to ensure that the three-prong test is satisfied and this includes participation for male and female students provided in numbers substantially

³⁷⁹ Doyice Cotton and John Wolohan, *Law for Recreation and Sports Managers* (4th edn, Kendall and Hunt Publishing 2006)

³⁸⁰ Alicia Irons, ‘The Economic Inefficiency of Title IX’ (2006) Spring, Major Themes of Economics <<http://www.cba.uni.edu/economics/Themes/irons.pdf>> accessed 2 April 2011

³⁸¹ See Susan Cahn, *Coming on Strong: Gender and Sexuality in the Twentieth Century Women’s Sport* (The Free Press 1994)

³⁸² Tower Amendments was later substituted with Javits Amendments which allowed the Department of Health, Education and Welfare to develop regulations implementing Title IX that look into account the ‘nature’ of particular sport.

proportionate to their enrolment numbers, the continuing practice of programme expansion demonstrating the developing interest and abilities of the members of the underrepresented sex and finally, institutions to illustrate that they are fully and effectively meeting the interests of the underrepresented sex. Although the wording of Title IX only benefits women athletes, it could arguably provide opportunities for coloured and Afro-American athletes to participate and potentially be selected to represent the United States in any future international competition.

It is interesting to draw an analogy between Title VI and organizations which have been created in England, for instance, the CRE, Sporting Equals and Sport England. At this stage, it could be deduced that there appears to be some resemblance or similarity when it comes to the position between both the United States and England. While the primary trajectory of Title VI is to open the door to members of underprivileged communities which were subjected to discriminatory practices, the latter shares a similar aim. As previously mentioned, the main objective of Sporting Equals and Sport England is to ensure that the minorities are given equal chances to participate and take part in sport without any discrimination.

Conclusively, Title IX of Educational Amendments Act 1972, Title II, VI and in particular Title VII of the CRA 1964 as amended are aimed at covering all aspect of anti-racial discrimination provisions. At this juncture, it is worth appreciating that RRA 1976 as amended in England shares a similar platform and views as that of its United States counterpart. The British government relied heavily on the United States anti-discrimination law in constructing its 1976 Act. On the other hand, there appear to be some differences when it comes to the construction or definition of both affirmative action / positive discrimination in the United States and positive action in England.

5.2.2.2 Legislative Provisions – Positive Action and Affirmative Action in England and the United States

With reference to the English model, it is worth noting that the main objective of this Act, amongst others, is not to give preference to ethnic minorities or to assure them employment in England and Wales. Instead, the Act, together with bodies such as

CRE and EOC (At present known as EHRC), does encourage the participation of minorities in seeking employment in England and Wales. Instead of relying on the terminology of positive discrimination or affirmative action, the government recognised the need for positive action to create a balanced workforce in all sectors of the economy. The implementation of positive action was intended to encourage ethnic groups in England and Wales to apply for and participate in employment and not to set a requirement or percentage for their involvement in the employment sector³⁸³. On the other hand, some limited provisions were specifically created to ‘positively discriminate’ against the majority of the population.

Under Section 5 of the RRA 1976 as amended, the government permitted employers to positively discriminate against other racial groups for ‘genuine occupational qualifications’. Therefore, it would be permissible to discriminate in favour of an ethnic group where the job involves participation for which a person of that racial group is required for reasons of authenticity³⁸⁴. In contrast, the application of this Section in sports was limited, as sports did not have any such boundaries. However, Section 35 of the 1976 Act provides that ‘any particular racial group would be afforded the access to facilities or services to meet the special needs of persons of that group when it comes to their education, training or welfare, or any ancillary benefits’. The provisions were intended to encourage and assist ethnic minorities in overcoming problems such as poverty.

Sections 37 and 38 of the RRA 1976 further reinforced the interests of ethnic minorities. Under these Sections, minorities were given encouragement to integrate into society and seek proper employment³⁸⁵ in areas where the particular group or groups were not previously represented³⁸⁶. For the purpose of these Sections, training of any kind would be given to ensure that they would be confident to compete for employment under equal opportunity policy. Under positive action, the CRE’s 1998 reform proposals stated that, ‘The RRA 1976 recognises training as an important

³⁸³ *Commission for Racial Equality; Positive Action and Equal Opportunity in Employment* (2nd edn, Interlink Longraph 1985). See more in Office of Public Sector Information (n337).

<http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1976/cukpga_19760074_en_9#pt6-11g53>
accessed 20 October 2007

³⁸⁴ RRA 1976, s 5(2)(a)-(d)

³⁸⁵ RRA 1976, s 37(1)

³⁸⁶ RRA 2001, s 37(1)(b)(i)-(ii) and s.38 (2)(a)

means of enabling members of racial groups that have been underrepresented in the past to compete on equal terms for jobs and promotion'.³⁸⁷ On the other hand, these Sections as highlighted should not be misunderstood as 'a set of quota or requirement' for the employers to adhere to.

The role of Sections 37 and 38 have now been re-emphasised under Sections 158 and 159 of the Equality Act 2010. The latter basically covers the issue concerning the role of positive action and most of its provisions mirror the application of the previous provisions. There are two important differences however; one being that the new legislation is applied to different protected characteristics in different ways. Section 159 however takes the application of positive action to a new level. The new provision, as highlighted under Section 159(1) to (4) allows employers to undertake a variety of positive action measures to the point of recruitment or promotion. As a consequence, this brings the concept of positive action closer to the theory of affirmative action for the purpose of the Equality Act 2010.

The position in the United States, as previously mentioned, incorporates both the concept of equal opportunity and affirmative action in order to achieve equality. Similar to England, the federal government does not allow any implementation of quotas or afford preferential treatment over other races in order to afford opportunities to the minorities. Under the provision of Title VII of the CRA 1964 as amended, every citizen in the United States is given equal opportunity to apply for employment without discrimination³⁸⁸.

In most employment and educational settings however, the United States does have an affirmative action policy which requires that if a candidate from a major group and another from a previously underprivileged group or members of minorities are equal in terms of relevant experience and qualifications, the latter candidate should be given the position. Therefore, race becomes a prime factor only in the case of candidates being equal. In short, there is an element of overlapping between these two concepts, though it would appear that the principle of equal opportunity takes precedent over

³⁸⁷ McColgan (n23) 167-168

³⁸⁸ 'Race / Colour Discrimination' (*U.S Equal Employment Opportunity Commission - EEOC*) <<http://www.eeoc.gov/types/race.html>> accessed 15 October 2009

affirmative action. However, it is worth noting that the degree of overlap is not certain and still remains one of the controversial areas when it comes to practical application.

Take an example; Title VII of the CRA 1964 protects individuals against employment discrimination on the basis of colour, as well as national origin, sex and religion. Although the basic meaning of the Act could be deemed as synonymous with the RRA 1976 as amended, the former included a provision which prohibited any attempt to 'exclude persons of a certain racial group significantly more than others'.³⁸⁹ If taken literally, this could imply that any sports bodies or organisations will be deemed liable if they fail to include any other underrepresented groups or races in the company. In addition, such wording would also result in the sports bodies facing the prospect of being prosecuted should they fail to bring the level of underrepresented races up to a level which is acceptable under Title VII of the 1964 Act. Alternatively, a person would also be deemed to be in breach where the dominant group is significantly more than the other members of underrepresented groups or minorities. It is worth noting that on the other hand there are no 'strict' guidelines as to the means of achieving such aims.

Thus, in order to remedy such a situation, the federal government will enforce affirmative action in order to increase the level of participation of underprivileged groups or races in the sector involved. The above ought not be interpreted as though affirmative action is the core solution in combating racial discrimination in the United States. Affirmative action would only be used as a last resort to prevent single race domination in any workplace. Apart from that, it is vital to note that the theory of equal opportunity remains the main pillar in ensuring that all races are not excluded from any form of participation.

The above practice can be highlighted under Executive Order 11478 as amended by Executive Order 13087 and 13153³⁹⁰. Under Section 1 of the Order, 'It is the policy of the government of the United States to provide equal opportunity in federal

³⁸⁹ *ibid* EEOC. <<http://www.eeoc.gov/types/race.html>> accessed 15 October 2009

³⁹⁰ 'Executive Order 11478' (*United States Department of Labor*) <<http://www.dol.gov/oasam/regs/statutes/EO11478.htm>> accessed 16 October 2009. See also 'Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government' (*U.S Government Printing Office*, 2008) <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr04my00-118.pdf> accessed 16 October 2009

employment for all persons to prohibit discrimination in employment because of race, colour ... national origin, through a continuing affirmative action ...'.³⁹¹ In this case, equal opportunity policy is given primacy while acknowledging the secondary role of affirmative action when it comes to issue of employment. The importance and primacy of equal opportunity is further highlighted in the Section where, '... policy of equal employment opportunity applies and must be integral part of every aspect of practice in employment ...'.³⁹² As a consequence, this falls neatly into the earlier jurisprudential argument of primary and secondary theory.

It is also important to consider Title IX's contribution in addition to the ones under Title VII. Title IX appears to have benefited all women in this society, including women of colour. Title IX (Together with Title VII) has 'experienced a major increase in participation opportunities for female athletes of color in athletics. There was a 955% increase in participation opportunities from 1971-2000 – 137 to 22,541 participants respectively'.³⁹³ Although the overall numbers of female athletes of colour were under represented in other collegiate sports, they have at the same time experienced a substantial increase in scholarship assistance from \$100,000 in 1971 to \$81 million in 2000³⁹⁴. This in a way relates to under-represented colour female athletes and with both Title IX and VII, this could assist in promoting their participation in sport and subsequently to the professional level.

In comparison, England does not adhere to affirmative action or positive discrimination theory. Similar to sport, everyone is afforded equal opportunity in gaining access to employment or places in the national team. In contrast to the United States however, it would not be against the RRA 1976 as amended if the employer fails to balance the racial composition in a company. In other words, it is not a breach for simply not employing enough underrepresented groups or races to fill the gaps in employment, including sport. Nevertheless, it would be equally incorrect to state that the United Kingdom adopts strict application of equal opportunity.

³⁹¹ United States Department of Justice (n 369)

³⁹² United States Department of Justice (n 369)

³⁹³ Johnella Butler and Donna Lopiano, *The Women's Sports Foundation Report: Title IX and Race in Intercollegiate Sport* (Eisenhower Park 2003) 5

³⁹⁴ Amanda Paule, 'How Title IX impacts women of color' (The Women Sports Foundation, March 2009) <<http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/H/How-Title-IX-Impacts-Women-of-Color.aspx>> accessed 2 April 2011

The meaning or the definition of equal opportunity in the United Kingdom allows for the adoption of ‘positive action’ in encouraging the underrepresented groups or races to participate in the selection process. Hypothetically, if there are no black football coaches in the English Premier League, the Football Association of England can take positive steps in order to encourage the black community to involve themselves in the sport. This implies that suitable training would be given and allocated to further persuade people from ethnic minority communities to apply. On the other hand, it would be a breach of the legislation if the employer decided to employ any individuals just for the sake of achieving ‘racial equality’ in a workplace without having regard to the abilities and qualifications of that particular individual.

With the introduction of Section 159(1)(b) of Equality Act 2010 however, there could be an arguable case where ethnic minorities might be recruited where participation in an activity by persons who share a protected characteristics is disproportionately low. This is however subjected to Section 159(1)(4) which provides that the employers must first establish that the candidates are of ‘equal merit’ in order to use positive action provisions.

In contrast to sports in the United States, such practices can also be reflected by Executive Order 10925 and thereafter Executive Order 11246 which requires employers to take ‘affirmative action towards prospective minority employees in all aspects of hiring and employment’.³⁹⁵ In addition to the above, some professional sports in the United States require the employer to interview a minority candidate should the position applied for be at a managerial level. In contrast, there is no obligation to hire them if they are not suitable for the work. Section 703(3)(e) of the CRA 1964 as amended however provides instances in which a ‘limited positive discrimination or affirmative action’ may take place where a person may be lawfully discriminated against. Again, it is interesting to appreciate that there seems to be a major resemblance with the provisions under Section 5 of the RRA 1976. However, its application is, as per Section 5, limited in sports and thus will not be considered further.

³⁹⁵ EEOC (n388). <<http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-11246.html>> accessed 15 October 2009

5.2.2.3 Foreign Nationals as ‘Aliens’ in Sport – Race Discrimination?

Despite the wide coverage afforded under various federal legislative provisions, there appears to be a stark contrast when it comes to possible interpretation involving racial discrimination based on nationality. It is clear from the outset of Section 1 of RRA 1976 as amended forbids discrimination of this form but any resembling provision is not included as part of the CRA 1964. The closest similarity would be related to prohibition of discrimination based on national origins. Such a distinction would be a matter of significance in view of globalization. Section 1 provision would ensure that no individual be discriminated against, for instance, for being a foreign national, as defined under Section 3 in applying or being considered as a candidate for employment in the sports’ industry.

Contrary to provisions as mentioned under Title VII with reference to Section 703 of the CRA 1964 as amended, case laws such as *Dowling v. United States* established that Title VII does permit employment discrimination based on alien-age or citizenship. In fact, the recent Racial Equality Directive did not include discrimination on the grounds of nationality in the formulation of the Directive. As a consequence, the only avenue for bringing any claims under this ambit would be the provision as stated under RRA 1976.

Dowling’s case could, to a certain extent, be a device to undermine the applicability of CRA 1964. However, the justification was that while every applicant regardless of their nationality would unquestionably received equal treatment in terms of application, preference will be given to the citizens of the United States³⁹⁶. Questions would surface as a result of such a justification. As far as Section 1 is concerned, theory would suggest that every individual will be treated as equal when it comes to the process of selection. Practically however, preferences ought to be given to any person who is categorized as a ‘local resident’ which includes nationals of the European Union. Amendments to the 1976 Act itself pose additional difficulties in order for a claimant to invoke the assistance of the Act. In a hypothetical sense

³⁹⁶ *Dowling v. United States* (1979) D. Mass. 444 U.S. 979

therefore, it is possible for a talented sportsperson from another country to be ‘racially discriminated’ against in order to ensure preference remains within the citizens’ of a particular country.

The situation might be similar under the new provision. Section 9(1)(b) of the 2010 Act includes the definition of race to include nationality. There is however a slight difference in that the Act does not apply to any foreign nationals who apply for employment but for which his status is subjected to immigration control. This arguably brings the English provisions closer to the EU Directives which only cover foreign nationals with settled status.

5.2.2.4 Equal Opportunity – Incorporation as part of the Law?

Perhaps the most controversial point is whether equal opportunity is only considered as a ‘policy’ per se and not directly as part of the country’s legislation. Countries such as England and the United States prevent any form of discrimination and in some instances promote the theory of equal opportunity for employment related purposes. On closer observation however, the words contained within both RRA 1976 (Equality Act 2010) and CRA 1964 as amended only provide for elimination of racial discrimination as well as exceptions where positive discrimination would be allowed. The words ‘promotion’ or ‘advancement’ of equal opportunity for all ought to be differentiated with any words or phrases that have been given ‘legal force’. Rather, promotion could refer to a common policy (guiding principles which are totally independent from legislation) being placed by various organisations to ensure that ethnic minorities or members of underrepresented groups are being encouraged to apply.

As a consequence, this creates an instant ambiguity in that particular law and does not necessarily have any direct relationship with the principle of equal opportunity. Thus, promotion of equal opportunity in sports for every section of a heterogeneous community does not imply any kind of legal intervention should one group later claim to be left out of the game. As a consequence, the only means of redress would be for the affected individual to base his claim using the anti-racial discrimination legislation. Unless there is a persuasive linkage between implementation of equal

opportunity policy and the legislation itself, it would appear that equal opportunity policy will remain a mere practice guide for employers.

Sport in England is also influenced by policies emanating from the European Union. In 2007, the EU issued a White Paper on Sport³⁹⁷, the first such guidance for addressing sports-related issues in a comprehensive manner across the Union. The White Paper underlines the intention of the Nice Declaration in 2000 which provides for 'Sporting activity should be accessible to every man and woman, with due regard for individual aspirations and possibilities'.³⁹⁸ This has also been highlighted by the Lisbon Treaty which re-emphasise the Union's commitment to promote European sporting issues and creating an action which is aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports.

While the Paper does not constitute law it acts instead as policy guidance, not to regulate activities of Member States but rather to adopt incentive measures to harmonise their actions. According to the Commission, 'sport has certain characteristics and it cannot be construed as to justify a general exemption from the application of EU Law'.³⁹⁹ The White Paper includes notions of social inclusion, integration and equal opportunities in sports as well as identifying the economic dimensions of top-level sports and its importance to the economies of the member states. In terms of racial discrimination, it recognises the fact that sports makes an important contribution to economic and social cohesion and emphasises the need to include under-represented groups and people from less privileged backgrounds. Equally, it seeks to provide increased access to sports for all EU citizens. In this case, the White Paper recognises the right for nations to select national athletes for team competitions including quotas of locally trained players as long as they do not contravene discrimination laws.

The provisions of the Equality Acts 2006 and 2010 confirm the status of equal opportunity as part of national formulation in creating equal societies in England.

³⁹⁷ Commission 'White Paper on Sport' COM (2007) 391 final

³⁹⁸ *ibid.* Commission

³⁹⁹ *ibid.* Commission

According to Section 8 of the 2006 Act, the Commission (Commission for Equality and Human Rights) ‘shall ... promote equality of opportunity, enforce the equality enhancements, and work towards the elimination of unlawful discrimination ...’.⁴⁰⁰

Unlike the RRA and subsequent amendments, this Act emphasizes the absolute need for every local and national sports body to adopt equal opportunity as the pillar upon which to ensure equality. Under Section 159 of the Equality Act 2010, it could be viewed as a form of affirmative action but primarily still build within the concept of positive action and equal opportunity. In relation to the United States, it would appear that the Executive Orders made would rightly be considered as a stamp of approval of equal opportunity being part of the country’s legislation.

5.2.2.5 Conclusion

As a concluding remark, both England and the United States share substantial similarities when it comes to the construction of statutes or legislative provisions in relation to racial discriminative issues. It is generally true to admit that both countries’ policies are largely based on equal opportunity policy where all races or ethnic groups are allocated an equal chance to participate in any of their chosen sports. The main objective of RRA 1976 as amended by subsequent Acts and the application of European legislation can largely be mirrored by provisions under the CRA 1964 as amended. For instance, the coverage of Title VII of the 1964 Act and Section 1 of the 1976 Act respectively provide extensive coverage on how a person may be liable for any discriminatory acts. The only slight difference perhaps lies in the fact that Title VII’s provision appears to be more specific and leaves limited gaps for doubt and the anti-racial discriminatory provisions in England cover nationality as opposed to those in the United States. With reference to sports, it is clear that no individual, be it from underprivileged groups, race or other members of the minorities could be denied access to participate with other citizens of a particular country.

These Sections open the door of opportunity for ethnic minorities to get involved and participate with the locals. The commencement of these Acts resulted in the emergence and involvement of black or Afro-Caribbean athletes in major sporting

⁴⁰⁰ Equality Act 2006, s 8(1)

events. Perhaps the best illustration of this is the influx of black players into England's football clubs as well as in professional sports like the National Football League and National Basketball Association in the United States since the 1980s and the 1990s. With the concept of 'equal opportunities' introduced and propagated by the CRE and EEOC, the government had managed to unleash the potentials of ethnic minorities in sports.

On the contrary, neither country practices the concept of strict equal opportunity. Therefore, the biggest difference lies with the fact that England only encourages the concept of positive action per se and disregards affirmative action or positive discrimination which affords privileges to other members of communities as discriminatory. The United States tends to adhere to the former but reinforces affirmative action in order to ensure that other members of the minorities are afforded some additional uplifting in order to be considered for any job opportunities.

Despite this, England and the United States forbid any implementation of quotas in their attempt to alleviate or improve the participation of racial minorities in sports. Additionally, England does not impose any requirement for any employers to meet but rather utilizes the words 'to encourage'. The usage of affirmative action in the United States' context however, gives a hint, and rightly so, that there must be a requirement in any attempt to hire or employ a sport related person for a managerial level. As discussed earlier, preference would be afforded to the members of the minorities where both candidates from different races are considered equal in terms of their qualifications and skills. As a consequence, this reinforces the view that affirmative action does play a role alongside the concept of equal opportunity in the attempt to achieve parity between races.

5.3 A Summary

All the four countries appear to share similar goals in achieving equality and this is mirrored in their respective legislations. The major difference being that both Malaysia and South Africa's provision on equality is clearly spelled out in the Bill of Rights and Constitution, while in England and the United States it is mentioned in relevant statutes. In relation to Malaysia and South Africa in particular, there are some

exceptions to the general rule under equality since it provides for legitimate affirmative action to benefit the majority of the population who have been previously deprived of any opportunity to be involved in sports. In contrast, the position in England as highlighted under the RRA 1976 as amended prohibits any form of affirmative action. In any case, Section 5 of the 1976 Act only provides a very limited avenue in positively discriminating against other employees and it does not apply to sports.

However, the position in the United States in relation to affirmative action appears to favour the ones in South Africa and Malaysia. One may therefore argue that the CRA 1964 as amended does harmonise with the provisions under Section 9 of the South African Constitution, Article 8 of the Malaysian Federal Constitution as well as any subsequent legislations that were passed in both countries. However, care must be taken to establish that affirmative action theory in the United States is not similar to the provisions in Malaysia or South Africa. Firstly, the United States places greater emphasis on the theory of equal opportunity and as mentioned earlier, equal opportunity must form an integral aspect of every employment opportunity in the country. Thus, these arguably have relegated the position of affirmative action to a more inferior position.

Crucially, the provisions of the CRA 1964 as well as the Executive Orders, while acknowledging the need for continuing affirmative action practices, only works in a tie-break situation where there are no ethnic minorities being represented at all. As a result, there is no further obligation to ensure that the ethnic minority reaches a certain percentage in sports participation or in any other kind of employment. Unlike Malaysia and South Africa, it is clear that the Constitution and legislations specifically require affirmative moves to ensure that the designated groups are substantially represented in the long term. Therefore, affirmative action theory takes a more active role in Malaysia and South Africa than elsewhere.

Setting aside the theory of affirmative action and equal opportunity, it is important to note that England is the only country which does not allow discrimination based on nationality. In theory, this enables foreign nationals to have equal opportunity to compete when it comes to employment prospects. As opposed to the theory of equal

opportunity and affirmative action in the United States, foreign nationals are treated as aliens and therefore do not enjoy the provisions under the CRA 1964 as amended. As for Malaysia and South Africa, the rights of foreign nationals could be very limited since they are not afforded, in theory, any protection under the country's Constitution.

At this stage, while it is important to appreciate that only a few cases are made in reference to sports in both the United States, Malaysia in particular and England and South Africa, it is nonetheless necessary to evaluate the depth to which the legislation could have impacts on sport. As sports continued to globalize and develop through the turn of the 21st century, it reached a stage where it would be inappropriate to discard the issue of racial discrimination in sports. With an in depth evaluation of various legislative provisions and how these relate to the four different countries, the next chapter will therefore examine its practicability in sports. Although some analysis might not be truly reflective of the current situation within a country, assumptions and hypothetical evaluations are needed to address the issue of the extent to which the law has and had played its role in hindering or promoting participation of various races in sports.

Chapter 6 – The Relationship between Legislations and Sports' Regulation

Earlier, we established that the Constitutions of both Malaysia and South Africa represent the highest form of law in each country. A different situation could be argued for England and the United States. Although the Constitution and legislations provide a basic framework for equality however, to what degree does a country's law have any impact on sports? Sports in general are governed by various international sports' governing bodies as well as the local sports governing bodies. For example, football is governed by an International Football Federation as well as by the football associations of the respective countries. In general, all localized, regional sporting events or tournaments fall under the framework of local governing bodies and hence these have a duty to ensure that all rules and regulations as provided by individual sports' bodies are fully adhered to. Furthermore, any rules and regulations of individual local sports' governing bodies are primarily subjected to the international sports' bodies. For the purposes of this research, it is essential to consider the role of legislations and relevant sports' regulations when it comes to equality of participation.

Fundamentally, all international sports' governing bodies rules and regulations make reference to the Olympic Charter which provides for the unrestricted right for any individuals to participate in their chosen sport. The enactment of the Olympic Charter is the responsibility of the IOC which oversees all ISFs. In addition, the right for an individual to participate must not be subjected to any form of discrimination⁴⁰¹. This for instance could be mirrored in the International Cricket Council Anti-Racism Code which stated that, 'ICC and all its Members shall ensure that there is no discrimination in any form against any person because of race, colour, religion, national and ethnic origin'.⁴⁰² The BWF goes a step further by reassuring its affiliated members that 'The Federation shall allow no political, religious or discrimination to affect its decisions or actions'.⁴⁰³ As a consequence, the wordings from the

⁴⁰¹ Olympic Charter (n69)

⁴⁰² 'ICC Anti Racism Code' (*International Cricket Council - ICC*) <http://static.icc-cricket.yahoo.net/ugc/documents/DOC_F97840A2DC1953F7C5DD8EBBE3BA2E25_125525591903672.pdf> accessed 11 October 2009

⁴⁰³ 'BWF Statutes 2009 – Constitution' (*Badminton World Federation - BWF*) <<http://www.internationalbadminton.org/page.aspx?id=10513>> accessed 11 October 2009

International Sports' Federation suggest that no conditions can be imposed to prevent individuals from participating in their chosen sports.

The stance taken by the ISF is usually followed by all national sports' governing bodies in a country. The English Cricket Board (ECB) for instance followed the International Cricket Anti Racism Code by stating that, "The ECB, as guardians of the game in England and Wales, will ensure that no individual or group is discriminated against in their pursuit of inclusion in cricket or its administration ...".⁴⁰⁴ In theory therefore, any disputes in relation to the participation of any individual fall under the jurisdiction of the respective national or international sports' federation for the particular event.

National courts have always been reluctant to intervene in any sporting disputes. In other words, the wordings in a country's legislation should not be given effect or application in sports. Initially, the ISF seemed to enjoy special status where the final decision making process of any dispute fell under the federation itself. One of the most illustrative examples of this involves disputes between the United States Senate and the Federation Internationale de Natation (FINA), the International Swimming Federation in 1973. Since the People's Republic of China was then not recognized by FINA, the International Federation rejected an attempt by the United States Senate to create an exemption which would enable United States swimmers to take part in China. This early approach seemed to favour the sports body over national laws⁴⁰⁵.

The decision in *Nehemiah v. Athletics Congress*⁴⁰⁶ again illustrates the supremacy of the International Sports' Federation in delivering a final decision in matters concerning the rights to participate. In *Nehemiah*, it was held that the IAAF could not be subjected to the jurisdiction of New Jersey. Furthermore, in *Michels v. United States Olympic Committee (USOC)*⁴⁰⁷ which was reaffirmed in *Oldfield v. Athletics Congress*⁴⁰⁸, Posner, J commented that, 'There can be few less suitable bodies than the federal courts for determining the eligibility of athletes to participate in the

⁴⁰⁴ International Cricket Council (n402) <http://icc-cricket.yahoo.net/the-icc/anti_racism.php> accessed 11 October 2009

⁴⁰⁵ Hill (n69) 43-44

⁴⁰⁶ 765 F. 2d 42 (3rd Cir. 1985)

⁴⁰⁷ 741 F. 2d 155, 156 (7th Cir. 1984)

⁴⁰⁸ 779 F. 2nd 505, 507 (9th Cir. 1985)

Olympic Games'.⁴⁰⁹ This in effect suggested that rules and regulations set by ISF have precedent over the application of national legislation.

Posner's view could be likened to the conclusion given by Lord Denning in *Enderby Town Football Club Limited v. The Football Association* where he stated that '... Justice can often be done, in them (Parties), better by a good layman than by a bad lawyer ...'.⁴¹⁰ Hence, the discussion above illustrates the reluctance of the courts in applying the law against sports rules and regulations. In that sense, there appears to be a demarcation between a country's legislation and the rules and regulations enacted by its sports' bodies.

In *Shen Fu Chang v. Stellin Mohlin*⁴¹¹ however, Goff, J decided that the judiciary have the right to construe the rules of any ISF if there is a need to do so. It could be argued that this decision maintains the autonomy of sports' regulation leading to interference by the judiciary in sports, although equally, if the courts reserve the right to interfere it could also be argued that the autonomy of sports regulation might actually be weakened. Since then, there have been a series of cases where courts have exercised their discretion in opposing certain sports regulations. In *Reynolds v. IAAF*⁴¹², the Court of Appeal ordered a preliminary injunction to prevent the IAAF from impeding or interfering with Reynolds' ability to compete in the 1992 Summer Olympic Games. The quotation provided by Stevens, J⁴¹³ indicated a strong message to the ISF that the courts would not hesitate to interfere and apply the law wherever necessary to prevent any unfair rulings made by the sports' bodies. The decision of *Katrin Krabbe v. IAAF*⁴¹⁴ where the German court overruled the 4 years ban on Krabbe is yet another example of modern interference of the law into sports regulation.

The decisions in both *Reynolds* and *Krabbe* mark the end of a myth that rules and regulations made by the International Sports Federation are not subject to any form of

⁴⁰⁹ *Oldfield v Athletics Congress* (1984) 741 F. 2nd 155, 159, 7th Cir. 1984 (Posner J)

⁴¹⁰ *Enderby Town Football Club Limited v The Football Association* (1971) Ch 591 at page 605 (Denning MR)

⁴¹¹ (Unreported) 5th July 1977

⁴¹² (1992) Et. AL 505 US 1301

⁴¹³ *Reynolds v IAAF*; Et. AL 505 US 1301 at page 1302 (Stevens J)

⁴¹⁴ (1995) Landgericht Munchen I; File No.7 HKO 16991/94

intervention. In addition, this also signifies the relationship between the law and sports' regulation. Although sports' regulation still maintains some degree of autonomy in relation to matters pertaining to sporting interest, it is interesting to note that the law has some form of influence over matters involving the economic activities of a country. The vulnerability of the ISF has impacts upon the rules and regulations enacted by respective national sports' governing bodies or federations. It could be implied that all national sports federations, while aiming to harmonise the rules and regulations according to the ISF, are subject to the national law of a country.

Kolpak's ruling⁴¹⁵ perhaps demonstrates the supremacy of legislation over the national sports federations. It was held that the Federal Regulations concerning the limitation on numbers of foreign players playing the game of handball contradicted the provisions of European Union law and amounted to racial discrimination based on nationality. Earlier, the European Union law exerted its authority over the United European Football Associations (UEFA) regulations following a landmark decision in Bosman⁴¹⁶. As a result, a modern constitution or regulations amended by ISF have the tendency to be more relaxed and afford more autonomy to the National Federation so that their regulations reflect the overall position of a country's law in relation to equality.

6.1 National Sports Governing Bodies' Regulation – Meeting the Balance between the Law and International Sporting Federation

Due to differing political backgrounds between the four chosen jurisdictions, it is inevitable for individual National Sports' Federation to create a charter or constitution which meets the expectation of the country's legislation and regulations provided by respective international sports governing bodies. It is clear that any conflicting sports' rules and regulations which fail to conform to the law of the country would not be likely to have any effect. The authorities provided in Reynolds, Krabbe and Kolpak serve as a reminder of the relationship and supremacy of the law over both the International and National Sports Governing Bodies.

⁴¹⁵ Case 438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECJ

⁴¹⁶ Case 415/93 *Union Royale Belge des Societes De Football v Bosman* [1993] ECJ

For countries adhering to the theory of affirmative action and equal opportunity, it is hardly surprising to discover the variances within the rules and regulations of individual sports' governing bodies. Take the sport of rugby in South Africa and England as a primary example. As discussed, South Africa's law is modelled upon the theory of affirmative action as opposed to England which adopts the theory of equal opportunity. The International Rugby Board's (IRB) Regulation 20 provides that 'All Unions, Associations, Rugby Bodies, Clubs ... shall not do anything which is likely to intimidate, offend, insult, humiliate, discriminate against any other Person on the ground of ... race, colour, national or ethnic origin'.⁴¹⁷ Interestingly however, Regulation 3 provides for the Domestic Union '(Provided) that [they] ... are not in conflict with these Regulations and subject to conformity with the relevant legal systems to make and adapt other more restrictive local regulations ...'.⁴¹⁸ For the purposes of this research, the term Domestic Union refers to both the English Rugby Board and South African Rugby.

Both Regulations 3 and 20 of the IRB could therefore imply that the English and South African Rugby Boards are free to implement their own Regulations but not if this results in deprivation of opportunity for any individual to be part of the sport. Another crucial observation is that the Regulation does not make specific reference to discrimination based on selection. It could therefore be said that Regulation 20 only prohibits Unions from discriminating against anyone from playing the sport. The provision under Regulation 20 could also be observed under Policy 1.2 of the South African Rugby Constitution and Policy Statement 1.2 of the English Rugby Board. Both National Policies forbid any form of discrimination based on race, colour, creed or ethnic origin.

However, the relaxation provision under Regulation 3 of the IRB witnessed two separate approaches taken by the South African and English Rugby Boards. In relation to Policy 1.3 of the South African Rugby Board, it provides for the national rugby board to pursue policies and programmes aimed at redressing imbalances during the apartheid era. The Policy therefore reflects the main intention of Section 9

⁴¹⁷ Regulation 20.1.12 of the International Rugby Board (IRB). See more at 'Regulations' (*International Rugby Board – IRB*) <<http://www.irb.com/lawregulations/regulations/index.html>> accessed 11 October 2009

⁴¹⁸ *ibid.* International Rugby Board. Regulation 3

of the South African Constitution of 1996 as well as relevant provisions under the Employment Equity Act 1998 which provides for affirmative action programmes to give additional rights to the designated ethnic groups. Specifically, this Policy mirrors the medium affirmative action theory. Section 9(2) of the 1996 Constitution in particular mentions that unfair discrimination measures may be taken to ensure fairness.

This can be seen to be opposed to the English Rugby Board's Objective 2.2 providing for a 'planned approach to eliminate perceived barriers which discriminate against particular groups ... widening traditional approach and include communities currently under-represented in the game or experiencing disadvantage ...'. This Objective clearly follows the theory of Equal Opportunity and in addition, the concept of Positive Action. Policy 1.2 and Objective 2.2 reflect the main aim of Section 1 of the RRA 1976 and 2001 as amended. Crucially, Objective 2.2 also imitates Section 32 of the RRA 2001 and Equality Act 2010 which gives encouragement and training to ethnic minorities in employment sectors in which they are under-represented. Another interesting aspect is that Policy Statement 1.2 includes prohibition of any discrimination based on nationality. As opposed to the United States, South Africa and Malaysia, RRA 1976 as amended is the only legislation that prevents discrimination based on nationality. Without doubt, there is no question as to the involvement of law in sports' rules and regulations.

A similar situation can be seen in cricket. While upholding the commitment to prohibit racial discrimination, Cricket South Africa through its Transformation Charter emphasised the requirement of their moral duty, cricketing and economic reasons to 'ensure that cricket grows and flourishes among the truly disadvantaged of society, with the recognition that the majority of disadvantaged come from black African communities'.⁴¹⁹ This again contradicts the Statement of Intent by the ECB. Under Statement 3.3, the ECB would consider positive action in order to achieve

⁴¹⁹ 'Transformation Charter: The South Africa's Cricket Pledge to the Nation' (*Cricket South Africa*, 1999) <<http://www.cricket.co.za/default.asp?cId=3234&cl=yes>> accessed 1 November 2010. Also see 'Empowering SA Cricket' (*Cricket South Africa*, 1999) <<http://www.cricket.co.za/empowering-sa-cricket.html>> accessed 1 November 2010

equality of participation⁴²⁰. Both the Transformation Charter and Statement of Intent are certainly not independent creations by the ICC. Certainly, this can be seen to resemble the law of both England and South Africa.

Unlike South Africa and England, the National Sports' Federations in Malaysia and the United States do not have specific rules and regulations governing provisions of equality in sports due to the difficulty in obtaining the rules and regulations. However, they do adhere to both the law and the relevant International Sports' Bodies. The main vision of the Malaysian Hockey Federation (MHF) is to reach out the game to all Malaysians⁴²¹. This is similar to the provision as provided under Article 6 of the International Hockey Federation (FIH) which opposed any discrimination based on race⁴²². Similar to both rugby and cricket however, Article 6.1(b) provides a relaxation clause to enable the members of the FIH to be solely and exclusively responsible for their own affairs. Therefore, it appears that MHF is left with the task of ensuring that their rules and regulations are in line with the law. From the evaluation of South African rugby and cricket, it is hardly surprising to conclude that Malaysian hockey might adopt a similar stance as that provided under the federal constitution of Malaysia. The same conclusion could also be deduced from the United States perspective in terms of both basketball and American football.

The example from the above sports and rugby in particular is one of many illustrations to demonstrate the interrelations between the law and International and National Sports' Federations. More importantly perhaps, the evaluation suggests that the law of a country takes primacy or exerts great influence over the construction of regulations of National Sports' Federations. Earlier examples also witnessed the eagerness of local courts in exerting authority over the ISF. Although it is not directly associated with racial discrimination, this would give an insight into the future attitude of the courts in applying relevant laws in sports participation. While the role

⁴²⁰ 'ECB Equity Cricket Policy: Actions' (*England and Wales Cricket Board - ECB*, October 2007) <<http://static.ecb.co.uk/files/ecb-cricket-equity-policy-10085.doc>> accessed 1 November 2007

⁴²¹ 'Sejarah Hoki di Malaysia' (History of Malaysian hockey) (*Malaysian Hockey Federation – MHF*, 2008) <<http://www.malaysiahockey.com.my/historysport>> accessed 12 October 2009

⁴²² 'International Hockey Federation – Statutes and Bye-Laws' (*WorldHockey.org*, 2009) <<http://www.fihockey.org/vsite/vfile/page/fileurl/0,11040,1181-171175-188393-98639-0-file,00.pdf>> accessed 11 October 2009

of the ISF is to ensure that no discrimination exists in sports, nonetheless, there appears to be more leeway given to individual national or local sports' governing bodies to enact their own rules. This is to ensure that the International Federation's rules and regulations do not overlap with national law in the respective countries.

Sports participation is undoubtedly influenced by the political background of a country which in turn results in the formulation of respective legislations to mirror the needs of a country. In conclusion, this chapter has illustrated two different sets of legislation; one in favour of affirmative action, the other favouring equal opportunity. Despite the differences, however, there is one thing in common. The dominance of the theories of affirmative action and equal opportunity as imprinted under the Constitution and laws of Malaysia, South Africa, England and the United States interferes with the sports' rules and regulations of those countries. More importantly, the law appears to take 'precedent' over both the International and National Sports Federations, creating an inevitable blending between them. The next area will analyse the unique or symbiotic relationship between the law and sport's regulation in detail.

6.2 Sports, the Law and Sports' Regulation in Racism – Inevitable Blending

'Legal norms are fixed rules which prescribe rights and duties; relationships within the social world of sport are not seen in this way'.⁴²³

Sport has traditionally seen itself as a private social activity separate from the reach of the legal framework. There are various rules for each sport – for instance, the offside rule in football. However, those rules are not associated with legal rules as applicable to society in general. According to Brailsford, 'Sport in the later Middle Ages began to achieve its own independent existence. It freed itself from the ties of specific holy days, began to attract spectators, achieved greater variety and took on more formal shapes'.⁴²⁴ This is in stark contrast to Beloff's observation in relation to the present status of sport that, 'Sport, once a recreation, is now a business. Not only individual

⁴²³ Ken Foster, *Developments in Sporting Law* in Luke Addison, *The Changing Politics in Sport* (eds) (Manchester University Press 1993) 106

⁴²⁴ Brailsford (n135) 12

reputation, but national prestige can be at stake in the game's outcome. In that valuable exercise, the development of a sports law is not an issue of desirability but of inevitability'.⁴²⁵ Clearly, Beloff is of the opinion that sports rules have been incorporated as part of the legal framework that affect society. The analysis provided in sub-chapter 4.4 appears to reflect his stance. While much has been mentioned about the relationship between the sports, the law and regulation, is there any word or phrase to sum up their inevitable relationship?

The blending of sports, the law and sports' regulation is known as the process of juridification. It is therefore essential to appreciate that this concept has been created due to the increasing legal and regulatory practices in sport. In a legal sense, juridification is defined as 'A spread of rule guided action or the expectation of lawful conduct in any setting private or public'.⁴²⁶ The concept of juridification has affected sport arguably since the time of the ancient Olympic Games. One of the examples of this involves the events leading up to the Sunday Observance Act 1625. Although the core issue was not over sport itself, the implications for English society were far reaching. This was followed with Bills to limit Sunday play successfully introduced in the British Parliament. Typical excuses limiting Sunday play were more to do with religious reasoning. According to the Declaration of Sports, King James I emphasised that those who did not go to church were 'unworthy of any lawful recreation'.

The above illustration provides an early example of the relationship that exists between sports, the law and sporting regulations. The modern era of juridification in sports occurs as a result of the increasing commercialisation of sports. This resulted in an urgent need to harmonise the area of commercial law and rules involving sport. According to Parrish:

Established general legal principles deriving from the rule-led boundaries of modern law have become applied to a growing number of sporting activities. Hence, criminal law, contract law, the law of torts, public law, administrative law, property law, competition law, EU Law, Company Law ... have been

⁴²⁵ Beloff (n136)

⁴²⁶ Lars Blichner and Anders Molander, 'Juridification' (Arena: Centre for European Studies) <http://www.arena.uio.no/publications/working-papers2005/papers/wp05_14pdf> accessed 5 February 2009

applied to sporting contexts involving public order, drugs, safety, disciplinary measures, conduct and wider issues relating to restraint of trade, anti-competitive behaviour and commercial exploitation in sport.⁴²⁷

Quoting an example from the tort of negligence, James observed that ‘Where injury was once considered to be an inherent part of playing sports, it is now often seen as the setting for litigation. The pace at which the law has developed in this area has been dramatic’.⁴²⁸ Other sport cases involving Reynolds and Krabbe appear to be in agreement with the former. Therefore, this further entrenched the belief that the concept of juridification has now become a common phenomenon in the world of sports. For this research however, one may question the applicability of the juridification concept with regards to racism in sport. The crucial question here is the relevance of the theory of juridification when it comes to racial discrimination in sport and to what extent this theory works. The main objective of this sub-chapter therefore is to explore and analyse the extent to which sports and racial discrimination fits into the meaning of juridification.

However, it is essential to note that the concept of juridification covers some different areas. For instance, juridification could refer to the constitutional impact experienced by a European country upon its accession into the European Union. In addition, the concept of juridification could also refer to the status by which people increasingly tend to think of themselves and others as legal subjects⁴²⁹. According to Blichner and Molander⁴³⁰, there are five dimensions of juridification which include constitutive juridification, juridification as law’s expansion and differentiation, juridification as increased conflict solving by reference to the law, juridification as increased judicial power and juridification as legal framing. The authors suggest that there is a ‘positive relationship’⁴³¹ between the dimensions of juridification. For the purposes of this research however, the following will only explore the relevance of three dimensions within the area of racism in sport.

⁴²⁷ Richard Parrish, ‘The Birth of European Union Sports Law’ (2003) 2 Entertainment Law 2, 21

⁴²⁸ Mark James ‘Liability for Professional Athletes’ Injuries: A Comparative Analysis on where the risk lies’ (2006) 1 Web JCLI <<http://webjcli.ncl.ac.uk/2006/issue1/james1.html>> accessed 18 December 2008

⁴²⁹ *ibid* Mark James.

⁴³⁰ Blichner and Molander (n426)

⁴³¹ Blichner and Molander (n426)

Constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system⁴³². While some describe this in relation to the development of international law⁴³³, the establishment of a 'formal constitution is the most evident case of further development of (constitutive) juridification'.⁴³⁴ In relation to racial discrimination in sport, the European Parliament and Commission have introduced considerable EU legislation, Regulations and Directives. In England for instance, the Equality Act 2006 was introduced as a result of the Racial Equality Directive. Amongst others, this Act was created to enhance the pre-existing equal opportunity provision and to give additional support to uplifting the participation of ethnic minorities in sport. This resulted in wide-ranging effects. The 2006 Act became part of English Law and national sport governing bodies would have to take into consideration the Act. Hence, one would be able to appreciate the role of constitutive juridification in relation to sports and racism.

Many points have previously been raised in relation to the deprivation of chances to participate for the ethnic minorities. Equality legislative provisions have since been introduced in different countries in order to redress the problems of participation in sport. For the purposes of this research, this is limited to Malaysia, South Africa, England and the United States. According to Gardiner, 'There are a number of reasons for law's intervention in sport. The commercialisation of sport presents a palpable need for legal regulation. Many 'problems' in sport such as drug use and violence are presented as 'moral panics' in need of legal regulation'.⁴³⁵ The word 'problems' as highlighted could also include the problem of racism and participation issues in sport although this is not specifically spelled out. As explored earlier, different racial and ethnic groups are subjected to different treatment. Quoting another example from England, it is not possible to witness ethnic minority groups actively taking part in sports until the commencement of the RRA 1976. That is perhaps the most important feature of creating equality provisions in various countries. The more

⁴³² Blichner and Molander (n426)

⁴³³ Kenneth Abbott et al, 'The Concept of Legalisation' (2000) 54(3) *International Organisation* 401-419

⁴³⁴ Blichner and Molander (n426)

⁴³⁵ Gardiner, James and O'Leary (n5) 91

recent case law in *Kolpak* can be used as another demonstration in relation to this area. This therefore fits into the concept of juridification as a means of law's expansion and differentiation.

Beloff further mentioned, '... The law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport; differently from other activities or bodies ... English courts are beginning to treat decisions of sporting bodies as subject to particular principles'.⁴³⁶ Following from Gardiner's view, it appears that Beloff's contention suggests that conflicts are increasingly solved by reference to legislation. With reference to racial discrimination in sports, it could be deduced that as the law expands in terms of achieving equality of participation, any disputes would have to be solved by making reference to the law. *Hussaney v. Chester City Football Club*⁴³⁷ is one of the strongest precedents to illustrate the increasing juridification in sport to curb racism.

As suggested by Blichner and Molander therefore, it appears that the concept of juridification does apply when it comes to regulating the area of racism in sports. With increasing legal intervention in sport in order to resolve problems faced by individuals alleging racism, it affirms the earlier argument that sport is no longer an independent entity, regulated by its own set of rules. Also, such blending between sports, the law and regulations on anti-discrimination issues have undoubtedly contributed to the continuous literature in suggesting the emergence of sports law – a concept which would not have existed a century ago. Since this area is gaining prominence, it is hardly surprising that in a country such as England, laws in relation to the prevention of sports racism have been enshrined in the 'higher' Constitution in Brussels.

6.3 A Conclusion – Politics of Affirmative Action, Equal Opportunity, the Law and Sports Regulations

As we progressed through the mid 20th century until the present day of globalisation, affirmative action or positive discrimination had, and has, been implemented in

⁴³⁶ Gardiner, James and O'Leary (n5)

⁴³⁷ *Hussaney v Chester City Football Club and Another* [2001] All ER 47

different countries with an aim to unite the people of different backgrounds. The main objective of affirmative action and equal opportunity is to improve the living standards as well as to bring the under-represented groups or members of the minority on to an equal footing with the rest of the community.

The same applies for sport. All participants and athletes from different countries are made up of different racial composition. Gone are the days where only a handful of represented groups were able to participate in global sports. It is indeed a proud moment for sports where all the best participants, regardless of race, creed or nationality are able to illustrate their skills in individual sports, be it in the Olympics, Commonwealth or Asian Games. It is without doubt that affirmative action and equal opportunity have contributed to increased or substantial participation of different groups and races in various countries. However, these terminologies do not come into play without legislative intervention. Until such theory has been embedded as part of a country's legislation or written constitution, it remains a 'lifeless phrase'.

In theory, politicians would take a balanced approach when forming affirmative action and equal opportunity policy as part of the country's legislation or national policy. The reason for this is that it would infringe the basic fundamental human rights of an individual if affirmative action and equal opportunity provisions only afforded advantage to one community or race. This approach would ensure that the level of underrepresented communities or minority groups could be improved and be on par with other races. On the contrary and at the same time, it would be immature to dismiss claims that other forms of affirmative action do not exist. In fact, there is evidence that a handful of countries have adopted strong practices of affirmative action to the extent of depriving others. For instance, a country such as Zimbabwe and to some extent Fiji which practices extreme affirmative action would illustrate such practice.

Despite the above however, politicians chose the intermediate approach as a solution to resolve problems of racial under representation. As stated, intermediary forms of affirmative action do strive to preserve equality to a certain extent, the difference being that the deprived groups ought to obtain preferential treatment over the former. As a consequence, it would be 'proper' to state that 'officially', intermediate or

medium forms of affirmative action policies can be indicated by the law or legislation of a particular country. Hence, the legislation or local sports governing bodies' policies reflecting the practice of affirmative action would decide the extent and limitation as to its applicability in any sectors or industries which obviously include sports.

Another important theory would include quotas as part of affirmative action policy benefiting some groups or races over others. In countries which exercise such a theory, it would bring about problems since little is specifically mentioned in the constitution, but rather the phrase 'quotas' is introduced for alleviating certain groups of deprived citizens of the country. The repercussion would be disastrous in the long run and it would even result in other groups or races being subjected to direct forms of discrimination. In the context of sports, implementation of quotas without proper specification or guidelines would result in single race participation, something which could create a feeling of discontent from other affected races or groups.

As opposed to affirmative action however, to what extent is the principle of equal opportunity clearly spelled out in the legislation(s) of England and the United States? The evaluation of the legislation in both countries suggests the need to preserve equality. Without any doubt, such a phrase has been used by many governmental bodies, agencies and sports bodies in the matter of exercising their daily functions. On the other hand, the degree of its flexibility in exercising the theory remains another separate question. It can be equated to an individual claiming to be practising a religious faith; however, we could not, as a matter of certainty, ascertain the depth of this practice.

To be fair however, there is some form of certainty if a country decides to take the meaning of such a phrase literally. For instance, the implementation of equalities of opportunities as part of legislation might imply that while any form of discrimination is not permissible, the national sports bodies or the employers will only accept applications from the most suitable or talented. The former thus illustrates a clear overlapping relationship between the law, equal opportunity theory as well as sports. However, the advancement of equal opportunity has since been officially classified under the law by virtue of the Equality Act 2010 in England.

The principles of equal opportunity, similar to the theory of affirmative action have seen increased participation of every section of communities comprising different races, background and nationalities. Though methods of achieving such targets are being pursued mainly via Assimilative Theory and Primary and Secondary Theory, the main goal is to achieve a certain level of participation from various groups in sports. Thus, the principle of equal opportunity would ensure that we obtain the most qualified and the best for the good of the sports, which would in turn increase global growth in the area of sports.

The assertion made previously in chapter 4 suggesting an inevitable relationship between sports and politics has now been confirmed. Generally, individuals have unlimited rights to participate in sports. Political meddling or interference in sports however has resulted in a regulated manner of participation. This interference could be reflected by the words contained in a country's constitution, law or statutes on the equality of participation. With reference to the various legislative provisions as highlighted, the end result is the formalised creation of affirmative action and equal opportunity policy in sports participation. Although International Sports Governing Bodies have their own regulations, there is a tendency to allow the local sports governing bodies to regulate certain areas and in particular, the team selection process. In this respect, all National Sports Federations make reference to the law in reaching a decision. However, it is not possible for any individual to discern affirmative action and equal opportunity policy by merely analysing the model theory, politics or the law.

Sport could provide a solution in discerning the effect of affirmative action and equal opportunity. As discussed briefly above, sport is no longer considered a 'customary' or 'localised' event as opposed to its position in the 19th and early 20th centuries. It is appropriate to mention that only commerce covers the earth; however, the situation has changed since. In fact, at the present date, sports form part of a 'commercial entity' with which it forms 3% of the world's gross domestic product (GDP) and 2% of the Gross National Product of the 25 member states of the European Union⁴³⁸. This

⁴³⁸ Gardiner, James and O'Leary (n5) 399

fact has been evident and the best possible illustration would be the level of transfer fee paid for any well experienced football player in Europe. Upon considering the law of these countries, the next chapter seeks to reveal the practical application of legislation and sports regulation and its effect on a country's sporting success. With statistical analysis from different selected countries therefore, it will be possible to conclude on this note that sport is a vital barometer by which to measure the politics and laws of a nation. However, it is worth noting also that this research is not dismissive of other sectors or industries in procuring barometers to measure the effect of affirmative action in other countries.

Chapter 7 – Racial Discrimination in Sport – The Impact of the Law

7.1 General Introduction

As discussed in the previous chapter, the concept of juridification has resulted in an overlapping relationship between legal rules and sports despite some arguments that suggest to the contrary that it remains a relatively independent entity, free from any political or legislative interference. Analysis however has suggested that laws, regulations and politics have played a major role and had various effects on the development of sports in various countries. As a consequence of differing approaches taken by different countries, it would be appropriate at this stage to summarise that the law is reflective of different theoretical analytical concepts of affirmative action and equal opportunity⁴³⁹. Therefore, the main purpose of this chapter will be to evaluate the practical effects resulting from the incorporation of affirmative action and equal opportunity into the sports' industry. For the purposes of this research, areas of discussion are confined to the selected sports for the different countries in question. The criteria for the selection of sports will be discussed later.

In discussing this chapter, it is also vital to explore the regulatory implications, where appropriate, emanating from the international sports governing bodies. The globalization of sports from its humble beginnings has unavoidably resulted in the participation or involvement of courts in settling disputes between conflicting parties. At the same time, courts have expressed some restraint in interfering in sporting disputes and only step in whenever this is deemed to be justified. This could prove to be daunting since courts, with their primary duty of enforcing national legislation in settling disputes, have to challenge some regulations as provided by the international sports governing bodies, a form of legal plurality. It is worth appreciating at this stage however, that while most of the cases involve areas of personal injury, intellectual property rights and disputes between private sportspersons and relevant national governing bodies, a matter involving racial dispute needs to be highlighted since this area is gaining prominence. As a result, this has challenged the view that both national

⁴³⁹ See Chapter 3

legislation and international governing body regulation are independent regulatory frameworks⁴⁴⁰. In order to target this research, therefore, it is important to identify and evaluate specific sports for each of the selected jurisdictions.

7.2 What Makes a Good Sport?

At this stage, it is important to highlight and identify some of the most popular sports within a country prior to evaluating the practical effect of affirmative action and equal opportunity in terms of participation, selection processes and successes within these sports. This is essential for the research since the four chosen jurisdictions, namely Malaysia, South Africa, England and the United States differ in terms of their political, social and cultural outlook. As a result, this chapter will firstly evaluate the criterion of what constitutes popular sports within a country. Secondly, the number of sports as appropriate samples will be considered. This sub-chapter will finally conclude by analysing the type of sports for each jurisdiction and justification of the need for suitable comparators together with an identification of limitations to this study.

The selection of popular sports in the four chosen jurisdictions is subjected to, and influenced by, several factors. Consequently, the historical nature or characteristics of a country must be taken into consideration. The historical nature⁴⁴¹ of a country helps to reveal the trend or personality that reflects the interest of the general population within a country itself. For instance, countries that have a long historical success and participation in a particular sport would be considered to be one of the features that they would be judged by for the purposes of this study⁴⁴². This statement should be

⁴⁴⁰ See further in Chapter 6

⁴⁴¹ Historical nature (With reference to countries) can be defined as 'Natural development of something over a period of time' (*MSNEncarta*, 2007)

<http://encarta.msn.com/dictionary_1861696701/natural_history.html> accessed 9 December 2007

⁴⁴² See further in Derek Birley, *Land of Sport and Glory - Sport and British Society 1887-1910* (Manchester University Press 1994). In relation to English rugby, Birley quoted '... people of all classes saw the sporting spirit as a vital ingredient in the British make-up, fostering qualities of character that fitted them uniquely well for the task of governing the vast empire they had acquired, and for defending it against lesser nations'.

taken as a general rule since not all types of sport flourish in the country in which they were originally founded⁴⁴³.

Closely related to the historical nature and characteristics of a country, any sport that is part of a country's national identity will be taken into consideration as well. National identity within a country is regarded as something which is exclusive and capable of distinguishing one nation from another and the values which shape how groups define themselves.⁴⁴⁴ Houlihan for instance gave an example from England, 'The overlap between British and English identity is clearly evident in sport. While there is only an English soccer and cricket team at the international level, track and field athletes will compete ... for Britain in the Olympics'.⁴⁴⁵ Thus, sports that have existed for a period of time within a country and are unique, even against neighbouring countries, would fall under such a category. However, this category is not strict in the sense that some countries share similar sporting identities with each another. A country that has been subjected to previous colonial administration might share a similar sports' identity with that of the former colonial power⁴⁴⁶. For example, Allison stated that 'Cricket is an Indian game accidentally invented by the English although Indians would not agree with the remark'.⁴⁴⁷

The other criterion that needs to be considered here is funding. Funding could come in terms of a monetary aspect or even via the contribution of tangible assets for the development of particular sports such as the allocation of a new sports hall. Arguably, sports that attract huge allocations of funding from the government or sports' ministry could imply seriousness in ensuring the particular sports reach a certain level when it comes to international participation⁴⁴⁸. Hopes are high and it is clear that the

⁴⁴³ For example, the sport of badminton is founded in England but yet flourished in North-East and South-East Asian regions.

⁴⁴⁴ Jack Williams, *Cricket and England: A Cultural and Social History of the Inter-war Years* (2003, Frank Cass) 8

⁴⁴⁵ Barry Houlihan, 'Sport, National Identity and Public Policy' (1997) 3 Association for the Study of Ethnicity and Nationalism 1, 121. The Irish example ('Between National Identity and National Dimension') is also highlighted where association football in Ireland follows state boundaries, with separate teams for Northern Ireland and the Irish Republic. Rugby Union, on the other hand, has an all-Ireland team which includes both Southern Catholics and Northern Protestants. For more, refer to Coackley and Dunning 347.

⁴⁴⁶ For instance, see England, Australia and New Zealand.

⁴⁴⁷ Jarvie in Coackley and Dunning (eds) (n80) 349

⁴⁴⁸ 'Funding Boost for English Cricket' (*Sportbusiness*, 9 February 2006)

<<http://www.sportbusiness.com/news/159336/funding-boost-for-cricket>> accessed 17 October 2009.

government would expect some successes by the selected participants in return. Other miscellaneous and minor issues that could reflect the popularity of a sport in a country include the size of audience that support the particular sport in question⁴⁴⁹.

The number of sports chosen as appropriate samples must be taken into consideration for the research as well. Using sports in general as a comparator in establishing the effect of affirmative action and equal opportunity in sport would not provide a satisfactory result since the application would be too wide and logistically impossible. Therefore, the breadth of issues involved makes it necessary to restrict the number of sports in order to refine the area of research. Currently, there are 26 different sporting events contested during the Summer Olympics and 7 different disciplines for the Winter Olympics⁴⁵⁰. As a result, it would not be appropriate to institute research into 33 different kinds of sports. In view of word constraints, two popular sports will be chosen from each of the selected jurisdictions.

Originally, it was planned that comparisons made between countries should be confined to two similar sports. The advantages of this approach would include the creation of standardized statistics that could procure comparative results in evaluating the effect of affirmative action and equal opportunity in sports when it comes to the selection to national teams and the effect on overall sporting success. However, this approach is not possible due to certain factors as highlighted below.

To use the same sports as a means of comparison between two different countries would not give satisfactory decisions. For example, to evaluate the game of badminton in the chosen jurisdictions would not be a good comparator since the sport does not command substantial interest from society in one country as opposed to another. Therefore, analyzing the game of badminton in Malaysia might deliver some desirable results for the purposes of the research but it might not be the same for the

Also see 'Finance and Funding for Community Rugby Clubs' (*Rugby and Football Union – RFU*); <<http://www.rfu.com/ManagingRugby/ClubDevelopment/FinanceAndFunding.aspx>> accessed 17 October 2009. See other examples such as 'Malaysian Badminton to launch multi-million dollar programme' (*Badders.com*) <<http://www.badders.com/news/item/21/malaysian-badminton-to-launch-multi-million-dollar-programme.html>> accessed 17 October 2009.

⁴⁴⁹ 'CSA best ever season brings financial turnaround' (*Cricket South Africa*) <<http://www.cricket.co.za/csa-best-ever-season-brings-financial-turnaround.html>> accessed 17 October 2009

⁴⁵⁰ '33 Sports' (*Olympic.org*) <<http://www.olympic.org/en/content/Sports>> accessed 17 October 2009

United States or even South Africa since the sport is not considered integral to the country's sporting culture.

For the purposes of this research therefore, two different types of sports will be used for each of the countries as a means of comparison in determining whether affirmative action and equal opportunity policies have impacted upon the ethnic participation and sporting success of those countries. The justification for selecting two different types of sports involves the fact that some countries do not participate in certain sports which are not considered part of their culture or national heritage.

For the purposes of the research the game of cricket and rugby will be considered in relation to England and South Africa. Both rugby and cricket were founded in England⁴⁵¹ and since then have flourished to become part of the national heritage of the country. At present, both sports still command popular support among the local population. At the same time, these sports reflect the country's national identity which distinguishes itself from other continental European countries such as France and Germany where it is not considered as one of the favourite sports.

Similarly, cricket and rugby will also be used as a comparison since South Africa is one of the leading countries in both sports, achieving considerable success over the years⁴⁵². Following the abolition of apartheid and the election of President Nelson Mandela in 1994, these sports have shown a broadening of identification with national teams that are still overwhelmingly white. Allison quoted:

⁴⁵¹ See further in Rudolph Brasch, *How did Sports Begin?* (Tynron Press 1986) 83-86 (Cricket) and 145-151 (Rugby). In relation to cricket, Brasch quoted, 'Various claims have been made (and disputed) regarding the first mention of cricket and its earliest pictorial illustration ... The oldest description of the sport has been attributed to a poem by William Goldwin, of King's College, Cambridge, published in 1706 and the first preserved cricket score and code of laws dated back to 1744.' For rugby, 'In 1839, Authur Pell, a student at Cambridge University, suggested to friends that they 'have a go at that game at Rugby'. The name stuck and Rugby football became famous in the world of sport.' Also see 'A brief history of Cricket' (*ESPNCricinfo*) <<http://www.cricinfo.com/ci/content/story/239757.html>> accessed 18 October 2009. Also see 'Origins of Rugby' (*ESPNCricinfo*) <<http://www.cricinfo.com/ci/content/story/239757.html>> accessed 18 October 2009

⁴⁵² See further in Birley (n 442) 167-168 where he quoted, 'Cricket was not the only game to follow the flag (British colonial officers) to South Africa. The Rugby Union organised a tour in 1891 ... In those glorious days when Britain was proud to have an empire, it was the Dominions and the Colonies who received the first fruits of what the Rugby Union had done in gathering together the threads of a game that was gaining popularity at great speed.' See also 'Sport in South Africa' (*South Africa Info*, March 2009 Updated) <<http://www.southafrica.info/about/sport/sportsa.htm>> accessed 15 December 2007

The 1995 Rugby World Cup continued a process which seemed to begin with the 1992 Cricket World Cup of people classified as black, coloured and Indian under apartheid coming to support the rugby and cricket teams: this change was clearly symbolised by President Mandela wearing a Springbok shirt at the 1995 Rugby World Cup Final.⁴⁵³

With reference to both cricket and rugby in England and South Africa, they are currently ranked in the world's top ten for these sports. In particular, South Africa has been ranked alongside Australia as the strongest cricketing nation in the world and is the current world champion for the game of rugby. The popularity of the sport has also been echoed by Cricket South Africa (CSA), where it was quoted that, '... facilities and the growth of junior cricket and the development program at grassroots level spread the popularity of the game to all corners of the country ... cricket today enjoys high popularity ratings amongst all sectors of the population'.⁴⁵⁴

With reference to Malaysia, sports such as badminton and field hockey will be considered. Despite the fact that modern badminton and field hockey were first established in England⁴⁵⁵, the popularity of such sports has increased tremendously since the British introduced the game into Malaysia. Malaysia is now considered as one of the powerhouses in badminton even though football is actually treated as the national sport. Malaysia is ranked among the top ten countries in the world with respect to the games of badminton and field hockey and has produced top-ranked players as listed by the IBF and IHF⁴⁵⁶. Moreover, these sports have attracted large numbers of spectators from within the country.

According to Martinez:

⁴⁵³ Jarvie in Coakley and Dunning (eds) (n80) 348

⁴⁵⁴ Cricket South Africa (n447). Andre Odendaal, 'Transformation and Nation Building – An Ongoing Concern in Cricket' <<http://www.cricket.co.za/default.asp?cId=3252&cl=yes>> accessed 15 December 2007)

⁴⁵⁵ Brasch (n 451) 20. Badminton is named after a country seat of nobility. Badminton was the residence and estate of the Duke of Beaufort, situated in the southern part of the county of Gloucestershire, England. Ancient hockey derived from Persia about 2000BC but the history of modern hockey can be traced from its ancestor, hurling. 'Hurling crossed the sea from Erin to England, to be assimilated into the English way of life and eventually, to become hockey'. Also see 'Hockey History' (*Field Hockey Equipment*) <<http://www.southafrica.info/about/sport/sportsa.htm>> accessed 18 October 2009. For history of badminton, see 'History of Badminton' (*British Broadcasting Corporation*) <http://news.bbc.co.uk/sport1/hi/other_sports/badminton/4163074.stm> accessed 17 October 2009

⁴⁵⁶ See further on Abdul Hamid (n197) 54-55 and 72-73

Initially, Malaya was unknown in the global badminton scene ... All that changed in 1936 when five-time All England Champion J. F Devlin of the Irish Free State was convincingly beaten by Leow Kim Fatt (Colony of Singapore), Foo Lum Choon (Selangor), Tan Cheng Por (Perak) and Thung Ghim Huat (Colony of Penang), the world began to realise that there was a badminton powerhouse. Since then, badminton is one of the most popular sports locally and associated with national pride ...'.⁴⁵⁷

In contrast, in the United States concentration is given to American Football and Basketball. American football, a mixture of the sports of rugby and football has gained prominence in the United States and has attracted substantial amount of support around the country. The sport is unique since it was founded in the United States itself and the country has managed to distinguish it from other traditional sports such as football and rugby⁴⁵⁸. American football has also been considered a 'truly American sport'.⁴⁵⁹ According to Brasch, 'No individual contributed more to its evolution than Walter Camp who rightly has been called 'the father of American football' ... With its many American characteristics, its highly efficient organisation, padded and armoured players, and fervent partisanship, it is a game pursued with deadly earnestness and unsurpassed zeal'.⁴⁶⁰ In fact, the Super Bowl is one of the most watched television events in the country and the sport itself has developed from being played in college to a professional sport that also encompass students both in elementary and high schools⁴⁶¹. Although attempts have been made to introduce the sport to other countries, with the exception of Japan it is still considered to be in its infancy and indeed in most countries it remains very much at the amateur level.

⁴⁵⁷ Abdul Hamid (n197) 70-71. Note that Colony of Singapore and Penang, Federated Malay States of Selangor and Perak later became part of the newly formed Federation of Malaysia in 1963 with Singapore leaving the Federation in 1965.

⁴⁵⁸ Brasch (n451)

⁴⁵⁹ Sintilia Mieceyole 'The Most Popular Sport in the United States' (*Articlebiz.com*) <<http://www.articlebiz.com/article/968-1-the-most-popular-sports-in-the-united-states>> accessed 20 December 2009

⁴⁶⁰ Brasch (n 426) 153

⁴⁶¹ Mieceyole (n459)

A similar observation could be made for basketball⁴⁶² as well, even though the sport receives tremendous support in many other countries. Founded in the United States, this is another popular sport with a huge audience. According to Tooley, basketball's popularity in the United States is well recognized⁴⁶³. In addition, basketball, alongside other popular sports in the United States can be seen as a symbol representing the historical nature of the country. Similar to American Football, the sport of basketball is prominent from elementary school right up to the University level where players then subsequently attempt to participate at higher levels. For example, there are just over a million boys and girls who represented their schools in Interscholastic Basketball Competitions⁴⁶⁴. Moreover, substantial funding is afforded towards the progression of the sport in the USA.

The author is aware that analyzing the practical effects of affirmative action and equal opportunity in terms of sporting success could imply investigating all aspects of sports participation. In other words, this can refer to participation or processes of selection for the Under 23s or Under 18s in any competition. For the purposes of this research consideration will be limited to participation by athletes in relation to professional sports only, as these are the main indicators of a country's sporting success. Within the context of this research, professional sports include any sports that involve international participation rather than the participation of local clubs. Consequently, any other levels of sport as described earlier or any selection or participation for amateur leagues within a country will not be considered as part of the research.

The above mentioned sports are suitable as a means of establishing whether racial discrimination occurs within a country. Due to its popularity and opportunity to showcase the might of a nation to the international community, the government does not hesitate in ensuring that the concept of affirmative action and equal opportunity are applied to these sports accordingly. In addition, with the appropriate allocation of funding and the status as the national sport of the country, it would be proper to attract participation of the some best athletes, thereby ensuring participation from certain

⁴⁶² Mieceyole (n459)

⁴⁶³ Jim Tooley, 'USA Basketball Partners with Sports Museum of America' (*USA Basketball*) <http://www.usabasketball.com/news.php?news_page=08_SportsMuseumofAmerica> accessed 15 October 2009. See further in Brasch (n 426) at 41-43 where he credited Naismith for spreading the sport around the States and subsequently worldwide.

⁴⁶⁴ *ibid.* Tooley

groups. Therefore, the application of both affirmative action and equal opportunity would confer different results and outcomes. As mentioned previously in an earlier chapter, affirmative action would in theory result in procuring racial representation in sports whereas equal opportunity would ensure that all races are afforded equal chance of participation.

7.3 Affirmative Action and Equal Opportunity in Action – The Practical Effect

From the previous chapters, it has been seen that the theory of affirmative action could result in potentially racial discriminative measures against certain groups that wished to participate and be selected for the national team. Conversely, the principal argument for the theory of equal opportunity is that there would be equal chance for every individual to participate. As mentioned however, results based on theoretical considerations would not provide a desirable answer since this approach does not reflect the true chain of events. Therefore, the main purpose of this chapter is to evaluate the effect of affirmative action and equal opportunity practices in sports having identified relevant sports for the four chosen jurisdictions.

At this stage, it is equally important to appreciate that some countries treat any form of dissemination or distribution of information as regards to racial participation in sports as a sensitive issue. This follows the possibilities of encouraging members of the public to question the rights of groups that benefit under a certain scheme which is designed specifically for their benefit as provided under the legislation of a country. In some cases, the former might attract an action under the Sedition Act 1971 as amended which might lead to an indefinite arrest without any trial⁴⁶⁵. As a result, this may result in difficulties in obtaining the relevant information⁴⁶⁶. Other factors include situations where the relevant country does not keep any record of its racial participation in sports. Therefore, credible data or charts have to be tailor-made making use of the limited information obtained. However, such information will

⁴⁶⁵ For instance, see sub-Sections 3 and 4 of Sedition Act 1971 as amended with reference to Malaysia. See further in Chapter 4

⁴⁶⁶ See further in Chapter 2.2 which highlights the limitation on using quantitative methods

nonetheless inform readers of the trends of possible racial discriminative issues within the country.

Take Malaysia as an example, statistics of racial participation in major badminton and field hockey would ideally be obtained from their previous and present participation in the Commonwealth Games. These statistics would provide the reader with a rather clear outcome of whether affirmative action policies have played any role in affecting the participation and success of the Malaysian badminton and field hockey teams. There may be other annual international events taking place, however, this would not be able to provide consistency since in the game of badminton, for example, the number of players being selected for each competition differs and thus could not be considered to form part of a credited statistical set of results.

Therefore, comparative analyses in establishing possible racial discrimination in sports for various countries do not come from any single source. In view of the difficulty in obtaining credible information, there is a need to analyze the effect via the incorporation of custom made charts and diagrams. Overall however, this will still be able to provide a picture as to whether affirmative action or equal opportunity does actually increase the potential risks of racial discrimination or otherwise. Thus, the next area will highlight the important aspects of this chapter.

In Malaysia and South Africa where the theory of affirmative action affords preferences to certain groups of races, this has resulted in direct discrimination against other races in the country. In South Africa, there have been reports⁴⁶⁷ of excluding, or the introduction of racial measures to restrict, participation of whites when it comes to the selection criteria. Such a growing trend might pose serious consequences to the nations' progress in sports' since it has arguably procured a two tier effect. Firstly, it could be argued that there may be an increase in terms of participation by the benefiting parties and secondly the potential impact of this upon the sporting success internationally. Since apartheid was only abolished relatively recently in favour of the new South African Constitution of 1996, it is argued that the effect of such changes does not alter the status quo of racial participation as well as its successes in sports.

⁴⁶⁷ See legislative interpretation as per in Chapter 4. For more discussions, see later.

However, it is still necessary to consider such changes since this might deliver some results in terms of sporting success in the future as a result of the implementation of an affirmative action programme.

On the other hand, the sporting situation in Malaysia would also illustrate the extent of any possible occurrence of racial discrimination in sports or otherwise. As mentioned in earlier chapters, the Malaysian government adopted the affirmative action practices after Independence Day in 1957 and this has been given additional weighting after the racial riots involving multiracial Malaysia just over four decades ago. Socially and economically, the country has performed well under affirmative action practices. Poverty for instance has decreased dramatically from 49% to a mere 15% in 1999⁴⁶⁸. This figure has since dropped even further and in 2005 the poverty level had dropped to 8%. In addition to this, access to education and employment for Malays has also improved so much so that the distribution of employment in different sectors of the economy as well as in better paid occupations is already approaching target figures⁴⁶⁹.

However, this has been achieved at the expense of the ethnic Chinese and Indians who are subjected to quotas when it comes to their admission to public universities as well as any public sector employment⁴⁷⁰. The Malaysian transformation into a mainly manufacturing and service based hub in the region has created new job opportunities for the Malays while non-Malays did not lose jobs to make room for the Malays. The general statement concluded above however is reflective of the overall performance of the country's economy.

As discussed, countries such England and the United States adopt a different approach to Malaysia and South Africa. The concept of equal opportunity is used as a means to ensure that all races and ethnic groups within a country are afforded equal chance to

⁴⁶⁸ 'Wealth and Poverty – The Malaysian Perspective' (APRODEV)
<<http://www.aprodev.net/files/CPW/Malaysia.pdf>> accessed 20 December 2007

⁴⁶⁹ *ibid* APRODEV.

⁴⁷⁰ *ibid* APRODEV. See also Kua Kia Soong, '1Malaysia – Beyond the Hype' (*SUARAM – Suara Rakyat Malaysia*, October 2009) <<http://www.suaram.net/node/238>> accessed 21 October 2009 and Ahmed Ameen, 'Positive Discrimination' (*Malaysia Uncut – A Malaysian Repository and More*, 19 February 2007) <<http://mymalaysia.wordpress.com/2007/02/19/positive-discrimination-2>> accessed 2 January 2008

be selected as part of their national teams. Even if that is the case, it could be argued that there is still a lack of opportunity for ethnic minorities to be included within sports. Similar to affirmative action, there are arguably two tier effects in the application of equal opportunity in sport. Firstly, only the best are given places in the national team and this generally disregards the notion of race. Thus, this may, in principle, increase the sporting success of the country internationally. On the negative side, application of this concept does not necessarily guarantee or assure participation for all races. No doubt they would be given the chance and encouragement to be considered as part of the national team; however the final decision would reflect the former requirement.

Both England and the United States are developed countries and increasingly considered to be multiracial due to the influx of immigrants since the end of the Second World War⁴⁷¹. Generally, there has been integration between races in different sectors within both countries. Similar to South Africa and Malaysia however, the crucial question here is whether the literal interpretation of the term equal opportunity is enforced in favour of ensuring that every individual is given the chance to be part of the national team of either England or the United States. Prior to looking at the sporting situation in different countries, it is important to decide the key question in establishing racial discrimination in sport.

7.3.1 Racial Discrimination in Sport – The Implication of Affirmative Action and Equal Opportunity

In an earlier chapter, it was discovered that the word discrimination could be defined relatively easily. Practically however, establishing potential racial discrimination in sport is not dependant solely upon the participation of athletes or players representative of the total population of the country as a whole. For example, in a country which has 35% of its population who are from 'X' race, discrimination cannot be said to occur if the participation or number of 'X' race being selected to the national team falls below that percentage. Likewise, if participation of 'X' race exceeded 35% in comparison with the 'Y' and 'Z' race, it would be inappropriate to

⁴⁷¹ See earlier in Chapter 4

suggest that there has been discrimination against the other races or ethnic groups within the country.

Therefore, the implication of affirmative action and equal opportunity in sport is dependant upon several factors. The test introduced below for both affirmative action and equal opportunity is designed to be sports-specific and does not mirror the applications made in other areas. It is important to note that this test does not represent an absolute rule or precedent in establishing discrimination and its effect on sporting success since there may be other factors that affect the rate of participation of ethnic groups such as perceived incompetence, poor decision making and corruption within the sports' governing bodies. Rather, and for the purpose of this research, it serves as a basic guideline in suggesting racial discrimination in sports has potentially occurred.

Affirmative Action

Firstly, there must be statistical evidence to suggest that the proportion of participation by race in a particular sport is dwindling and that other races that benefit under affirmative action practice are increasing over time. However, this by itself would not be sufficient in determining whether affirmative action policy has impacted upon a country's overall sporting performance. For countries adhering to affirmative action and any of its sub-theories as discussed earlier, this would seem to suggest that the theory is in action although for some quarters, this can amount to discrimination. In short, this is generally the norm, considering the nature of affirmative action, which affords additional rights and benefits to certain groups.

Secondly, it is important to establish the primary effect on the sporting success within a country. If there is clear evidence to suggest a slow, gradual or sudden surge or decline of participation by a race or by other groups and that this affects the overall performance or results in decreasing the success rate of the national team in a country within a reasonable time frame, this might suggest discrimination against other races or groups. For countries adhering to the affirmative action practice, this could result in a clear attempt to use legislation or sport regulations (wherever appropriate) as a means to racially discriminate against the others when it comes to participation in

sports which could potentially affect the overall sporting success of a country. However, there are exceptions to this rule, which are discussed below.

Thirdly, even if it appears to affect the country's performance in sport as per the above, it is equally essential to take into consideration other variable factors or circumstances surrounding a country. Coalter, Taylor and Jarvie have highlighted several factors that could affect the overall sporting performance and success within a country⁴⁷². For example, a continuing disappointing outcome in competition which triggers a 'crisis of national self confidence and ability'⁴⁷³, 'culture of bad practice or governance within sports governing bodies'⁴⁷⁴ which directly affected the attitude and commitment of professional athletes and 'unrealistic expectations (by the sports governing bodies) of sporting performance resulting in self doubt'.⁴⁷⁵

Therefore, the implementation of affirmative action in sport would in theory affect the rate of participation of other racial groups which do not benefit under the affirmative action policy and potentially decrease the overall sporting success in a country. On the contrary, the implication of affirmative action would not be sufficient by merely analysing the charts. It is pertinent here to note that this remains a general application, which might be subjected to other possible exceptions since circumstances of various countries could require further in-depth evaluations.

Equal Opportunity

In relation to countries practicing the concept of equal opportunity, the test would also largely resemble the above. Consequently, it would be important to consider whether ethnic minority groups have been sidelined from participation in the national team for any kind of sports. The nature of equal opportunity provides for the best to participate and it would be a one off situation where a specific group or race was considered as capable in the specific sport. If the answer is affirmative, this would suggest potential discrimination similar as that for affirmative action. The test on whether

⁴⁷² Fred Coalter, John Taylor and Grant Jarvie, 'Culture of Winning in Scottish Sport – Report to the Scottish Institute of Sport Foundation' (*In the Winning Zone – The passionate face of Scottish sport*) <<http://www.inthewinningzone.com/wz/media/docs/StirlingReport-part1.pdf>> accessed 13 April 2010

⁴⁷³ *ibid* Coalter, Taylor and Jarvie

⁴⁷⁴ *ibid* Coalter, Taylor and Jarvie

⁴⁷⁵ *ibid* Coalter, Taylor and Jarvie 27-31

discrimination is justified would also be the same as for the theory of affirmative action discussed above.

However, if the numbers of ethnic minorities that have been selected to represent the national team have increased, which in most cases they have, the general observation would be that of no discrimination. On the contrary, this theory deserves additional scrutiny. Unlike affirmative action that only confers benefits to a particular group; the concept of equal opportunity applies to all racial groups within a country. In other words, the definition of ethnic minorities within that country would not encompass only one ethnic minority group but other notable members of the minority. As a matter of illustration, countries such as the United States and England have notable ethnic black, Asian and Latino groups.

Even if a country has managed to project itself as being successful in the sport, this would still attract an argument for potential racial discrimination against the others. As a result, the justification on dismissing the former would lie in the country's legislation in relation to equality as well as to the different equal opportunity approaches taken. This should be highlighted along the way. Therefore, the next section attempts to analyze potential racial discrimination in the countries selected. Finally, an evaluation will be drawn from the analysis below from countries adhering to affirmative action and equal opportunity practices.

7.4 Country Analyses

7.4.1 England

Both rugby and cricket are considered to be popular sports in England alongside football. Rugby and cricket will only be considered for the purpose of this research. While the game of cricket is the national sport of England, rugby commands huge support from local English supporters. At present, the England national rugby team as well as the cricket team remains among the top ten based on international rankings for those sports⁴⁷⁶. Traditionally, rugby and cricket have been predominantly white

⁴⁷⁶ See earlier in Chapter 7.2

dominated sports. Due to waves of immigration notably during the mid 20th century to this present date, this has arguably changed the landscape of the sports. Interest has grown among the immigrants who have settled for a considerable period of time in the country and this has resulted in the younger generation following suit.

As England has slowly and increasingly turned into a multiracial country, the effect has undoubtedly resulted in more ethnic minorities or races taking part in sport. However, could the same be mentioned in relation to international participation for the sport of rugby and cricket? For example, the English football team at present has six black players in the national team even though the total black population is less than ten percent of the total population of England⁴⁷⁷. In a country where racial discrimination used to be prevalent, this research would therefore aim to discover and evaluate whether such trends still exist in modern English sport. Any evaluation establishing possible racial discrimination in English sports should have regard to the theory of equal opportunity and positive action (The Assimilative Theory). For the purposes of this thesis, the data is gathered from England's participation in the Six Nations Rugby⁴⁷⁸ and World Cup Rugby⁴⁷⁹ since 1950 and for cricket through the team's participation in World Cup Cricket.

⁴⁷⁷ See further in 'England's Men Senior Team' (*TheFA.com*)

<<http://www.thefa.com/England/MensSeniorTeam/Players.aspx>> accessed 28 October 2009

⁴⁷⁸ With reference to the 6 nations championship, from 1940-1999, it was then known as the Five Nations Rugby. In 2000, Italy joined and the name was changed to Six Nations Rugby. For the names of English participants from 1950s until 1998, refer to Jason Woolgar, *England Rugby – The Official Rugby Football Union History* (Virgin Production 1999). For information from 1998 onwards, information can be obtained from Official RBS 6 Nations Rugby;

<<http://www.rbs6nations.com/en/home.php>> where details of each English rugby players can be viewed. accessed 28 October 2009

⁴⁷⁹ See further in Woolgar (n 478) for English rugby World Cup players from 1987 - 1997. For the names of English participants from 1997 onwards, refer to Rugby World Cup 2011 Official Website, 'Player Statistics' (*Rugby World Cup 2011*)

<<http://www.rugbyworldcup.com/statistics/season=0/type=Points/team=0/player=0/statistics/index.html>> English rugby player's profile can be found by clicking on the relevant year. Accessed 28 October 2009. Additional information can be found at RFU; www.rfu.com

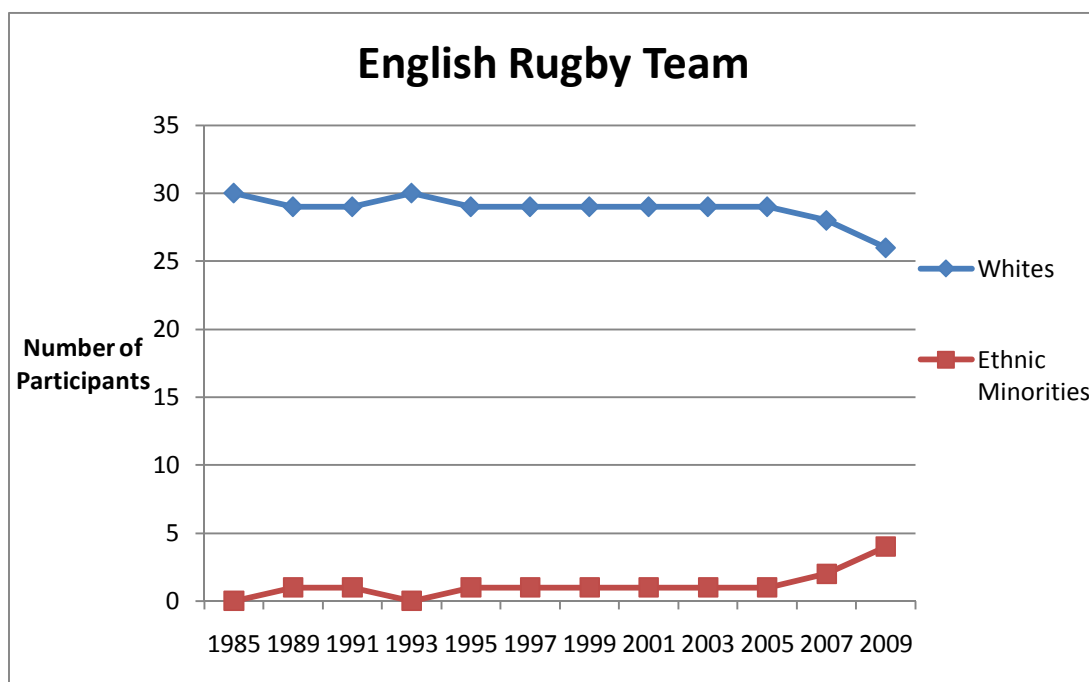


Chart 4: English Rugby Team

With reference to the above chart, the period covering the 1950's until the 1980's have only been characterized by the participation of white rugby players. During that period, lack of participation from any ethnic groups could be attributed to lack of main legislative provision to ensure that the former are afforded equal opportunity to be part of the sport. Arguably, the status of ethnic groups or races only changed after the introduction of RRA 1976 which makes any direct or indirect discrimination based on race, colour and nationality unlawful.

Since then, black rugby players started to make appearances in the English national team in 1989. Since the appearance of Jeremy Guscott, the period covering the 1990s also witnessed the participation of another 2 black players, namely Victor Ubogu and Stephen Ojomoh⁴⁸⁰. The 21st century has observed continued and consistent participation of black rugby players in the first team although their participation is still considered as minimal. Despite this, one may question the exclusion of other ethnic groups or races from the sport. Arguably, it is legitimate to question the application of the 1976 Act since it fails to incorporate other racial minorities into the sport or even a small number of black players in the sport. Blackshaw attributed this to the '... weak application of the law involving equal opportunity. The test to decide

⁴⁸⁰ Woolgar (n478)

on merits is an objective one. The question is whether the objective test is applied in the proper manner'. According to the population census of 2006, blacks made up just 2.3% of the total population in England in comparison with ethnic Asians, which comprised 4.57% of the total population⁴⁸¹. Therefore, does this amount to potential discrimination against the other minority groups when it comes to the selection process?

It may be easy to reach a conclusion solely based on the statistics as provided in the national census. As mentioned earlier, however, this alone would not be enough to claim possible discrimination against other racial minorities. Therefore, it is essential to look into the success rate of the English rugby national team and having regard to the legislative provisions in relation to racial equality. With the exception of the 1950s⁴⁸², Woolgar has described the period of 1988 to 1995 as the glory years of the English national rugby team in contrast to his assertion in describing English rugby 'In the Wilderness Years' during the period of early 1960s until 1987⁴⁸³. It would be appropriate to summarise that the glory years ought to be extended up to 2003.

In comparison, the England rugby union team only won 3 Five Nations Rugby titles together with a Grand Slam during the 25 years' period from 1963 to 1987; while the 20 years' period from 1988 to present witnessed the team winning 7 Five Nations Rugby (it was later changed to Six Nations Rugby in 2000 to reflect Italy's participation in the tournament) titles. Importantly, England claimed 4 Grand Slams and a Triple Crown during that period together with the Rugby World Cup title in 2003 and reached the final in 1991 as well as 2007⁴⁸⁴.

With the information provided, it would not be appropriate to argue that there has been potential racial discrimination when it comes to rugby. Firstly, the participation of black rugby players in the national team has been encouraging since the 1990s. Secondly, even though ethnic Asians have not obtained the chance to participate, this is mainly due to the legislative approach and the concept of assimilative theory taken

⁴⁸¹ Simon Rogers, 'England's population by sex and race' *The Guardian* (London, 9 March 2009) <<http://spreadsheets.google.com/pub?key=phNtm3LmDZENxj9B3Ujnfew>> accessed 26 October 2009

⁴⁸² Although the late 1940s and 1950s is considered as a golden era in English rugby, steady immigration only occurred during the late 1950s and 1960s onwards.

⁴⁸³ Woolgar (n478) 24 and 56

⁴⁸⁴ Woolgar (n478) Official RBS 6 Nations Rugby and Rugby World Cup

by England. In other words, the theory of equal opportunity still requires the best to be selected while ensuring that all races are given equal chance to be considered. At the same time, the government, through its sub-bodies such as UK Sport has required local sport governing bodies in England to encourage participation of ethnic minorities in sports.

In fact, attempts have been made by the RFU to incorporate more minorities to take part in the sport. As a governing body for the sport in England, the Union's strategic plan from 2006 - 2013 is to 'is to promote and develop the game within the community by encouraging and supporting all those who want to participate by playing, coaching, refereeing, administrating or spectating'.⁴⁸⁵ The efficiency of such efforts however remains questionable. Blackshaw is of the view that there are very few chances for other ethnic groups and 'Unless it is applied across the board and reflects the multi-cultural society in England, there is no point in having a well written paper or legislation on anti-discrimination law'.⁴⁸⁶

Despite this and in particular the promotion of the sport to ethnic minorities, the 'RFU will develop and promote programmes which provide the opportunity for ethnic minority groups, disabled people and people from socially excluded areas to be involved in the playing, coaching, refereeing and Volunteering areas of the game'.⁴⁸⁷ As recognition of this principle the RFU will comply with the Sport England Equality Standards 2005. The former's practice could be reflected upon the success obtained by the English rugby union team during the 20 years' period. As a result, any potential argument on discriminating against ethnic minorities in terms of being selected as part of the national team is not justified.

⁴⁸⁵ '2005/06 – 2012/13 RFU Strategic Plan – Community Rugby. Inclusive Participation' (RFU) <http://www.rfu.com/index.cfm/fuseaction/RFUHome.simple_Detail/StoryID/11104> accessed 20 January 2008

⁴⁸⁶ Interview with Ian Blackshaw, Member of the Court of Arbitration of Sport, UK Sports Dispute Resolution and International Sports Lawyer, Visiting Lecturer. (10 October 2009)

⁴⁸⁷ RFU (n485). <http://www.rfu.com/index.cfm/fuseaction/RFUHome.simple_Detail/StoryID/11104> accessed 21 January 2008. Also see the latest Equal Opportunity Policy Statement which states the continuing commitment to 'adopt a planned approach to eliminating perceived barriers which discriminate against particular groups. This will include widening the traditional approach and include communities currently under-represented in the game or experiencing disadvantage and poverty'. Available at <<http://www.rfu.com/TheGame/Regulations/PolicyStatements/EqualOpportunities.aspx>> accessed 28 October 2009

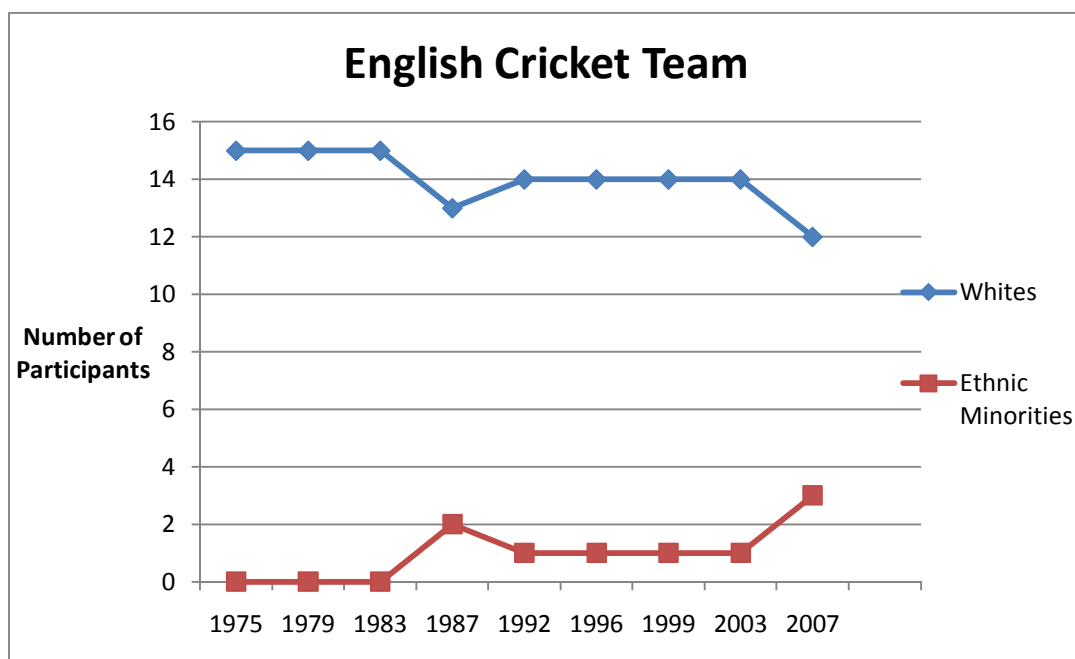


Chart 5: English Cricket Team

Similar to professional rugby, the participation of ethnic groups for professional cricket only emerged in England during the late 1980s⁴⁸⁸. Phillip DeFreitas and Gladstone Small became the first ethnic minorities to feature for England in the 1987 World Cup Cricket in India and Pakistan. England has since succeeded to incorporate the participation of ethnic minorities as part of the national cricket team during successive appearances in the World Cup. The most recent World Cup in the West Indies illustrates the highest ever representation of ethnic minorities in the sport where three Asian cricketers were incorporated as part of the national team.

From the facts, it could be argued that there is no reason to argue that there is any potential discrimination in cricket. The inclusion of ethnic minorities in the team has not affected the rate of success enjoyed by England in World Cup Cricket during the late 1980s until the mid 1990s. Secondly, although one may argue against the exclusion of black cricketers from the team, however, the selection could be made

⁴⁸⁸ ESPN Cricinfo (n451); For list of English cricketers who participated during the 'Cricket World Cup of 1975', please refer to <http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC75/> For 'Cricket World Cup 1979' <http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC79/> For 'Cricket World Cup 1983' <http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC83/> For 'Cricket World Cup 1987' <http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC87/> Other essential information can be obtained from the websites by clicking on the year and followed by 'English squad / team'. For additional information, please refer to England and Wales Cricket Board (ECB) <<http://www.ecb.co.uk>>

justifiable from the fact that England cricket team has generally performed well in series of test matches despite the fact they had failed to qualify for any quarter finals since 1996. The failure of the England Cricket team to do well for the subsequent World Cup could be justified based on disputes and conflicts in relation to the participation of players for County Cricket and the national team during the mid-1990s which eventually led to the establishment of the England Cricket Board. Importantly, the appointment of Nasser Hussain as the team captain for the English Cricket team further suggested and implied that the selection criteria for any player is based on merit rather than the colour of the players.

In conclusion, the participation of ethnic minorities as part of the English Cricket team for the World Cup could signify a clear indication to dispel any claims against potential discrimination. Even if the most recent participation of ethnic minorities only involves ethnic Asians, it is not sufficient grounds to argue on possible discrimination against other notable ethnic groups in England considering the legislative approach taken by England which only allocates the best spot to the most talented while encouraging the participation of other ethnic groups via positive action. Furthermore, evidence has illustrated that the ECB has become the first sport and leisure organisation in the country to achieve the Intermediate Level of Sporting Equals – ‘Achieving Racial Equality in Sports’,⁴⁸⁹

This has then become one of the main objectives of the governing body which states the objective of the cricket board as ‘Increasing participation, club membership, club affiliation, coaching roles and volunteering roles, together with securing funding, promoting equity ...’.⁴⁹⁰ Finally, even though England has not enjoyed the taste of lifting the World Cup, the above factors in assimilating players from different ethnic groups have definitely outweighed any potential claims of racial discrimination in that sport.

In relation to both the RFU and ECB, there is evidence to illustrate the proactive approach or positive action taken from the respective governing bodies in ensuring

⁴⁸⁹ ‘Cricket leads in Achieving Racial Equality’ (The Professional Cricketer’s Association) <http://www.thepca.co.uk/ecb_racial_equality_vision.html> accessed 25 January 2008

⁴⁹⁰ ECB (n408) ‘Developing the Game’ <<http://www.ecb.co.uk/development>> accessed 25 January 2008)

that their corporate objectives mirror the requirements of the overall legislative provision – which is the RRA 1976 as amended by the Racial Relations Regulations 2003 as well as the Equality Act 2006. However, the status quo in ensuring only the best being selected for the team still remains and this could be mirrored under the equal opportunity stance taken by the country.

Despite the above however, there is another point worth considering. Although the concept of equal opportunity works well in relation to both cricket and rugby, it could be argued that similar opportunities only arise for certain classes of the public. Frame describes

Although the law prohibits discrimination, what they did not do enough is to encourage the members of the ethnic minorities to participate. For example, county cricket got South African cricketers rather than local players ... Another example would include the county cricket sticking to the old cliché that No Public School, No Cricket.⁴⁹¹

This view has been shared by Williams who commented that, ‘... It cannot be simply a question of English coaches being useless or foreign coaches being brilliant ... English Cricket and Rugby Union still suffer from the gentlemen and players class snobbery system and it is this that stifles the English game ...’.⁴⁹²

Thus, the former statement suggests that cricket and rugby are still dominated by certain classes of society. As a result, it may appear as though there is internal inequality of opportunity when it comes to rights of participation since it is class-based. Therefore, it might be argued that there is potentially discrimination in these sports. Blackshaw stressed his strongest point where ‘there is also problem from the high management i.e.: failure to choose players from the wider pool. Since this is an affluent sport, does this mean that no ethnic players should be selected?’ This issue will be considered later.

⁴⁹¹ Interview with Douglas Frame, Solicitor, Passmore’s Solicitor (15 September 2009)

⁴⁹² Richard Williams, ‘Cricket, Football, Rugby – England and the art of losing ignominiously’ *The Guardian* (London, 7 December 2006)
<http://blogs.guardian.co.uk/sport/2006/12/07/cricket_football_rugby_the_eng.html> accessed 25 January 2008

7.4.2 United States

In contrast with other countries, basketball and American football are considered for the United States analysis. Basketball was first invented in the United States although the founder of the sport was a Canadian⁴⁹³. However, the sport has since flourished throughout the North American continent and primarily in the United States itself. Until this present moment, the sport has continued to gain popularity and the sport is participated in at all levels within the United States, which includes High School and College Level⁴⁹⁴. With a large pool of talent, this development eventually led most of the players to the professional level and subsequently to represent the country for major events such as the World Basketball Championship (WBC) and the Summer Olympics.

In addition to basketball, American football also gained primacy in the United States. For the purposes of this discussion, American football would simply be known as 'football'⁴⁹⁵. This ought not to be confused with the sport of football which is governed by FIFA which in contrast has been described as soccer in the United States. Similar to basketball, the sport was founded in the United States from the variation of rugby which is generally popular in the United Kingdom. Since then, the sport has gained primacy in the country to the extent where it is participated at the youth, high school and collegiate levels. It mirrors the popularity of basketball in the sense that a large pool of talent would then be considered playing for the semi-professional and subsequently professional clubs governed by the National Football League (NFL). At present, both basketball and American football continue to dominate audience numbers in the United States.

For the purposes of this research, two different approaches will be taken. In relation to basketball, information will be gathered from the number of players selected to participate for the United States during the World Basketball Championship as well as

⁴⁹³ 'The Biography of James Naismith' (Naismith Museum)
<http://www.naismithmuseum.com/naismith_drjamesnaismith/main_drjamesnaismith.htm> accessed 30 January 2008

⁴⁹⁴ See earlier in Chapter 6.2

⁴⁹⁵ See more in 'History of Football'. <<http://www.historyoffootball.net>> accessed 30 January 2008

the Summer Olympics. With reference to football however, figures are gathered from the general participation of players in the professional football league from major notable races within the United States. The figures will however exclude participation of college football and this will only be mentioned wherever relevant. The definition of 'Professional Football League' will only encompass teams playing under the banner of NFL⁴⁹⁶. Any relevant discussion concerning the American Football League (AFL) will only be incorporated upon its merger with the NFL. Unlike the other sports considered for other countries, football is still considered to be in its infancy when it comes to participation outside the United States which has been mirrored by its continuing effort to promote the sport outside the North American continent.

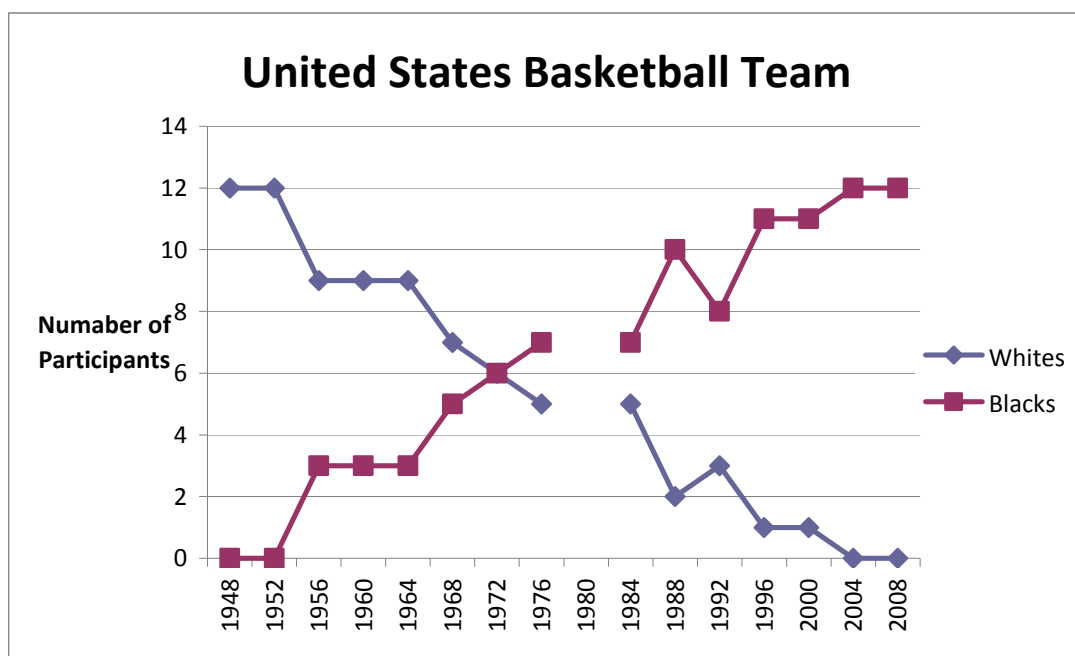


Chart 6: United States Basketball Team

In relation to basketball the chart illustrates a major swing or increase of participation of black basketball players in the Summer Olympic Games as well as the WBC⁴⁹⁷. At this juncture, it is pertinent to note that the number of total participants varies slightly

⁴⁹⁶ American Football League (AFL) used to be a separate different entity from the National Football League (NFL) until the merger between the two in 1970.

⁴⁹⁷ See further in 'US Basketball'. For list of US senior basketball team, please refer to http://www.usabasketball.com/men_team.php?page=msnt_history accessed 28 October 2009. With reference to list of participants / US basketball players who took part for the previous Summer Olympic Games and World Basketball Championship, click further to respective year(s) for detailed information. For additional information, also see 'The Racial and Gender Report Card' (University of Central Florida – College of Business Administration, June 2009) <http://web.bus.ucf.edu/sportbusiness/?page=1445> accessed 28 October 2009

between the years. However, the difference is rather small where in some instances, there were a total of 13 or 14 players in the team rather than the conventional 12 players. The blacks made their first ever appearance in the 1956 Summer Olympic Games as well as the WBC in 1959. Since then, their participation has been consistent with the amount of black basketball players increasing after the enactment of CRA 1964 as amended. At the recently concluded Summer Olympic Games in Athens and WBC in 2004 and 2007, the United States basketball teams were comprised of nearly all black basketball players.

With a total population of 12.8% in the United States⁴⁹⁸, American blacks have been subjected to segregation laws in the past where they have been marginalized from participation although it is undeniable that some made it through to represent the United States in some major sporting events prior to the enactment of the 1964 Act. Their current participation in the national team has undisputedly dispelled any claims of potential racial discrimination within the United States basketball team selection. According to Gray, 'When it comes to the selection of players, they are selected based on their merits and affirmative action is not used ... since there would be fewer meritocracies if it goes beyond player's selection'.⁴⁹⁹

Given the fact they would be considered to be previously disadvantaged groups, the latter have benefited indirectly from the primary and secondary theory or quasi affirmative action policies. This has been reflected in President Executive Order 11478 as amended by President Executive Order 13087 and 13153 which prohibits any form of discrimination in employment through continuing affirmative action practices. As previously mentioned in an earlier chapter, President Executive Order 10925 and 11246 further strengthen the applicability of affirmative action with respect to hiring prospective minority employees in all aspects of employment⁵⁰⁰ together with CRA 1964 as amended although these provisions are not specifically applicable for sport. Wolohan however argued that 'selection process are based on

⁴⁹⁸ 'Annual Estimates of the Population by Sex, Race, and Hispanic or Latino Origin for the United States: April 1, 2000 to July 1, 2006' (*U.S Census Bureau*, 2006)

<<http://www.census.gov/popest/national/asrh/NC-EST2006-srh.html>> accessed 1 February 2008

⁴⁹⁹ Interview with Jim Gray, Attorney at law, Milwaukee Law Office (20 July 2009)

⁵⁰⁰ See further in Chapter 4 and 5

merits and based on affirmative action.’⁵⁰¹ This raises speculation as to the role of secondary theory (affirmative action) in US sport. Craib however mentioned that ‘While affirmative action does not generally apply in sport, Civil Rights Act 1964 as amended did assist in assimilating and increasing the number of ethnic minorities being employed in sport’.⁵⁰² Therefore, it appears that the role of affirmative action in selection of sport is rather indirect.

On the other hand, the question of excluding other notable racial minorities or even reverse discrimination against the whites might be raised in lieu of such developments. According to the 2006 population estimate, there are nearly 8% Asians and 80% white populations in the United States⁵⁰³. In answering this question, it is necessary to consider the success rate of the United States basketball team during the Summer Olympics as well as the WBC. The performance of the United States basketball team has been convincing even after the incorporation of black players. Results have been consistent where the team won a total of 12 gold medals out of the total of 15 Olympic outings where the remaining 3 medals were silvers and bronze respectively. Similar feats could be mentioned for the WBC where their achievements have been consistent despite recent problems which have primarily been attributed to an increase of competition by other European nations as well as increased foreign basketball players playing in the Professional National Basketball Association (NBA) tournament that since brought back their skills to their respective home countries⁵⁰⁴.

Based on these factors, it could be deduced that there is no reason to assume that there has been potential racial discrimination against other notable minorities or against the dominant ethnic groups in the United States. In addition to the secondary theory which promotes affirmative action policy, the primary theory adheres to the concept of equal opportunity which requires that only the best be chosen for participation. In recent years, basketball has been dominated by black Americans. This does not encompass the extent of senior national teams representing the United States for the

⁵⁰¹ Interview with John Wolohan, Professor of Sports Law and Chair of the Sport Management and Media Department, Ithaca College (15 September 2009)

⁵⁰² Interview with Donald Craib, Attorney at Law, Craib’s Law Office (30 July 2009)

⁵⁰³ U.S Census Bureau (n498)

⁵⁰⁴ Carrie Brown, ‘Spain’s Basketball Kings’ (*Aljazeera News Network*, 29 May 2007) <<http://english.aljazeera.net/NR/exeres/5B87FFD8-1142-4747-B483-656BB1FD355F.htm>> accessed 2 February 2008

Olympics and WBC but includes the Under 19 as well as the Under 18 National teams. Another important element lies within the fact that blacks are considered as physically stronger which is deemed suitable for basketball. According to Laettner, ‘The White kids are still trying as hard as they’ve ever tried ... The players who tend to be athletic and really good ... once you get to the higher levels, more and more it seems to be the black group ...’.⁵⁰⁵

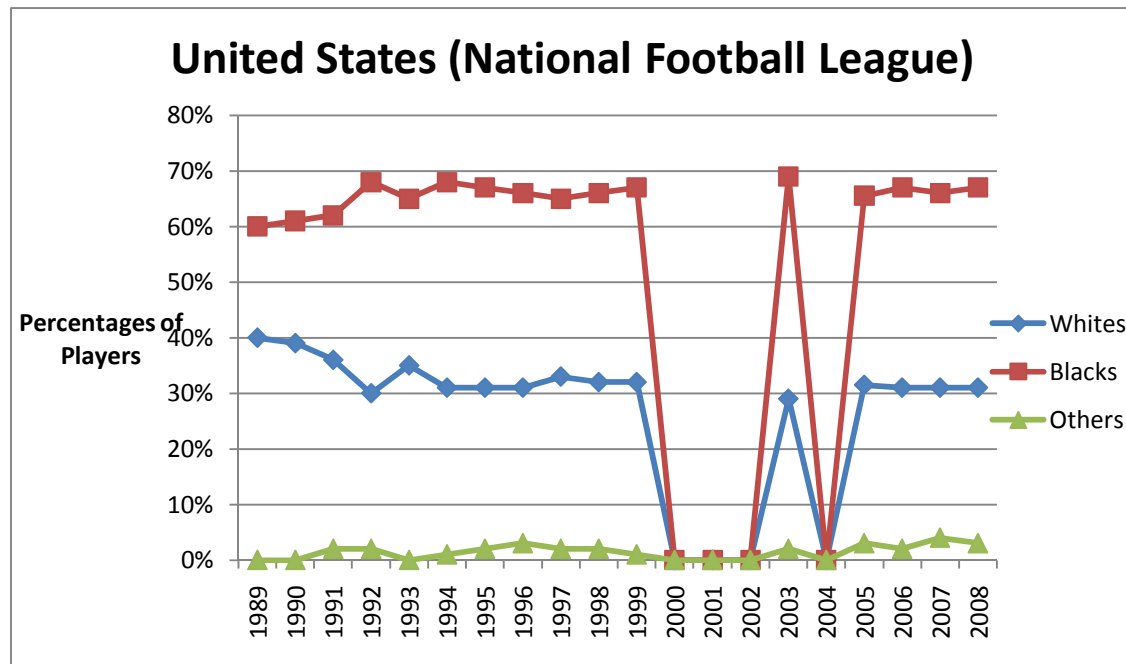


Chart 7: United States (National Football League)

Similar to basketball, American Football has also seen a major increase in overall black participation. Due to difficulties in obtaining crucial materials or charts in relation to the participation of black and other communities from the 1950s until the late 1980s, the discussion will nonetheless endeavour to highlight the participation of the ethnic minorities during the period mentioned above. According to Davis, participation by blacks in football increased during the Second World War since ‘colleges were “forced” to seek talents which had been previously ignored although any black participation in the NFL was barred until 1946’.⁵⁰⁶ George Taliaferro made the first ever appearance of a black football player in the modern era (Post World War

⁵⁰⁵ Entine (n260) 272-273

⁵⁰⁶ Timothy Davis, ‘The Myth of the Superspace – The Persistence of Racism in College Athletics’ (1995) 22 Fordham URB L.J 615, 5

II) in the NFL when he was drafted by the Chicago Bears but crucially, Wally Triplett became the first black player to play in the NFL for the Detroit Lions in 1950⁵⁰⁷.

During the 1950s however, the participation of black athletes in the NFL came with little effect. In fact, the effect of being sidelined persisted until the introduction of the CRA 1964 as amended. For clarification purposes, the period mentioned does not imply that all NFL teams were 'white'⁵⁰⁸. Accordingly, there is a tendency to suggest that black participation in the NFL has been very low. According to Longley, Crosset and Jefferson, there was a massive emigration of African-American footballers to the Canada Football League (CFL) to avoid racial discrimination within the NFL until the 1970s. According to Humber, 'The Canadian Football League survived the post war popularity of the National Football League by providing opportunities for minorities (African-Americans) to assume leadership positions ...'⁵⁰⁹. In addition, active recruitment of black and other minority football players by the AFL who have been ignored by the NFL further entrenched the belief that participation by African-Americans in NFL is only small in nature⁵¹⁰.

However, the merger between AFL and NFL opens a new dimension when it comes to the participation of African-Americans and other minorities in the sport. Since then, the participation of African-Americans and other ethnic groups have increased and importantly, the sport has been taken to a greater level. For instance, Eddie Robinson, who played an integral part in the AFL purportedly 'sent more than 200 players (blacks) into the NFL ...'.⁵¹¹ As described in the chart, the participation of African-Americans had surpassed that of whites by 1989. Since 1992, African-Americans and

⁵⁰⁷ 'African-Americans in Pro Football – Pioneers, Milestones and Firsts; "Firsts" by African Americans in the Modern Era' (*Pro-Football Hall of Fame*)

<<http://www.profootballhof.com/history/general/african-americans.jsp>> accessed 2 February 2008

⁵⁰⁸ See more in Charles Ross, 'Outside the Lines: African Americans and the Integration of the National Football League' (New York University Press 1999)

⁵⁰⁹ Neil Longley, Todd Crosset and Steve Jefferson, 'The Migration of African Americans to the CFL during the 1950s: An Escape from Discrimination?' (2007) IASE/NAASE Working Paper Series, Paper No 07-13, June 2007, 5 – 6

⁵¹⁰ 'Minority Players and the American Football League' (CognilioFamily)

<www.cogniliofamily.com/MinorityPlayers.htm> accessed 5 February 2008

⁵¹¹ Joe Macaluso, 'Eddie Robinson 1919-2007' *The Advocate* (Los Angeles, 5 April 2007)

<<http://media.2theadvocate.com/documents/070405robinsongraphic.pdf>> accessed 10 February 2008

other ethnic groups have formed nearly 70% of the racial composition in the NFL and this status remains until the present date⁵¹².

The change of structure resulting in more participation of African Americans in particular into American Football therefore illustrates the workings of the primary and secondary theory even though the total population of African Americans does not reach a quarter of the total population. Wolohan argued that 'When it comes to sports at the professional level, teams pick the best athletes and disregard the colour of the skin. As long as the player brings finance and skills to the team - that would suffice'.⁵¹³ Wolohan's statement seems to suggest that affirmative action does not play any role when it comes to the selection of players. In agreeing with Wolohan, Gray suggested that 'Affirmative Action (as in law alone) is not used when it comes to selection of players ...'. However, he is not entirely dismissive of the indirect role played by the primary legislation when it comes to selection of players in sport. He added, 'Affirmative action as applied to sport has been effective when combined with economic and social pressure, as compared to using the law alone'. Arguments suggesting potential discrimination over whites and other minorities ought to be set aside. Similar to United States Basketball, it is justifiable that only the able and talented are selected for representation in order to produce the best out of the sport. In addition, the percentage of African Americans and other ethnic minorities has been stagnant at nearly 70% of the total players thus suggesting that equal opportunities are still being afforded to the other racial groups.

Despite the above arguments however, it appears that there is still racism or discrimination from within. This does not refer to the racial composition of the chart however, but to the position of footballers in the team. According to Woodward, 'Traditionally ... African Americans were less likely to be found in thinking positions, most notably at quarterbacks, offensive center ...'.⁵¹⁴ Gray describes the phenomenon of 'unconscious racism where certain ethnic groups tend to be associated

⁵¹² University of Central Florida – College of Business Administration (n497)

⁵¹³ Interview with John Wolohan, Professor of Sports Law and Chair of the Sport Management and Media Department, Ithaca College (15 September 2009)

⁵¹⁴ John Woodward, 'An Examination of a National Football League College Draft Publication: "Do Racial Stereotypes still Exists in Football; Department of Sociology and Anthropology"' 2002 Sociology and Sport Online, 5 no. 2 <<http://physed.otago.ac.nz/sosol/home.html>> accessed 17 September 2009

with certain characteristics.’ As a result, it is argued that African-Americans are confined to positions where it requires physical strength and perhaps stamina at the expense of the forward thinking positions. In addition, the composition of African-American NFL coaches is substantially lower in comparison to the on-field statistics. This will be discussed in greater length during the overall evaluation. This arguably is similar to United States Basketball where such players have been chosen largely due to their physical abilities. At this point however, it is worth concluding that the theory of primary and secondary theory in the United States has benefited in ensuring the equality of participation based on skills.

7.4.3 South Africa

In relation to South Africa, the charts and evaluation of potential racial discrimination will only be based on international participation and results after the dismantling of apartheid. The main reason for this is due to the international boycott by various international sports’ bodies against South Africa which effectively rendered it impossible to measure the success rate of the team – although as mentioned within Chapter 4, sport in South Africa had become deracialised in 1976. For the purposes of this research, the sports of rugby and cricket will be analysed in order to establish whether potential racial discrimination has occurred since the implementation of the new South African Constitution of 1996. Similar to Malaysia, South Africa incorporated affirmative action as reflected under the Constitution of the country. Rugby has gained popularity in South Africa since the sport was introduced there more than a century ago. Prior to this, the sport was known as Winchester Sport which resembled the present game of rugby. The sport has since grown and consequently the South African rugby team, also known as The Springboks started touring the British Home Nations and was generally successful in their matches in continental Europe.

Cricket was equally accepted in South Africa upon the introduction of the sport into the country. The South African team, which is also popularly known as ‘The Proteas’ went on to become the third test playing country after England and Australia. Despite the international boycott, the team continued to host several other test nations such as

England, Australia and New Zealand⁵¹⁵. This reflects the continued popularity of the sport even though the team was barred from any test series or World Cup cricket until the deconstruction of apartheid. In establishing potential racial discrimination or otherwise, the charts and evaluation will be based upon the participation of both the South African rugby and cricket teams during the World Cup as well as any other significant achievements made by the teams.

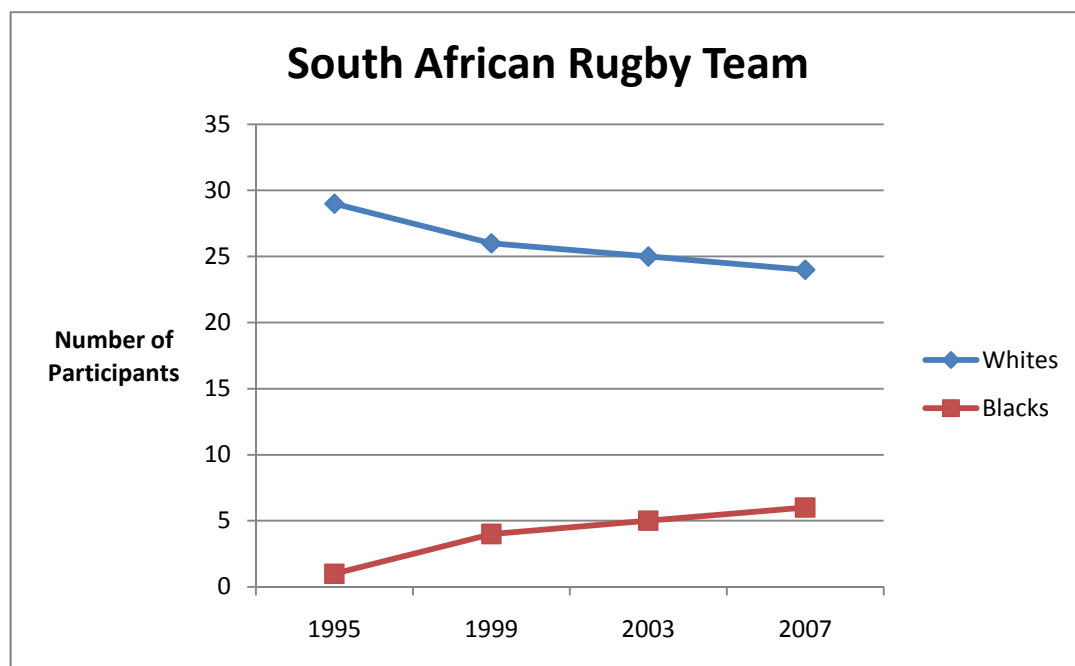


Chart 8: South African Rugby Team

From the charts⁵¹⁶, it is evident that The Springboks continue to be dominated by white rugby players since their return to international Rugby World Cup in 1995. This however changed during the subsequent World Cup. There is evidence to suggest that the number of black rugby players have increased steadily. In 1995, Chester Williams was the only black player to have participated in the 1995 World Cup. Since then, there were four black rugby players, Breyton Paulse, Deon Kayser, Kaya Malotana and Wayne Julies, included in the South African rugby team for the 1999 Rugby

⁵¹⁵ For examples from rugby and cricket, see 'No Maoris – No Tour' (*New Zealand History Online*) <<http://www.nzhistory.net.nz/media/photo/no-maoris-no-tour-poster>> accessed 18 October 2009. Also see 'Stopping the 1972-1981 Springbok Tour' <<http://www.nzhistory.net.nz/culture/1981-springbok-tour/1973-springbok-tour>> accessed 18 October 2009

⁵¹⁶ Information on players and their background (inclusive) were obtained from 'The Springboks – History and Profile' <<http://www.sarugby.co.za/boks.aspx?section=boks>> accessed 22 October 2009

World Cup. The number has continued to increase to five and six black rugby players during the 2003 and 2007 Rugby World Cups respectively. They included Guthro Steenkamp, Ashwin Willemse, Bryan Habana, Ricky January, Akona Ndungane and JP Peterson. One would question whether the other groups have been discriminated in sport.

Thus, would it be conclusive to suggest that there has been potential racial discrimination in the South African rugby union team? Interestingly, the Springboks have managed to lift the World Cup twice from a total of four appearances⁵¹⁷. Moreover, the team has never failed to exceed the preliminary stages of the World Cup while their worst performance was failure to get past the quarter finals in the 2003 Rugby World Cup in Australia. In addition, Bryan Habana won the award for the player of the tournament and was also chosen as the IRB's World Player for the Year 2007.

In order to establish whether potential racial discrimination has occurred, it is important to observe the participation of ethnic groups that benefited under the legislative provision in South Africa. Incorporation of two black players as part of the South African rugby national team could suggest potential discrimination. In addition, the appointment of Peter de Villiers as the first black South African national coach could prompt any reasonable person to suggest the former is taking place⁵¹⁸. On the other hand, this test alone would not suffice. As mentioned earlier, the Springboks have managed to perform well in their World Cup outings. Importantly, they won the recent rugby World Cup by defeating the defending champions. On the basis of probabilities therefore, it is rather naïve to conclude that there is a blatant racial discrimination taking place. On the contrary, this may appear as a justifiable form of discrimination, taking into consideration the principal clause of equality of the country as provided under Section 9 of the South African Constitution of 1996 which provides for affirmative action in favour of the previously disadvantaged groups – which includes the blacks. Essentially, the increase in the number of black rugby

⁵¹⁷ IRB (n409) 'South Africa' <<http://www.irb.com/unions/union=11000034/index.html>> accessed 21 October 2009. In the latest IRB World Rankings as updated on the 19 October 2009, South Africa is still ranked number 1 in the world.

⁵¹⁸ For more, see Fred Bridgland, 'Black Coach Peter De Villiers wins Springboks job as rugby bosses admit his colour settle decision' *TheTimes* (London, 10 January 2008) <<http://www.timesonline.co.uk/tol/news/world/africa/article3162167.ece>> accessed 22 October 2009

players at a grass roots level since the end of apartheid could also be seen as a reason behind the improvement of black participation in the sport. As echoed by Van Graan, ‘... After 1992 and especially in 1995, black rugby players started to upgrade and with improved infrastructure, they are trying to participate on an equal level playing field ... At this moment, 70% of blacks and other ethnic groups are playing rugby at various club levels’.⁵¹⁹

Furthermore, the application of Section 9 could be reflected under the present South African Rugby Constitution which was adopted in March 2008. Although it is the policy of the sports’ governing body to forbid any form of discrimination based on race, colour, creed or gender, there is an exception to this general application. Under the policy paper of the governing body, it is stated that, ‘The National Rugby Controlling Body shall at national and right down to club and school level pursue policies and programs aimed at redressing imbalances and ... [creating] genuine non-racial, non-political and democratic dispensation ...’.⁵²⁰ According to Shikwambana, the General Manager of SASCOC, ‘We do not discriminate against anyone when it comes to sports. However, we need to understand that South Africa had gone through some rough patches during the past ... There is a need to transform South African sport to make it more representative’.⁵²¹

The approach taken by the sports governing body in South Africa, together with the wordings provided under the country’s constitution suggests the application of an intermediate or medium form of affirmative action. While affording additional rights and benefits to previously disadvantaged groups or other ethnic groups; participation by the former must be judged upon the best individual suitable for the sport. Similar to Malaysia, it could be deduced that the theory of affirmative action, though it might appear discriminatory, must not be made synonymous with practical application unless there is any reason to suggest otherwise.

⁵¹⁹ Interview conducted with Barend Van Graan, Chief Executive Officer of Blue Bulls Company, South Africa (29 June 2008)

⁵²⁰ ‘The South African Rugby Constitution adopted on 28th March 2008’ (*SuperSport.com*) <<http://images.supersport.co.za/SARugbyConstitution28Mar08.doc>> accessed 20 October 2009

⁵²¹ Interview conducted with Patience Shikwambana, SASCOC General Manager, Operations and National Federations Support (27 June 2008)

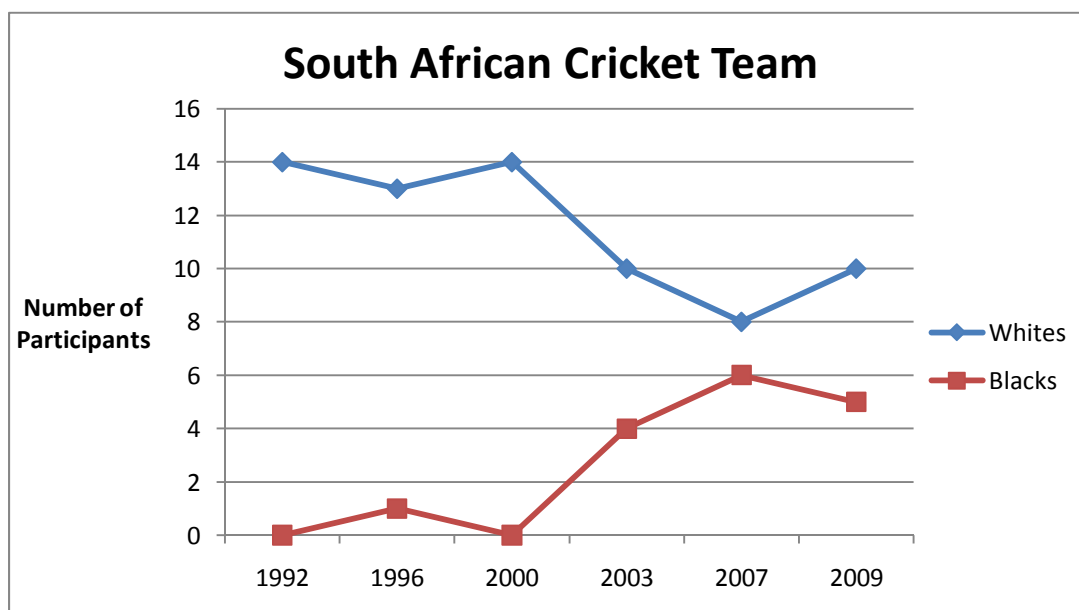


Chart 9: South African Cricket Team

Cricket in South Africa mirrors the situation of rugby. Ever since the reinstatement of The Proteas to the international scene and primarily to the Cricket World Cup, the country's cricketers have witnessed a quicker transformation than that of their rugby counterparts. Setting aside the 1992 World Cup squad, the rise of ethnic blacks and other groups have been steady throughout the competition. From the chart⁵²², the South African cricket team selected only one black player for the 1996 World Cup Cricket as opposed to six black and coloured cricketers during the most recent 2007 World Cup in West Indies. In short, the Proteas are represented by nearly 45% of non white cricketers in the first team competition⁵²³. However, it is worth noting that the only black cricketer, Ntini, was disqualified from participating for the team in the 1996 World Cup due to his alleged involvement in a criminal act⁵²⁴.

⁵²² ESPN Cricinfo (n451). For the names of South African cricketers who participated in the 'Cricket World Cup of 1992' please refer to http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC92/WC92_TEAMS.html accessed 11 January 2008. 'Cricket World Cup 1996' please refer to http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC96/PLAYERS/RSA/ accessed 11th January 2008. 'Cricket World Cup 1999' please refer to http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC99/SQUADS/WC99_RSA-SQUAD.html accessed 11 January 2008. 'Cricket World Cup 2003' please refer to http://static.cricinfo.com/db/ARCHIVE/WORLD_CUPS/WC2003/SQUADS/WC2003_RSA-SQUAD.html accessed 11 January 2008. 'Cricket World Cup 2007' please refer to <http://www.cricinfo.com/wc2007/content/squad/279498.html> accessed 11 January 2008. Additional information can be found at Cricket South Africa. See <http://www.cricket.co.za>

⁵²³ ESPN Cricinfo (n451)

⁵²⁴ ESPN Cricinfo (n451). See further in <http://www.cricinfo.com/ci/content/player/46592.html> accessed 11 January 2008

In comparison to rugby, a similar observation could be made for cricket. On the surface, it could be argued that potential racial discrimination within the team is taking place when it comes to the selection of players. This factor alone however, would not be enough to suggest the former. Therefore, it would be essential to compare the overall success rate of the sport. Since the involvement of the Proteas in World Cup Cricket in 1992, they have managed to reach the semi finals in 1992, 1999 and 2007. A similar feat was achieved during the team's participation in the ICC Champions Trophy where they have twice been semi-finalists in 2002 and 2006 respectively. Despite their failure to be crowned as champions in any of these major tournaments, this nevertheless illustrates consistency since the incorporation of black and coloured cricketers since the abolishment of apartheid. Shikwambana attributed this to various programs undertaken 'to tap and identify talents from all villages and provinces' which have managed to create a larger pool of talent to continue the desirable results. Additionally, the South African cricket team has been ranked first when it comes to One Day Internationals (ODI) in 2007 and features among top five when it comes to the Official ICC Test Ranking⁵²⁵.

Despite rising feelings of discontent amongst the ethnic minorities who are not part of the affirmative action provision in relation to the quota system and the overall implementation of medium affirmative action, the performance involving the South African Cricket team has been consistent. In addition, it is pertinent to have regard to the principal clause of equality of the country as mentioned. Although the Constitution of Cricket South Africa only provides for a basic clause which reads, 'To promote, advance, administer, co-ordinate and generally encourage the game of cricket in South Africa ...',⁵²⁶ it could be interpreted to harmonise with the basic aim of the country's constitution; that is to redress the imbalances of the past. Shikwambana also noted that this is also part of 'SASCOC's plan to create multiracial team for each sport to reflect the population's representative'.

⁵²⁵ ibid ESPN Cricinfo. <<http://static.cricinfo.com/db/ARCHIVE/2007>> accessed 22 October 2009

⁵²⁶ Cricket South Africa (n409). 'Article 7 of the Constitution of the Cricket South Africa' <<http://www.cricket.co.za/default.asp?cId=3599&cl=yes#article7>> accessed 13 January 2008

In conclusion, both rugby and cricket in South Africa still managed to preserve their overall status quo as one of the powerhouses in these sports despite witnessing 'compulsory integration' from other previously deprived groups. As a result, intermediate affirmative action as practiced by South Africa does not necessarily affect the country's sporting standard if it is treated in a correct manner. One such illustration can be witnessed by the Blue Bulls rugby club which have consistently contributed and groomed future South African rugby players. Van Graan mentioned:

We (Blue Bulls) go around the country to scout and select the talented blacks and we put them in special school ... provided them with hostels where they can progress on to the University where they also have the chance to further their studies ... The idea is that they are properly trained and groomed in order for them to contribute to the sport.

In the long run however, a question would remain as to the viability of the concept of affirmative action bearing in mind that it has only been just over a decade since the concept was introduced as part of the country's constitution. Kriel is concerned 'With the implementation of the affirmative action provisions in sport. Sport is not a tool where anyone can simply be chosen to be part of the team'.⁵²⁷ Although not related to either rugby and cricket, the fear has also been noted by the South African national water polo coach Trninic where he observed that 'The way how they are pushing it (affirmative action) ... I am worried ... If the politicians pushed it too far, in which they are, they would not obtain the desired results. Sport is very competitive'.⁵²⁸

7.4.4 Malaysia

The most popular sports in Malaysia are badminton, football and field hockey. However, football will not be considered as a main part of the research due to restriction and difficulties in obtaining viable information⁵²⁹. Although modern badminton and field hockey were introduced in England, the popularity of this game

⁵²⁷ Interview with Kallie Kriel, Chief Executive Officer of Afriforum, South Africa (29 June 2008)

⁵²⁸ Interview with Vladimir Trninic, Coach, Senior South African Water Polo National Team (24 June 2008)

⁵²⁹ The Football Association of Malaysia's (FAM) website does not list or contain information or biography of previous national football players. In addition, attempts have been made to contact and obtain hard information but to no avail.

has gained prominence and commands large interest from the general Malaysian public.

Badminton is considered as one of the sports where Malaysia has managed to reveal its talent to the world. Therefore, this could attract the Malaysian government to ensure that the racial composition of the team does involve the participation of Malays or any groups that might benefit under the affirmative action policies as provided under the Federal Constitution of Malaysia. For the purposes of this research, analysis would be based on the information derived from the national team's participation during the Commonwealth Games⁵³⁰.

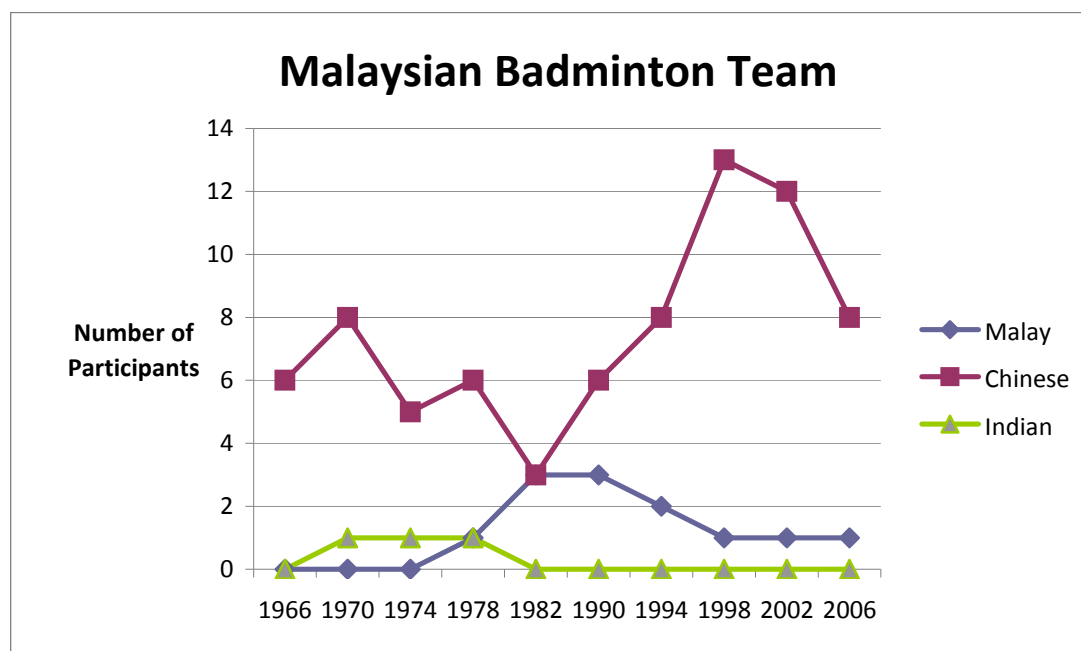


Chart 10: Malaysian Badminton Team

With reference to the above chart, the first ever participation by an ethnic Malay only occurred in the 1978 Commonwealth Games in Canada. Since then, Malays have consistently been selected in the sport of badminton. Arguably, this occurs as a result of the implementation of the NEP which is intended to address the problem of racial imbalance when it comes to participation in any sectors. Setting aside the 1982 Commonwealth Games held in Australia, it appears that while ethnic Malays made

⁵³⁰ Olympic Council of Malaysia (n217). 'Commonwealth Games – Previous Medal Tally' <<http://www.olympic.org.my/web>> accessed 18 October 2009. Also see 'Player's Profile' (Malaysian Badminton Association) <http://www.bam.org.my/index.php?option=com_content&task=view&id=89&Itemid=99> accessed 18 October 2009

appearances at the other Commonwealth Games, the participation of the ethnic Chinese has increased throughout the years. Perhaps, it is only the ethnic Indians who have been left out of the sport which saw the last appearance in the 1978 Commonwealth Games.

Although the sport has been dominated by the ethnic Chinese, the success rate enjoyed by the multiracial Malaysian badminton team appears to be consistent throughout the years apart from the 1986 Commonwealth Games in Edinburgh where Malaysia did not take part. In addition, it is interesting to note that more medals in general have been won by the badminton team since the introduction of the NEP which gave additional rights and benefits to the majority Malay population in the country. As a consequence, it could be argued that the application of affirmative action in respect of the game of badminton appears to be minimal. In addition, it is interesting to note that ethnic Malays who have been chosen to participate and to represent Malaysia in badminton alongside their counterparts performed well in the sport. Since the 1982 Commonwealth Games for instance, the Malays have contributed medals of all colours to the national team and played an important role in ensuring medals for the overall team event.

For the sport of badminton therefore, it could be deduced that while efforts have been made to incorporate the participation of Malays into the national team, there is no evidence to suggest that there needs to be a fixed number of participants from the Malays. It would appear as though this is a form of medium or intermediate form of affirmative action with preservation of the status quo in terms of equality of participation. However, it could be deduced that there is not enough evidence to suggest that the applicability of affirmative action has affected sporting success or performance in the sport of badminton in Malaysia. As mentioned, the crucial point which might dispel the former would be the fact that the Malays who have been chosen to participate in the sport have contributed medals and thus success to the national team.

Nonetheless, it could be argued that affirmative action could play an important role in restricting participation from other ethnic groups in the country. Although medium affirmative action could be seen as potentially discriminatory or directly

discriminatory as evaluated earlier in the theoretical chapter of affirmative action, it is not be treated as discriminatory per se if the overall performance of specific groups who are given preferences over other racial groups are good. It would therefore be inappropriate to raise suggestions or to conclude that racial discrimination in sports can be pre-determined by looking only at the scale of participation by various races. On the contrary, there would be discrimination if any increased participation by any groups which benefit under the system of affirmative action resulted in a continuous lowering of sporting standards in a country while the participation of other races is set aside.

Another sport that commands substantial interest from the members of the Malaysian public is field hockey. All names are obtained via the team's participation in the Olympic Games. For the purposes of this research, the author is referring to participation of the male field hockey team rather than both male and female since the Malaysian female field hockey team is not receptive amongst the members of the Malaysian public in general. Unlike badminton, the success of the national field hockey team will be compared against the achievements and failures of the team in the World Cup, the Olympic Games as well as the Asian Games⁵³¹.

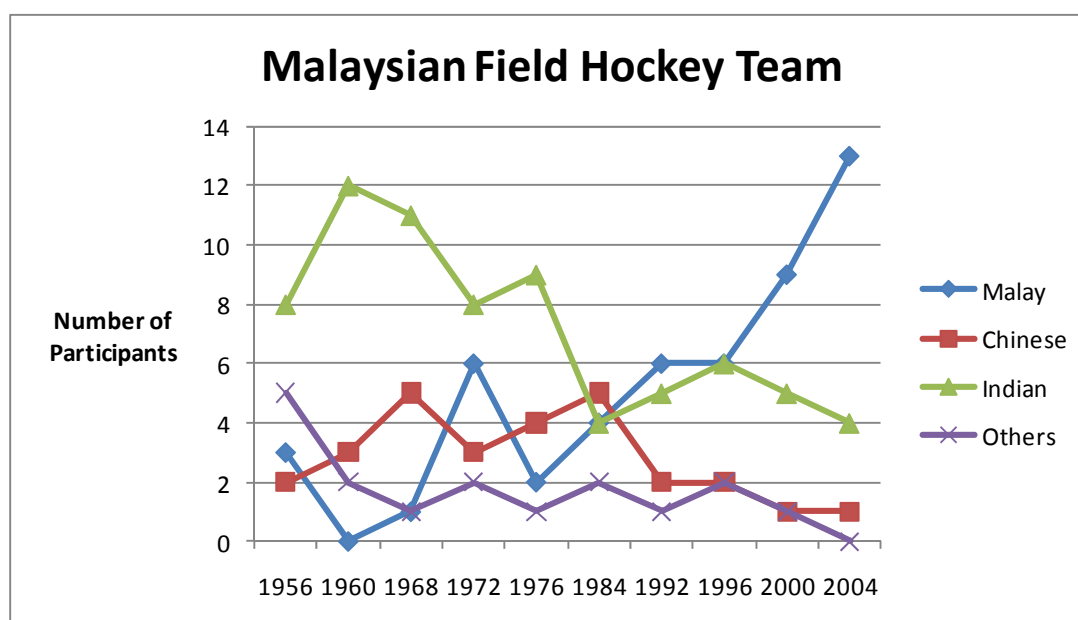


Chart 11: Malaysian Field Hockey Team

⁵³¹ Olympic Council of Malaysia (n217) 'Commonwealth Games – Previous Medal Tally' <<http://www.olympic.org.my/web>> accessed 18 October 2009. Also see additional information from 'Hockey in Malaysia – The Previous Teams' (*Malaysian Hockey Federation*) Available at <<http://www.malaysiahockey.com.my/pastteams>> accessed 18 October 2009

In contrast with badminton, the Malaysian field hockey team saw continued participation of ethnic Malays prior to the independence of the country. In addition, this is an event where all major races in Malaysia, namely the Malays, Chinese and Indians have been continually represented. The only difference is the variance when it comes to participation according to racial breakdown. As the chart suggest, the participation of Malaysians of Indian descent have depreciated since the mid-1970s while in stark contrast, the number of Malays that have been selected to participate in the game of field hockey have appreciated notably. The number of ethnic Chinese being selected as part of the national team has seen a relative decline since the mid-1980s to a current single representation. At this stage, similar to badminton, this could arguably illustrate the application of medium of intermediate affirmative action in Malaysian field hockey sport.

On the surface, it could be argued that there might be an element of bias or discriminatory measures being deployed in order to ensure that the number of Malays being selected to the national team has increased. On the contrary, the former statement must be treated with additional care since the result or the outcome of the Malaysian national field hockey team in most of the international field hockey competitions has not been exceptionally good thus far. For participation in both the Hockey World Cup and the Summer Olympics, Malaysia has not emerged as champion in either event or been successful in winning any medals since their first ever participation as a nation in 1956. For the Asian Games however, Malaysia has enjoyed success, third place being their best achievement so far.

On the other hand, some additional factors should be considered. The period of 1984 to 2008 (see chart) witnessed a considerable surge in Malays being selected to the national team while at the same time, the number of ethnic Chinese and Indians being selected as part of the national team dropped⁵³². Since 1984, with the exception of 1998 where the national field hockey team finished 11th out of a 12 team event and in 2002 where Malaysia was then the host, the country has failed to qualify for the 1986, 1990, 1994 and 2006 World Cup Hockey Tournament on merit. This could be equated to the failure to qualify for the 1988 and 2008 Summer Olympics in South

⁵³² Olympic Council of Malaysia (n217)

Korea and Beijing as well as being placed 9th and 11th out of the 12 teams competing in the 1984 and 1992 Summer Olympics in Los Angeles and Barcelona respectively⁵³³.

For the Asian Games, the Malaysian national field hockey team has been consistent in maintaining their grip on the bronze medal. However, the team only managed to finished 5th at the 1994 Games, their worst performance since the national team first competed in the Games in 1958. During the 2006 Asian Games in Doha, the national hockey team created another piece of history by finishing in 6th position, a feat that had never occurred before. While the team used to be considered among the top 10 teams in the International Hockey Federation ranking, the Malaysian national field hockey team is currently placed in 16th position under the latest IHF rankings published in September 2009⁵³⁴, one of the worst rankings the team has ever experienced⁵³⁵.

Evaluation might suggest that such a trend is the norm, judging by the past performance of the Malaysian field hockey national team before 1984 since the then field hockey national team failed to obtain any medals of any kind. Perhaps, the main distinguishing factor that differs from the period mentioned above and the pre-1984 performance lies on the part of consistency in qualification. For instance, Malaysia had qualified for the world cup hockey tournament on merit since it was first introduced in 1971, a feat that was repeated in 1973, 1975, 1977 and 1982⁵³⁶. Perhaps, the moment of glory for the Malaysian hockey team was in the 1970s where the team reached the semi-finals of the world cup hockey tournament in 1975. Similarly, the team had then succeeded to qualify for every Summer Olympics from 1956 until 1984; the only exception being the 1960 Summer Olympics in Rome.

⁵³³ See Aftar Singh, 'Ex-star laments culture of mediocrity in Malaysian Hockey' *The StarOnline* (Kuala Lumpur, 30 November 2008) <<http://thestar.com.my/sports/story.asp?sec=sports&file=%2F2008%2F11%2F30%2Fsports%2F2683409#>> accessed 18 October 2009. For more, also see Jonathan Fernandez, 'Simply not interested – MHF treat Razak Cup like a chore' *Malay Mail* (Kuala Lumpur, 24 August 2008) <<http://www.mmail.com.my/content/11459-simply-not-interested>> accessed 18 October 2009

⁵³⁴ 'ABN-AMRO Men's World Ranking Updated 1st September 2009' (International Hockey Federation, September 2009) <<http://www.fihockey.org/vsite/vfile/page/fileurl/0,11040,1181-192169-209392-141540-0-file.00.pdf>> accessed 18 October 2009

⁵³⁵ For interesting observation, please refer to Haresh Deol, 'We need matured and thinking players' *Malay Mail* (Kuala Lumpur, 19 August 2009) <<http://www.mmail.com.my/content/11040-we-need-matured-and-thinking-players-%E2%80%94-arul>> accessed 18 October 2009

⁵³⁶ Olympic Council of Malaysia (n217)

Similar observations could be mentioned for the team's participation in the Asian Games, where they had succeeded in retaining their bronze medal position from 1970 to 1982.

The above information represents another example of affirmative action in practice where sporting success of the country has been affected. Additionally, there is an initial indication to suggest that there is potential discrimination when it comes to the selection process for the Malaysian field hockey national team. As discussed however, this is not credible evidence as the number of participants has not been based against the success rate of the Malaysian national field hockey team. Even though the national team has failed to secure success in terms of winning medals internationally, the important factor however lies with their success to qualify for the World Cup Hockey as well as the Summer Olympic Games. In this case therefore, the success rate of the national field hockey team is not measured by the amount of medals being won but by the success rate of the nations' hockey team in entering or securing the finals appearances at the tournaments highlighted above. Therefore, since there has been gradual increase of certain races in comparison with the others coupled with the national team's failure to qualify for major international events, the affirmative action measure arguably has resulted in discrimination against the other ethnic groups in Malaysia.

In relation to both Malaysian national badminton and field hockey teams, there are several conclusions that could be made from the above observation. Firstly, the concept of affirmative action and in particular, medium affirmative action may not necessarily be considered as 'racially discriminatory' by itself in contrast to the theoretical perception of affirmative action. The main objective of the theory though appears as if discrimination might be intended to procure benefits to the previously disadvantaged groups or for the purposes of increasing the rate of participation or the chances of them being selected to the national team. As discussed, the rate of success enjoyed by the Malaysian badminton team has increased although there has been continued participation by the ethnic Malays in the sport itself. Secondly, the theory of affirmative action could only be considered as discriminatory per se if there has been an unjustified increase of participation by certain groups while the performance or results of the national team have decreased.

7.5 Racial Discrimination and Effects in Sports – An Evaluation

The Olympic Charter, amongst others has stated that, ‘The practice of sport is a human right. Every individual must have the possibility of practicing sport without discrimination of any kind ... [and] any form of discrimination with regard to a country on grounds of race ... is incompatible with the Olympic Movement / Charter’.⁵³⁷ The Charter therefore provides the clearest indication yet that any form of racial discrimination will not be accepted by the IOC. In addition, the Charter mirrors the fundamental principles as stated by the Universal Declaration of Human Rights which states that every individual is equal and entitled without any form of discrimination⁵³⁸.

As mentioned in previous chapters however, every country differs from one another, thus resulting in differing provisions for equality. Therefore, countries such as Malaysia, South Africa, England and the United States have relevant legislative provisions safeguarding and ensuring the rights of citizens in the country. From the case analysis above, different models of affirmative action and equal opportunity have procured different results. The striking similarity perhaps lies with the increase of participation of athletes or players from previously disadvantaged groups or ethnic minorities who had been set-aside from participation in the sports as mentioned. As the charts suggests, it is clear that more opportunities have been afforded as sports enter into the new millennium. In some cases, it is surprising to note that the participation of some ethnic minorities have surpassed the ones of the dominant ethnic group within the country. Others tend to illustrate a more subtle move towards recognizing the right of participation as reflective of the percentage of the total population of particular ethnic groups.

Whilst the objectives of affirmative action and equal opportunity have managed to produce certain desirable results, it still remains to be seen whether such measures have actually eliminated racism or discrimination within individual sports in various countries. Malaysia and South Africa, which have adapted to the concept of

⁵³⁷ Olympic Charter (n69)

⁵³⁸ See Chapter 3

affirmative action, have generally witnessed continuing progress and success in sports. The same could be said in relation to England and the United States. However, the working of both concepts could potentially procure differing results in the future. Therefore, the main objective of this sub-topic is to evaluate both the application of affirmative action and equal opportunity practices based on the above case analyses as well as assessing potential racism and its effect in sports as a result of those practices.

In relation to Malaysia and South Africa, the case for the implementation of affirmative action in general is to redress the imbalance of racial participation in the country's economy which includes involvement in the sports' industry. Moreover, in South Africa in particular where the scars of apartheid have resulted in seclusion of mainly black designated groups, immediate steps have been taken to ensure equity for the affected groups. With reference to the charts, the participation of Malays and Blacks has increased with the assistance of affirmative action policies towards the expense of other racial and ethnic groups. However, this raises immediate possible concerns when it comes to the sporting standards of those countries. Secondly, there is a fear of potential 'reverse discrimination' against the other racial or ethnic groups in Malaysia and South Africa.

Firstly, the standard in sports within different countries could be reflected by the affirmative action policies being taken. In other words, implementation of affirmative action could result in adverse returns when it comes to sporting successes if it is not applied in a reasonable and justifiable manner. The argument might vary with the charts, findings or case analysis made above in relation to South Africa. At this moment, there is nothing to doubt South Africa's status as a powerhouse for both cricket and rugby. The inclusion of more black players in the team has not affected the team's overall result. On the contrary, continued 'pressure' in the future to ensure that both the South African rugby and cricket teams mirror the racial demographic of the country could probably result in the decline of their status in those sports.

The basis of equality provision as reflected under the Section 9 of South African Constitution, various legislations such as the Employment Equity Act 1998, rules and policies adapted by both South African Cricket Board and Rugby Union are examples of such pressure. All these examples are arguably a medium form of affirmative

action. At this juncture, it is not suggested that the imminent decline of sporting success in the event of increased participation by blacks but rather possible repercussions of the inclusive application of affirmative action in sports. Moreover, affirmative action policy in South Africa is still at its infancy hence it would be incorrect to conclude solely based on this contention.

Credible precedence perhaps on the future of South African sports could be taken from Malaysia. With affirmative action in place for more than half a century as stated under Articles 8 and 153 of the Federal Constitution, the application could give an insight into the effect of adapting to the concept. Case analysis involving the Malaysian Badminton and Field Hockey teams appear to have given different results in relation to sporting success. In the case of badminton, continued participation by ethnic Malays, who benefited under the affirmative action policies has not affected the success rate of the sport although it has potentially affected the number of ethnic Chinese and Indians participating in that sport. The sport could arguably achieve greater sporting success in the absence of affirmative action.

On the contrary, the findings for the field hockey team illustrate the likely consequences of affirmative action practices. Increases in Malay participation have gradually resulted in a decline in performance. However, it would be unfair to equate the 'dwindling of performance' as disastrous since its effect has only affected the performance against other major field hockey giants and other growing superpowers in the field. In short however, it is gradually eroding the status of Malaysia as one of the powerhouses in field hockey. One of the illustrative examples perhaps involves the performance and success of the Malaysian national football team. Football has not been included as part of the case analysis due to difficulties in obtaining information. The contention is nonetheless based on the worsening performance shown by the national side. From a team comprising of Malays alongside ethnic Chinese and Indians in the 1960s, it is now dominated by Malays and this has resulted in a drop in FIFA world football ranking from 73rd position to the current 150th position⁵³⁹.

⁵³⁹ See more in 'FIFA/Coca-cola FIFA world ranking' (*FIFA.com*)
<<http://www.fifa.com/worldfootball/ranking/lastranking/gender=m/fullranking.html#confederation=0&rank=186&page=3>> accessed 28 October 2009

In a related development, increased participation from groups benefiting under affirmative action policy might also lead to reverse discrimination against the other racial and ethnic groups. The main application of affirmative action in sport is to ensure a balanced participation for all racial groups in a country. The phrase balanced participation could be associated with participation based on the total of one racial group in a country or a strict equal ratio of participation for all races. With the exception of the Malaysian field hockey team, it appears that there are no justifiable arguments or grounds leading to possible reverse discrimination against other races in terms of their participating. As a consequence, the theory which potentially equates affirmative action to reverse discrimination could not be regarded as true.

Despite this however, the present or future of affirmative action practices could lead to discrimination. For instance, the latest development from the South African Parliament which requires up to 50% or higher of the South African Water Polo team to be black discriminates against the other races in the country. According to Trninic⁵⁴⁰, this is ‘potentially discriminatory having regards to the numbers of registered swimmers with the South African team since there are more than 7,000 white registered swimmers as opposed to less than 50 registered black swimmers’. As a result, the new rule would increase the participation of minorities but this would greatly affect the success rate of the South African water polo team as well as resulting in reverse discrimination against other groups who do not benefit under the affirmative action policy.

In addition, continued alleged political interference in South African sports and in particular in rugby and cricket could result in affirmative action being used as a tool to discriminate against other races in the country. As Kriel pointed out, the failure to differentiate between ‘racialisation and transformation’⁵⁴¹ could justify an affirmative action policy into one of discrimination. Racialisation as suggested by Kriel makes reference to ‘merely picking individuals based on race and no effort to poach the young, poor or even at school level ...’⁵⁴² as opposed to transformation which should ensure proper utilisation of affirmative action for the benefit of the sport and nation.

⁵⁴⁰ Trninic (n528)

⁵⁴¹ Kriel (n527)

⁵⁴² *ibid* Kriel

Furthermore, the passing of the National Sport and Recreation Amendment Act 2007 which arguably erodes the autonomy of sports governing bodies might result in affirmative action being taken a step further. Section 13(5) of the Act provides that a Minister may ‘... direct Sport and Recreation South Africa from funding any federation (sports’) if they failed to adhere to the decision (Directives issued by Minister)...’. Crucially, the application of Section 13A also empowers the Minister to intervene if all means of resolving disputes between sports’ bodies and local governing bodies have been exhausted. Potentially, this could result in participation exclusive to a single group as well as eroding the sporting standard in the country.

Overall, the case analysis for Malaysia and South Africa conducted above does seem to suggest the possibility of the existence of potential discrimination in sports although it still remains inconclusive at this moment. Nevertheless, it is important to note the practical nature and workings of affirmative action in alleviating the level of participation for previously disadvantaged groups as well as any groups that benefit under those schemes. The application of affirmative action could result in different outcomes as illustrated between the Malaysian Badminton and Field Hockey teams. In the case of South Africa, the surface remains calm at this moment with the preservation of their status as powerhouses for both rugby and cricket although there has been a notable increase of black participation in the teams. As mentioned however, the current case analysis would result in a totally opposite direction if the practice of affirmative action in sports is not properly taken care of.

In contrast, the application of equal opportunity in both England and the United States in affording equal participation of sports is to ensure that suitable and talented members of management, players and officials are given the chance to be involved in the sport. As discussed earlier, the difference is that equal opportunity emphasizes merits as opposed to securing a place for a particular group. In contrast to affirmative action practices in Malaysia and South Africa, it appears to be one of the best mechanisms to ensure participation without causing any grievances to other racial or ethnic groups. Case analysis with reference to both England and the United States has also resulted in substantial representation of the ethnic minorities while preserving the sporting standards within those countries. Similar to affirmative action practices

however, the concept of equal opportunity does have its own potential drawback. It does not involve potential elements of reverse discrimination as in affirmative action but 'discrimination from within' the individual sport itself.

With reference to the sporting standard of both England and the United States, there is no doubt about the successful implementation of equal opportunity in sports. In comparison to affirmative action practices, it is safe to conclude that the achievement of the English and American teams have remained similar or improved. On the surface, there is nothing to suggest any form of racism or discrimination in relation to these countries. However, case analysis nonetheless reveals the possible existence of discrimination from within the sporting structure.

In this case, discrimination from within comes in three separate forms although they have similarities between them. The first form of discrimination could be related to reverse discrimination as per affirmative action; however the difference being that it is associated mainly with the physical appearance or attributes of an athlete or participant. The second form of discrimination mainly involves the mental capability and ability of an athlete or participant. Finally, the third form of potential discrimination is mainly associated with the class, status or perhaps the background of the athlete or participant. All of these will be explored as a result. The first and second form of discrimination is possibly evident in the United States NFL in particular and the NBA whereas the third form exists mainly in England.

Discrimination from within with reference to physical appearance occurs where a player or participant has been chosen to be part of the national team due to his natural or inherent strength. From the chart and case analysis, it appears that the NFL has managed to break the barrier in terms of racial participation but a closer look at its composition reveals a different story. As studies reveal, most African-Americans football players have been confined to defensive positions such as cornerback and safety positions in the NFL. Other positions include Running Back and Wide

Receiver. From 1989 to 2007 for instance; African-Americans formed an average 90% of the total cornerbacks and 84% of the safety positions⁵⁴³.

It is known that these positions require a substantial amount of physical strength and speed to prevent opponents of another team from scoring, or perhaps in assisting in scoring against the opposing team. Therefore, it would be correct to assume that the number of cornerbacks from a white background has dropped significantly since the implementation of the CRA 1964 as well as the merger between both the AFL and the NFL. As a result, this has arguably left a perception that only African-Americans are best suited for the position and such practices could therefore be considered discriminatory against the other footballers in the United States who intend to specialize in that area. In this case, the author is not suggesting that it is real discrimination for such exclusion and preferences in favour of one group but as a mere evaluation for the purposes of establishing potential racism within sports itself.

Similarly, case analysis for the United States NBA has also demonstrated the huge participation of African-Americans in international competition. The game of basketball equally requires the height and physical strengths of the participant in warding-off players and the attributes to score under physical pressure from the opposing player. Since the late 1980s until the present date, nearly 90% of the United States basketball players have been black. Such evidence could also be backed up by the total number of basketball players participating in the NBA. The latest figures have shown that African-American averages at around 75% in contrast with the other players from other backgrounds⁵⁴⁴.

Closely associated with the above is the discrimination from within with reference to the mental abilities of an athlete or participant. This is a complete opposite in comparison with the above. Discrimination arguably exists when a group has historically been confined to a certain position which does require mental ability or fast forward thinking in order to win the game. The position of the quarterback for instance is considered to be the leader of the offensive line and therefore requires

⁵⁴³ Richard Lapchick and others, *2006-07 Racial and Gender Report Card; The Institute for Diversity and Ethics in Sports* (University of Central Florida 2007) 55

⁵⁴⁴ Richard Lapchick, Catherine Elkins and Ray Matthew, *The 2008 Racial and Gender Report Card – National Basketball Association* (University of Central Florida 2008) 19

quick-thinking. Crucially, quarterbacks also strategise the team's attacking formation. From 1993 to 2007, the position has largely been confined to whites who average 85% of the total quarterbacks in the entire NFL. In contrast with the above, African-Americans constituted less than 15% of the total quarterbacks over the same period.

Consequently, one could argue that there are still forms of discrimination within the individual sport even though the charts and case analysis provided have suggested a general increase in participation by African-Americans for both basketball and football. In the case of the NFL in particular, there could be a legitimate argument for discrimination when it comes to 'stacking'. This has potentially led to preferences in favour of one group over the other. Despite these arguments however, it would not be enough to conclude that concrete racism has taken place in either sports. This could be justified since the nature of primary and secondary theory (principles of equal opportunity and affirmative action) provides that while affirmative action must be used to enhance or promote the participation of ethnic minorities in the United States, the main principle requiring the best or talented to participate still prevails over the former.

The third form of potential racism from within is mainly attributed to the social class, status and background of the individual or ethnic groups. This class of discrimination affects both ECB and RFU. Similar to the above, this form of discrimination is not treated as synonymous to active discrimination. According to Engel, 'English Cricket is being harmed by a form of racial segregation ... cricketing apartheid has become accepted practice within the domestic game ... refusal to go an extra inch and welcome outsiders into a club's often clannish atmosphere'.⁵⁴⁵ This gives the impression that English cricket is only confined to certain classes of people within or not within the same racial groups. In other words, the cricket board membership could be likened to an admission into Oxford or Cambridge Universities, thus limiting the participation of players to certain groups of students.

Organized sports such as rugby and cricket as argued by Mangan, was institutionalized in private (also known as 'public') schools in Britain as part of the

⁵⁴⁵ 'Apartheid holding back English cricket' (*British Broadcasting Corporation*, 1 April 1999) <<http://news.bbc.co.uk/1/hi/sport/cricket/309449.stm>> accessed 6 February 2008

character building process and to teach ‘manly characteristics’. The main objective was to ‘encourage boys to think of themselves as socially elite and preparing them for leadership’⁵⁴⁶. This resulted in the creation of an exclusive club and perhaps, a sport that is reserved only for certain groups of people even where they are from the same ethnic background. As immigration increased in post-war Britain, this concept has no doubt changed to include any person who is not of the same racial and ethnic background.

In relation to rugby, it is crucial to distinguish between the Rugby League, which was established by the Northern Rugby Football Leagues (NRFL) as well as the RFU in England. The Rugby League has been dominated by the working class while the Rugby Union by the southern clubs of gentlemen. The selection of rugby players to represent the England Rugby Football team is the responsibility of the RFU. The repercussion has prompted possible discrimination within the sport of English rugby since it would not be possible, though not impossible either, for any individual to be part of the sport if he is not from the elite private and grammar schools. According to Collins⁵⁴⁷, ‘...[during the ‘Broken Time’ dispute] Incredibly well campaign to marshal the votes by Oxbridge Colleges, Schools, army regiments, the RFU, as opposed to amateurism won a decisive victory against the northerners [Rugby League]’. In short, the RFU arguably have confined the eligibility of participation in Rugby Union to certain groups as discussed above.

Similar issues can be seen when it comes to English Cricket. In addition to class differences, the racial divide is based upon the participation of one group based in the urban areas and confined to council maintained public pitches and largely exists outside the official structures as opposed to being based in rural and endowed with well kept facilities and this exists largely as part of the official structure⁵⁴⁸. According to the charts, ethnic minorities have managed to appear for both the English Cricket and Rugby teams by the end of 1980s and have since continued to mark their presence

⁵⁴⁶ Roger Rees and Andrew Miracle, ‘Education and Sport’ in Jay Coakley and Eric Dunning, *Handbook of Sports Studies* (eds) (Reprinted SAGE 2010) 278

⁵⁴⁷ Tony Collins, ‘Inaugural Lecture: 1895 and all that: the past, present and future of rugby’ (*Carnegie Faculty of Sport and Education, Leeds*, August 2007) <<http://www.leedsmet.ac.uk/carnegie/tcollins.htm>> accessed 10 March 2008

⁵⁴⁸ Mike Marqusee, ‘Two Cultures of English Cricket’ (*Campaign Against Racism and Fascism – CARF*, July 1998) <<http://www.irr.org.uk/carf/feat23.html>> accessed 10 March 2008

in the national teams. Ironically, nearly all the first debutants from both cricket and rugby are from private schools in England.

Even though the racial barrier had been removed, assisted by the relevant English based legislation such as the RRA 1976 as amended, discrimination arguably still exists but within the class itself. In addition, the rules and regulations of English Cricket and Rugby Union governing bodies which prohibits any form of racial discrimination only applies to the players who are already part of the sports' bodies. Theoretically therefore, other bodies such as Sport England, Sporting Equal or even UK Sport which promotes equal opportunity and acts as watchdog to local sports' governing bodies would have limited power, or any at all, to require absolute integration between the sports and all levels of societies. As a result, there is a legitimate argument suggesting that any individuals, either with or without talent would stand a chance to be deprived of chances to participate with the English Cricket and Rugby national teams if they are not part of these organizations. On the wider aspect of the sport however, the practical effect of assimilative theory which incorporates both equal opportunity and positive action has nonetheless managed to promote integration of ethnic minorities and increased their chances of participation in both cricket and rugby.

7.6 Conclusion

The charts or case studies involving the four countries, Malaysia, South Africa, England and the United States, have revealed a better rate of racial participation for previously deprived or designated groups, racial and ethnic minorities in sports. This has resulted in greater integration and awareness of the need for all races within a country to be involved in sports. Therefore, both affirmative action and equal opportunity could be recognized as means of providing solutions to redress or address the issues concerning racial participation in sports. Specifically, both the construction of a basic Bill of Rights or Constitution in Malaysia and South Africa tends to lean towards the medium form of affirmative action while England and the United States utilise the primary concept of equal opportunity but with variances in between.

As the evaluation suggests however, there is a tendency that affirmative action could impact more upon sporting success in comparison to equal opportunity. Although affirmative action is used to alleviate or improve the rate of participation of certain racial groups, this could also be treated as a weapon to strengthen the position of one racial group which benefits under the scheme against another. It could therefore come to a certain point where affirmative action could be used as a device to potentially discriminate against the other groups. Based on the present charts and case studies however, it has not reached this stage as yet. Both Malaysia and South Africa are still generally incorporating all major races into their national team and producing reasonably average or good results.

On the contrary, the future of affirmative action practice would remain one that could possibly cause undesirable effects towards the rate of participation from other racial groups that do not benefit under the affirmative action scheme. In the earlier chapters, the main distinction between strict and medium form of affirmative action was argued to involve the numbers of participants. As mentioned, the Malaysian national field hockey team is one of those examples. If it is not treated carefully therefore, the practice of affirmative action could then be similar to reverse discrimination. Crucially, this could also pose a danger to the integrity of sports since any abuse of affirmative action could certainly be likened to having a terminal disease in terms of the country's sporting standard.

Meanwhile, the practice of equal opportunity in sports has resulted in the creation of new opportunities for other ethnic minorities to become involved in the sport. As the charts and case studies suggest, England and the United States have seen an increase of capable and talented players or participants in the sports without affecting the sporting capability of the countries. On the surface, there is no evidence to suggest any form of racism when it comes to sports. As highlighted however, primary and secondary theory as well as assimilative theory nonetheless reveals possible discrimination from within the sporting structure of the country or unconscious racism. In other words, it is also known as racial or class stereotyping.

In the United States for instance, the phenomenon of stacking by reserving certain positions based on a person's racial background could justify an allegation of racism

despite having more ethnic minorities in the team. In applying primary and secondary theory however, there would not be sufficient grounds to allege discrimination since the main exercise of equal opportunity is to afford places to the most talented. In addition, more participants from other ethnic minorities arguably have satisfied the secondary objective of affirmative action in the United States. Moreover, selection based on class or background of an individual as in English cricket and rugby could also be deemed to be unlawful.

In concluding this chapter, the overriding aim and objective of this research is to ascertain the effect of affirmative action and equal opportunity policies upon the success of sports within the chosen jurisdictions. The discoveries of other issues surrounding the area of unconscious racism, stacking or selection based on the social status of individuals in this chapter therefore fall outside the scope of this research although these areas could be considered for future research. Referring back to the research, the evaluation illustrates that discrimination still exists even in the light of having either affirmative action or equal opportunities applied. The only major contribution from both practices is perhaps their role in reducing racism or discrimination in sports while maintaining reasonable standards in sporting success.

Chapter 8 – Conclusion

8.1 Introduction

The purpose of this chapter is to reflect on issues raised and analysed throughout this research and the potential extrapolation of the theory to other sectors. Firstly, an executive summary would attempt to provide crucial and original elements of this thesis. Secondly, a short hypothesis in the form of a relational model looking at the correlation between sporting success and the theories of affirmative action and equal opportunities. Finally, this research will evaluate the potential alternative application to other areas such as selection process for judges and the area surrounding selective and comprehensive education systems in England and limitations to the research.

8.2 An Executive Summary - The Story So Far ...

The issue of promoting the concept of equality is becoming ever more prominent during the 21st century. In general, although there are still inequalities between various classes of societies in an economic sense, gone are the days of racial or ethnic demarcation when it comes to the issue of sporting participation. The 20th century has proved to be a major breakthrough in bridging the new and existing relationships between different communities from various ethnic backgrounds.

This has prompted measures by national governments from different countries in terms of designing and implementing solutions. Legal developments addressing the issue of equality have been duly introduced and enforced in order to correct past injustices against certain ethnic groups which have been deprived of their previous rights and entitlements. The area of employment for instance has witnessed a tremendous change of attitude in comparison to earlier days where societies were judged by the colour of their skin as opposed to their abilities. Such a change of attitude has undoubtedly changed the sporting scene when it comes to selection procedure for national participation. This change is evident in any major sporting competition such as the Olympics and the Commonwealth Games. It is indeed, at present, a celebration of individuals from different countries, coming from different

racial, ethnic or even religious backgrounds congregating together for the participation of major Games.

Differing historical backgrounds between countries suggest that it is by no means an easy task to create an equal society based on the principles of justice and fairness. Essentially, it is important to note that there is no single solution in achieving equality for all races and ethnic groups. As a consequence, new theories or concepts are required in order to address the complications faced. Hence, theories of affirmative action and equal opportunity have been analysed. These relatively new theories are used as means in assisting countries to introduce the equality provisions into their respective constitutions and legislation. As discussed, the main objective of both theories is to achieve equality even though each is different in substance. While the theory of affirmative action affords preferential treatment to certain racial or ethnic groups, the theory of equal opportunity gives equal rights to all ethnic groups to be involved at all levels.

There are however further sub-theories within the definition of affirmative action and equal opportunity in sport. As analysed, all countries have different historical backgrounds. As a result, individual countries would most likely be inclined to move away from the conventional theories of affirmative action and equal opportunity. These variations are separate and possess a distinct feature. Under the theory of affirmative action, it can be sub-divided into strong affirmative action, medium or intermediate affirmative action and weak affirmative action. On the opposing end, the theory of equal opportunity, it can be sub-divided into strict equal opportunity, assimilative theory (the principle of equal opportunity and positive action) and primary and secondary theory (the principle of equal opportunity and affirmative action).

The examination of these sub-theories suggests they do overlap with each other. The only exception involves strict affirmative action and strict equal opportunity. For example, there are well developed arguments linking both weak affirmative action and assimilative theory⁵⁴⁹. Neither sub-theories conform to the applicability of

⁵⁴⁹ See Chapter 3

affirmative action per se; but both argue for the need for support or encouragement rather than affording any form of preferential treatment to the previously deprived ethnic groups or minorities. Similar observations have been made with regards to both medium affirmative action and primary and secondary theory which seeks to preserve some form of qualified equality for all racial and ethnic groups.

The sub-theories of affirmative action and equal opportunity have been applied in a substantial number of countries. As a matter of illustration, the latest development in President Mugabe's regime in Zimbabwe and to some extent in Fiji demonstrated the will of the national governments of both countries to further their objective in benefiting only one single group. For the purposes of this research, countries such as Malaysia, South Africa, England and the United States are considered. The theory of affirmative action has and remains the main pillar in shaping an equal society in Malaysia and South Africa. In contrast, England and the United States have adopted the theory of equal opportunities in order to improve the standard of living of the ethnic minorities.

In the case of Malaysia and South Africa, both countries shared certain historical backgrounds. Formerly under British rule, both countries are rich in cultural, religious and ethnic heritage. Both are considered to be multiracial countries with different racial and ethnic groups residing within. There is one important factor which prompted the governments of both countries to introduce the theory of affirmative action as an inclusive part of the Constitution. The ethnic Malays and South African blacks have previously been excluded from substantial participation in the nation's economic growth. Even if they are entitled to participate, opportunities have often been limited. This has left them being deprived and excluded from social development and well being in their own native country. As a consequence, the ethnic Chinese and sub-continent Indians have benefited from the 'divide and rule' policy advocated during the colonial rule in Malaysia. For South Africa, the large proportions of the South African black population were stripped off their rights during the apartheid era.

Thus, affirmative action is employed in order to reduce the gap between these ethnic groups and others. In Malaysia, such provisions can be found under Article 8 and 153

of the Federal Constitution while for South Africa, such provision can be found under Section 9 of the South African Constitution of 1996. To afford total benefit to the previously deprived ethnic groups however would have adverse effects on the other racial and ethnic groups. In order to achieve some form of compromise, one of the solutions involves recognition that the basic concept of racial equality should be preserved. In addition however, the governments equally recognised the hardship and predicament suffered by the ethnic Malays and South African blacks. Therefore, both countries' highest form of law or constitution does reserve additional rights and entitlements to the former. It is the desire of both governments to ensure that the previously deprived ethnic groups can be on the same par as the others.

In short, one could conclude that the law of both countries concerning equality is based on the concept of semi-equality or one of medium affirmative action. Similar applications can be seen when it comes to the selection procedure for sport in both countries. The application of affirmative action in both countries is considered to be unique in the sense that it benefits the majority rather than the ethnic minorities. Specifically, the South African government has also attempted to incorporate some form of variation within the sub-theory of medium affirmative action. This includes the introduction of quotas reserved for certain racial and ethnic groups in which they argued might assist in improving the standard and the level of participation.

Similarly, both England and the United States share some form of similarity when it comes to the treatment of previously disadvantaged ethnic groups. From slavery to modern discriminatory provisions designed against ethnic minorities, both countries have taken drastic actions in order to redress the problems. As both countries experienced new waves of immigration from other countries, it would not be long before both countries were considered to be essentially multiracial countries. In order to integrate the ethnic minorities into society, discrimination was outlawed by both the CRA 1964 as amended in the United States and RRA 1965 (later repealed by the 1976 Act and subsequently Equality Act 2010) in England. Both legislations essentially provide for equal rights to participate in any fields or sectors. Sport is undoubtedly one of those areas included. In short, the legislations in England and the United States are based on the theory of equal opportunity.

However, there is one major difference between the form of equal opportunity being practised in England and the United States. For England, the RRA 1976 as amended and Equality Act 2010 enables the implementation of equal opportunity, allowing government agencies or local authorities to afford additional support to ethnic minorities. In a sporting sense, positive action is aimed at encouraging participation from the minorities. On the other hand, this must be distinguished from the theory of affirmative action or positive discrimination as it is known in the United States. As analysed earlier in depth, positive action does not set a quota or give any preferences when it comes to selection process in sport. Essentially, all ethnic groups would still be judged based on merits at the end of the day.

In the United States, there have been immediate measures taken in order to tackle the problem of ethnic minorities from the mid-20th century. Historically, the Native American population such as the Indians have been forced to relocate from their ancestral lands and have been subjected to harsh treatment. Similarly, the African Americans have been brought in as slaves and such activities were only outlawed after the British Parliament abolished slave trade. In order to live up to its expectation as the leader of the western and modern democracies, it is important for the government to place an immediate stop to discriminatory practices. These points illustrate the comments attributed to Dworkin in Chapter 3 of this thesis.

While the CRA 1964 as amended advocated equal opportunity, the Act also introduced affirmative action or positive discriminatory measures in order to increase the level of participation of ethnic minorities in the country. On the contrary, the affirmative action programme ought not to be confused with medium affirmative action as witnessed in Malaysia or South Africa. Although there are general similarities between both sub-theories, the interpretation of the 1964 Act implies that the notion of affirmative action and positive discrimination would only apply in situations where there is a clear lack of participation by the African American community and other ethnic minorities. As analysed, the sub-theory of medium affirmative action appears to place the theory of affirmative action on an equal footing with the theory of equal opportunity. The result means that the theory of equal opportunity still takes priority over the affirmative action theory.

Hence, it is clear that both England and the United States take a different approach with regards to the theory of equal opportunity. One could summarise that the equality legislative provisions in England resemble the assimilative theory or the principle of equal opportunity and positive action. Amongst the four different countries selected for this research, it is also pertinent to note that England is the only country that prohibits discrimination based on a person's nationality. While adhering to the similar theory of equal opportunity, the United States incorporates the theory of affirmative action as a secondary source in order to promote equality. Therefore, it can be concluded that the United States adheres to the primary and secondary theory or the principle of equal opportunity and affirmative action.

It is evident from the above that every country takes a different approach towards promoting equality. As highlighted in the earlier chapters, the route taken by the four countries under examination might differ from one another but the main objective of achieving the best equilibrium for all its citizens remains the same. For Malaysia and South Africa, the theory of affirmative action means uplifting certain ethnic groups or previously deprived groups to parity with the others. There are arguments that some (within the similar ethnic groups) are hired to make up the statistics as opposed to being appointed based upon their individual skills. As for England and the United States, the theory of equal opportunity implies that every ethnic group is entitled to the same level playing field. On the other hand, selections are still mainly based on the concept of meritocracy although the theory of affirmative action might be used in certain cases in the United States.

Having witnessed how the law in these jurisdictions is used to promote equality, it is interesting to explore in theory, the effects the law would have on the potential international sporting success of these countries. Generally, the application of affirmative action would increase the participation of certain racial or ethnic groups. Therefore, it is envisaged that the participation of ethnic Malays and blacks would increase in the case of Malaysia and South Africa. With reference to England and the United States, the theory of equal opportunity would also witness a general increase of ethnic minorities in the sporting scene. There is a major difference however – the theory of affirmative action may also result in a gradual reduction in participation by other racial or ethnic groups although this might not necessarily be the case in all

situations. This position might appear to vary with countries practising the theory of equal opportunity. As examined during the earlier chapters, it would not necessarily result in a gradual increment in the participation of ethnic minorities in sport since every individual is judged upon its ability to perform.

As a consequence, there appears to be a dilemma. On the one hand, every country would like to see their athletes perform well in any international sporting competition since this is one of the best methods to project the image of the country to the world. On the contrary, there is also a will of the particular country to ensure that the law or legislation works in a way that would ensure equality of its citizens at the national level. The earlier investigation in Chapter 3 has demonstrated that politicians have the motive to satisfy, forward and enhance their own political agenda. Thus, would it be possible for any of these countries to achieve both internal political success and external international sporting success?

In relation to affirmative action, merely increasing participation from a single or from certain groups of ethnic minorities who benefit from this scheme would undoubtedly reduce the number of places available to other ethnic groups in that country. Equated to the concept of the 'brain drain', this could potentially result in certain talents being lost as a result of being sidelined or afforded limited opportunity. In sports, the idea of expanding quantity at the expense of quality might well affect the overall outcome in international sporting competition. At this concluding end, the author is not attempting to dismiss the notion whereby the theory of affirmative action would almost certainly cause irreparable harm to the country's sporting success.

Some arguments have suggested that the situation could be different where careful selection based on skills from ethnic minority groups which benefit from affirmative action policy have been exercised and put into practice. As mentioned however, most of the politicians would utilise the law and legislations towards their favour and hence benefit certain groups albeit from the same ethnic groupings. It might hence be possible that internal political success to create an 'equal' society could be successful since the politicians from the ruling government hold the key to implementing policies and legislation.

In contrast, the theory of equal opportunity seems to provide a solution to the problems faced as a result of affirmative action. Under this theory, everyone will be given equal chance to take part in, and potentially be considered for, their respective national team. Therefore, if an individual proves that he or she has the relevant abilities and capabilities for the sport, it is likely that he or she would be included as part of the team. Hence, this would give the impression that all ethnic groups would be equally represented and be able to obtain the best result from any international sporting competition. As examined previously, this would also assist in future development of sports in that country.

On the contrary, the theory of equal opportunity does not necessarily guarantee participation by all racial and ethnic groups. Since this theory advocates pure meritocracy, it might be the case that only certain ethnic groups are eligible for participation. As a consequence, this theory only appears to afford equality of participation but not equality in terms of representation in the national team. The result of this appears to be the complete opposite of the theory of affirmative action. While the politicians might have been successful in projecting a nation with successful sporting talents, they might have been less successful in achieving an equal rate of participation in sport.

In theory therefore, equal opportunity appears to possess an edge over the theory of affirmative action although it might be the case that both theories face difficulties in achieving internal political success and external sporting success. In summary, it appears that international sporting success of a nation would be limited if affirmative action measures become too strict. Similarly, the theory of equal opportunity does not necessary guarantee participation for any racial or ethnic groups although all are invited to take part in the selection process. The concept of 'equality' might be simple to understand – however it remains a difficult concept to apply in sports.

The practical application however does not correspond with the theoretical arguments as highlighted. With evidence from primary and secondary data, the main objective is to identify a correlative relationship between the type of anti-discrimination law of a nation and the general impact that it might have on the degree of international sporting success of the nation. Using Malaysia, South Africa, England and the United

States as the relevant countries for the research, the results have been mixed although there appears to be some agreement with the theoretical aspects of affirmative action and equal opportunity. It is essential, at this stage, to re-emphasise that Malaysia and South Africa are the major proponents of affirmative action while England and the United States adhere to the principle of equal opportunity. In addition, it is also important to stress that different sports have been utilised to reflect the background and heritage of the selected countries.

In summing up, there is a general trend suggesting that the theory of affirmative action has resulted in an overall increase in racial and ethnic participation which emerged under the affirmative action scheme. As a result, this re-affirms the role affirmative action could have on the sports industry within a country. In addition, an illustration of the trend of participation by ethnic Malays and black South African in some major sports as identified supported the assertion mentioned above. Essentially, the theory of affirmative action has unquestionably lowered the rate of participation by other racial and ethnic groups.

On the contrary, it has also been proven that the theory of affirmative action as practised in both Malaysia and South Africa has not resulted in the general deterioration of sporting success within those countries. In South Africa's case, one can summarise that the country has managed to sustain its overall performance in cricket and rugby despite witnessing a gradual increase in the number of black South Africans and other ethnic groups into the team. As Kriel mentioned however, the South African nation is still relatively 'young' and hence it would take another decade or two in order to determine the future trend of sporting success within the country⁵⁵⁰. As mentioned by Van Graan, another important factor could be attributed to the proper selection of players from the same ethnic group as opposed to general 'pick and play' from a certain 'exclusive ethnic grouping'.⁵⁵¹

The sports of badminton and field hockey in Malaysia have produced an entirely different result. As analysed in Chapter 6, the theory of affirmative action has managed to preserve the general trend when it comes to international sporting success

⁵⁵⁰ Kriel (n527)

⁵⁵¹ Van Graan (n519)

while continued attempts to groom talented ethnic Malays into the sport. This is arguably one of the most important factors that would help to sustain the rate of performance for that sport. In contrast, national field hockey has witnessed a decline in terms of sporting success enjoyed by their predecessors in the 1960s and 70s. With the general trend demonstrating an increase of ethnic Malays in the sport, this conforms to the theory that the applicability of affirmative action has resulted in the internal success of increasing Malay participation but at the expense of the sporting standard in Malaysian field hockey overall.

The case for Malaysia and South Africa seems to be unclear – a general increase in participation by ethnic Malays and black South Africans with overall sustainability of sporting success. As echoed in Chapter 6 however, this could be due to a variety of reasons. One thing is clear though for South Africa as a nation – The theory of affirmative action largely remains a new concept for further exploration. In sports therefore, it would be the case that the situation would change for the better in the future. As for Malaysia, the BAM is advocating continued sustainability of badminton performance although steps are being taken to exploit the relevant talent from the ethnic Malays. The Malaysian field hockey team however continues to provide an inconclusive answer due to limitations in obtaining information from the relevant ministry. For the moment however, arguments from some quarters attribute the decline of the sport to internal politicking and affirmative action policies.

On the other hand, the theory of equal opportunity has in practice opened up new opportunities for blacks and other ethnic minorities to be involved in and selected as part of the national team. As argued in Chapter 7, the rate of selection of ethnic minorities have generally increased since the introduction of the RRA 1976 as amended in England and the CRA 1964 in the United States. This can be seen from the chosen sports within the two jurisdictions. Interestingly, the theory of equal opportunity in England and the United States has also managed to preserve the rate of international sporting success. As a consequence, this refutes the theoretical assumption that equal opportunity would not; in general promote equal participation by racial and ethnic minorities in sports.

In summing up, substantial initiatives via the assimilative theory (theory of equal opportunity and positive action) in England have managed to preserve their sporting success. As mentioned, the government and other relevant sports' bodies have invested in developing the games and affording financial aid in raising interest in the games amongst a broad range of communities. The English cricket team has witnessed a gradual increase in selection within the ethnic minority groups. In relation to the sport of rugby in England, it appears that the number of ethnic minorities being selected to the national team remains a small number.

One may argue that the situation is similar to that in Malaysia or South Africa where a lower percentage of selection might be due to other reasons. Potentially, rugby is part and parcel of English heritage and hence, the sport is considered popular at all levels of English society. More importantly, the continuing dominance by one ethnic group in England could also be attributed to the skills and merits of individual players since positive action does not guarantee automatic selection for certain ethnic minority groups.

Significantly however, the practical application of assimilative theory has produced capable players from other ethnic backgrounds. Since 1989, English rugby has always been represented by a number of black players when it used to be dominated by a single ethnic group. With increased financial allocations to various rugby organisations and even schools, this would no doubt increase the number of ethnic minority players in the English rugby national team in the future while sustaining the level of success of that sport at an international level.

There is however a caveat to this. As introduced in Chapter 5, participation in sport at the higher echelons in England is also influenced by European Union policy, as illustrated through the introduction of the White Paper on Sport in 2007. The White Paper on Sport generally emphasised the importance of sport as 'A growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity'.⁵⁵² The White Paper covered substantial areas in which the Member States could take in order to increase the

⁵⁵² Commission, 'White Paper on Sport' COM (2007) 391 final

involvement of society in sports. Some of these areas include volunteering through sport, increasing the importance of sport through various education and training efforts and the need for society to be involved to fight racism and violence in sport. It is also imperative that the White Paper also makes reference to the economic dimension in sport where sport could be used in order to create new jobs and generate income.

A potential conflict within the White Paper may be the effect that the influx of foreign sportspeople may have upon the already under-represented sectors of society targeted by equal opportunities policy. In the White Paper, the Commission recognised that ‘Discrimination on grounds of nationality is prohibited in the Treaties, which establishes the right for any citizen of the Union to move and reside freely in the territory of the Member States’⁵⁵³ and calls upon the member states and sports organisation to ‘... address discrimination based on nationality in all sports’ although the Commission reaffirms its acceptance of limited and proportionate restrictions to the principle of free movement with particular reference to the selection of national teams.

The Commission stressed:

In the area of professional sport, rules entailing direct discrimination (such as quotas of players on the basis of nationality) are not compatible with EU law and rules which are indirectly discriminatory (such as quotas for locally trained players), or which hinder free movement of workers, may be considered compatible if they pursue a legitimate objective and insofar as they are necessary and proportionate to the achievement of such an objective.⁵⁵⁴

The ECB and RFU, while in general support the Commission’s programmes to address the issue of social inclusion in sport, have voiced their concerns in that ‘... the import of talent from overseas will reduce the opportunities for players eligible to

⁵⁵³ Treaty of the European Union, Arts 18 and 12 which establishes the right of every citizen of the Union to move and reside freely within territory of the Member States and prohibits discrimination on the grounds of nationality.

⁵⁵⁴ Bill Cash, ‘Brussels set to interfere on sports autonomy’ (Bill Cash’s European Journal, 21 January 2011) <http://www.europeanfoundation.org/my_weblog/2011/01/brussels-set-to-interfere-on-sports-autonomy.html> accessed 17 March 2011

play for the national side to develop and they see the uncertainty about the validity within EU law of quotas of 'home grown' players as having an adverse effect upon national teams'.⁵⁵⁵ Both the national governing bodies in England had stressed that the success of the national team was crucial to its vitality. Even with the equal opportunity policy in place, the minority ethnic groups could find it difficult to penetrate to the club levels which would inevitably lead to potential 'loss of chance' to qualify or be part of the national team.

The White Paper in Sport signifies new dimension in encouraging social inclusion, integration and emphasising on providing equal opportunity for all members of the under-represented groups. In fighting against exclusion, the European Council suggested 'To develop, for the benefit of people at risk of exclusion, services and accompanying measures which will allow them effective access to education, justice and other public and private services, such as culture, sport and leisure'.⁵⁵⁶ This objective in itself described the Council's intention to employ equal opportunity to ensure social inclusion amongst the different communities within EU member states. This objective should be applauded. On the contrary, the outcome of the Commission's White Paper could have adverse repercussions in England and effectively, produce two layers of equal opportunity policies – one for creating equal opportunities from grass roots level for under-represented or minority groups and the other opportunities for professionals from the EU and non-EU to participate in England.

To enable the under-represented groups to compete at the international level and be part of the English national team, it is essential that the minority groups are given the opportunity to compete at higher club levels and this may be compromised by lack of available places. At club levels, this may be influenced by the tendency to employ the participant who already possesses such skills and abilities. It is therefore likely that under-represented or minority groups will be more adversely affected as a result of the White Paper. Consequently, it creates a contradiction between the needs of greater social inclusion and cohesiveness and economic performance. In the case of England, this would not affect the equal opportunity policies for all participants, however, the

⁵⁵⁵ HC Deb 8 May 2008, vol. 347

⁵⁵⁶ Commission (n550)

Commission's approach might present new challenges for the minority groups in order to excel and ultimately be part of the national team. In the broader picture, this could also affect the overall success of the national team in the long run.

Similar to their English counterparts, the rate of participation by ethnic minority groups has increased tremendously in the United States while maintaining the overall rate of international sporting success. The enactment of the CRA 1964 represents the pivotal moment for the inclusion of ethnic minorities into sport. This can be demonstrated for both sports – basketball and the National Football League. In relation to basketball, the sport has observed a massive surge of interest and inclusion from the African American community in particular. The continued interest, influenced by other factors such as size and physical appearance resulted in decline of participation by white Americans. Interestingly, African Americans form less than 15% of the national population. As a consequence, such trends illustrate the theory of equal opportunity in action.

Little difference could be observed with reference to the NFL. The sport had mainly been dominated by a single ethnic group prior to the 1964 Act. Since the late 20th century however, other ethnic groups – in particular from the African American community, have dominated the sport. Since the 1970s, the trend suggests a general decline of white American football players. Again, the result marked the success of the government in implementing such policies. The inclusion of other ethnic minorities has maintained the overall standard with the sport becoming more popular in terms of both participation and support. Although selection for the NFL appears to be fair, there have been some arguments in relation to discrimination within the sport itself. As mentioned in Chapter 5, positions which require physical strength have been reserved for the African Americans while most strategic positions have largely been given to white Americans. This concept however was not explored in detail since it is not the primary purpose of the research.

The case for England and the United States appears to deviate from the general perception that equal opportunity does not afford chances for the ethnic minorities to excel. Although other smaller ethnic minorities might not be represented at all in this sport, this nonetheless highlights the application of meritocracy when it comes to the

process of selection in sports. Let us take the sport of badminton as a basic illustration. The majority of badminton players in the United States are ethnically Chinese while in England, some of the players are from Indian ethnicity.

Comparatively, all these four countries have seen a more diverse participation from all races and ethnic backgrounds. Certainly, affirmative action and equal opportunity are geared towards implementing equality in terms of participation and selection to the national team. On the balance of probability however, it appears that the theory of equal opportunity seems to provide a more justifiable opportunity to participate as opposed to the theory of affirmative action.

8.3 The Trend between Affirmative Action / Equal Opportunity and Sporting Success

From the variation of analysis provided above and in earlier Chapters, it is clear that the outcome of the evaluation does not match the general trend or model as projected specifically in Chapter 3. From the Malaysian and South African perspectives, it has been proven that adopting the theory aligned towards affirmative action does not necessarily cause the demise of the country's international sporting success – save in exception for the Malaysian field hockey's overall performance. At present, the South African cricket team is one of the precedents that could be used to refute the general trend as suggested in Chapter 4. Equally, it is also envisaged that the implementation of equal opportunity in sport does not generally result in deprivation of other racial or ethnic minority groups from participation. This has already been illustrated through the stance adopted by the United States.

One may however conclude that it might not appear to be the case. Using England as our primary example – although the selection of ethnic minorities to the national team remains low - one will have to refer back to the primary purpose and definition of equal opportunity. In short, to provide and afford fair selection to the most capable and those deemed fit to be part of the national team. The English position, which is partially based on positive action, has given a new lease of opportunity for ethnic minorities to be involved in the sport.

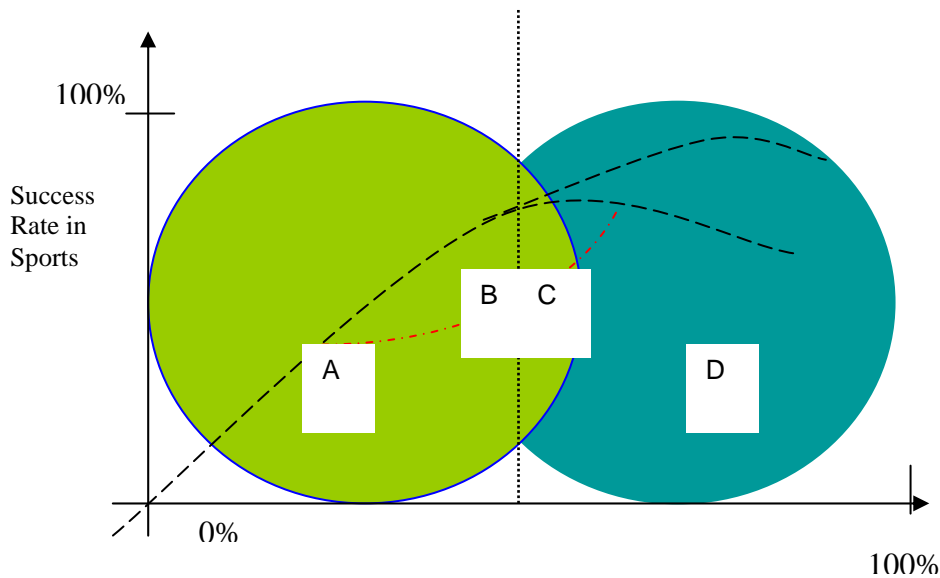


Chart 12: New Predictive Model

Rate/Chances of Participation for Ethnic Minorities

Legend:

A: Strict Affirmative Action

B: Medium Affirmative Action and Secondary Theory

C: Strict Equal Opportunity

D: Weak Affirmative Action and Assimilative Theory

This new model aims to look at the general correlation between sporting success and the theory of affirmative action and equal opportunity. The model might show some resemblance to the previous model analysed in Chapter 4; however, there are some distinct features that are worth elaborating further. Generally, there are striking similarities when it comes to the sub-theory of strict affirmative action and strict equal opportunity. Any legislations or policies which correspond to the strict affirmative action policy would deny any substantial rights to the participation of ethnic

minorities. With severe restrictions, this could potentially lead to a lesser chance of achieving international sporting success. As previously examined, the country might be missing out on some potential talents and would not enjoy the equal success in comparison to other countries which adopt the theory of equal opportunity.

There is a slight variation in relation to the theory of strict equal opportunity. Whilst the previous model envisaged that some racial or ethnic minority groups might be precluded from being selected to the national team, it has not been the case as demonstrated in England and the United States. With both countries primarily adopting the theory of equal opportunity evidence received suggests that ethnic minorities have always been selected for participation in international competitions based on meritocracy. In summing up the theory of strict affirmative action and strict equal opportunity therefore, any policies which only aim to provide benefits to one or certain ethnic groups would be almost certain to experience a drop or gradual drop when it comes to international sporting success. In contrast, affording strict equal opportunity would undoubtedly attract successful participation of ethnic minorities in sports generally. Talents identified could be utilised to bring further international sporting success to the country.

There are however differences prior to and after the mid-point or the meeting point between affirmative action and equal opportunity. As with the predictive model illustrated in Chapter 4, it is essential to note that the potential international sporting success rate and the overall rate of participation for ethnic minorities would increase if the chart were to move towards equal opportunity. The concluding remark for the present model however suggests that even though we might concur with the former, the general trend is fixed and could change over time. As a consequence, it is not possible to spell out a specific quantifiable correlation highlighting the sporting success of a country and the theory of affirmative action and equal opportunity.

As the model suggests, there are two general trends for medium affirmative action and primary and secondary theory (The theory of equal opportunity and affirmative action). At one end, these sub-theories would still be able to observe a higher rate of participation by some racial or ethnic minorities in those countries with considerable measurement of international sporting success provided that the laws and policies

have been executed in a proper manner. As explored earlier, these sub-theories afford chances to certain ethnic groups – the difference being that those players are selected based on their abilities to perform, and if that is not possible, equal chances would still be given to the other racial or ethnic groupings.

On the contrary, these sub-theories could also lead to a deprivation of chances for some ethnic groups to be involved in sports and therefore, trigger the general decline of sporting success for that nation. For example, certain parties could exploit the theory in order to further their own agenda or even to elevate certain racial or ethnic groups. Although the general equality provisions are still being observed, this would undoubtedly give certain racial or ethnic groups some advantages over the others. Brief examples will be drawn from the situation in South Africa and Malaysia in order to illustrate the arguments for such trends.

Generally, the South African rugby or the Malaysian national badminton team's sporting achievement has successfully been maintained in comparison with the Malaysian field hockey team. Statistically, there are a substantial number of ethnic Malaysian Chinese badminton players and white South Africans in comparison with the rate of other ethnic groups for the Malaysian field hockey team. Specifically, although this would be subject to some variables or underlying reasons, this nonetheless demonstrate the fact that different sports within a country might vary in practice while sharing similar theoretical applications.

Arguably, the same could be said about the general trend for equal opportunity. This includes both sub-theories of assimilative theory (the theory of equal opportunity and positive action) and weak affirmative action policy. By looking at the trend, one could witness an increasing trend involving both potential rate of participation and its international sporting success. Yet again, there are two different / separate trends as indicated in the chart itself. Therefore, it might diverge due to the different steps taken to enforce the law or policies governing the equality provisions. One example might include the earlier evaluation involving legislation in England where its practice is mainly based on meritocracy for sports. The other might involve examples such as imposing a certain degree of pressure or obligation to ensure that an ethnic minority is selected for the sport in addition to financial assistance given to the racial or ethnic

minority groups. Hence, it could be deduced that the general trend illustrating the role of equal opportunity in sport could not be fixed.

At this stage, it is necessary to re-assert the fact that any attempt to fully implement the theory of affirmative action policy in sport would be unlikely to be met with a successful outcome for both the country and in terms of successful international achievement. In contrast, any steps pursued towards the theory of equal opportunity would increase the winning opportunity for the country and increase the chances of sporting accomplishment. As per the above analysis and evaluation however, it might be the case where there are two separate trends are being highlighted due to variance in practice within each country. The only similarity that these trends share is that it will eventually reach the highest rate of international sporting success as well as the rate of participation for racial and ethnic minorities in sport for equal opportunity.

8.4 The Trend Continues – Relevance into other areas

The concluding analysis made above makes it clear that the theory of equal opportunity which affords equal rights to all individuals would be likely to witness a general increase of the success rate in sport. This trend could also be applied in other sectors which do not have any relevance to the sporting industry. Therefore, the purpose of this sub-chapter is to demonstrate briefly the potential applicability of this model to other areas – namely the selection process for selective and comprehensive education systems as well as process for appointment of judges.

8.4.1 Selective and Comprehensive Education Systems in England

‘The arguments for a comprehensive system of schooling should not be lost on higher education; those arguments are now exerting an influence on the education and training system after 18 – the openness to a much wider range of talent, aspiration and approaches to learning’⁵⁵⁷

⁵⁵⁷ Richard Pring and Geoffrey Walford, ‘Comprehensive Schools: The History.’ *Times Higher Education* (London, 12 June 1996)
<<http://www.timeshighereducation.co.uk/story.asp?storyCode=92186§ioncode=26>> accessed on 29 June 2009

How can the above statement be related to the general trend as analysed above? It is essential to give a brief evaluation of the education system in England in order to consider the relevance of the trend to the former. At this stage, it is also important to note that, with exception to Scotland, the education system in England also refers to Wales and Northern Ireland⁵⁵⁸ since there are substantial similarities between them. For the purposes of this research, concentration will only be given to the post Education Act 1944 and its subsequent Acts or legislation.

Under the Education Act 1944, English education was sub-divided in three different schooling systems. Under the Tripartite Education system, the English education system consisted of Public Schools, Grammar Schools (Maintained and Direct Grant Grammar Schools) and Secondary Modern Schools⁵⁵⁹. Under the grammar schooling system, students would be sitting for the General Certificate of Education (GCE) O-Levels and A-Levels. In contrast, most secondary modern schools would only sit for the Certificate of Secondary Education (CSE). The repercussion from such practices resulted in children from public / grammar schools monopolising the access to Universities in the country.

Under the Circular 10/65⁵⁶⁰ however, the then Education Secretary decided to make 'comprehensive schooling' government policy, replacing the Tripartite Education system. Comprehensive schooling can be defined as 'Secondary School offering the curricula of a grammar school, a technical school, and secondary modern school, with no division into separate compartments where pupils are placed according to their aptitudes and abilities'.⁵⁶¹ The main objective of introducing a comprehensive schooling system is to provide 'educational opportunities for all children, not to divide them at an early age into different opportunity groups on the basis of a questionable instrument of selection'.⁵⁶² Save in exception of independent schools⁵⁶³,

⁵⁵⁸ As per Education (Northern Ireland) Act 1947

⁵⁵⁹ 'Grammar School Statistics' (*House of Commons Library*, June 2008)

<<http://www.parliament.uk/commons/lib/research/briefings/snsg-01398.pdf>> accessed 14 July 2009

⁵⁶⁰ Circular 10/65 initiated as a result of the Robbins Report 1960 which suggested the abolition of the old grammar school and secondary moderns. Also see Herbert Andrew, 'Circular 10/65 12th July 1965' (*Old Monovians*) <<http://www.oldmonovians.com/comprehensive/circular1065.htm>> accessed 14 July 2009

⁵⁶¹ 'Comprehensive School' (*Dictionary.com*)

<<http://dictionary.reference.com/browse/comprehensive+school>> accessed 12 July 2009

⁵⁶² House of Commons Library (n559)

the majority of grammar schools in England have been converted into comprehensive schools. Within ten years of the introduction of the Circular, 90% of the schools became comprehensive⁵⁶⁴. Although the phrase ‘to provide educational opportunities’ appears to suggest the notion of equal opportunity, it is, on the other hand questionable.

For the purposes of this research, this thesis will only look into the political theory by the government in creating the comprehensive system. In terms of internal political theory, Circular 10/65 could be construed as a pressure on all grammar schools in England to change to a comprehensive system. According to Wilson, ‘the academic excellence of the Grammar Schools would live on within the new comprehensive schools’.⁵⁶⁵ Such pressure from the Local Education Authority and the government would be akin to those of affirmative action policies – an Act for all schools to affirm the internal political ambition of the government by placing all school children into the comprehensive schooling system in England. In contrast with the theory of equal opportunity, this theory would give freedom to the schools to choose the type of establishment, be it grammar or comprehensive.

As argued above, although affirmative action policy in the English education system would not result in a divisive society, there have been substantial questions and doubts as to its effectiveness in increasing the skills and abilities of all students in comprehensive schools. Morris is quoted as stressing that ‘a large number of children being taught in mixed-ability classes in comprehensive schools were branded as failures ... under the grammar (schooling) system, they would be given the chance to excel’.⁵⁶⁶ On the other hand, Pring and Walford thought that there ‘is much more to personal and social development than academic successes’.⁵⁶⁷ It is interesting to note

⁵⁶³ Under the Direct Grant Grammar Schools (Cessation of Grant) Regulations 1975, all direct grant grammar schools must be reverted to either comprehensive or independent schools.

⁵⁶⁴ Oldmonovians (n560)

⁵⁶⁵ ‘Comprehensive Success Story’ (Campaign for State Education – CASE)
<<http://www.campaignforstateeducation.org.uk/Comprehensive%20Success%20Story.pdf>> accessed 29 June 2009

⁵⁶⁶ ‘Bring back grammar schools’ (*British Broadcasting Corporation*, 12 June 2008)
<<http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/4714019.htm>> accessed 29 June 2009. Also see Sam Coates, ‘Grammar Schools ‘give a lift to results of all around them’ *Times Online* (London, 28 May 2007)) <<http://www.timesonline.co.uk/tol/news/uk/education/article1848439.ece>> accessed 30 June 2009

⁵⁶⁷ *ibid* Coates

that Pring and Walford are indirectly agreeing with the statement made by Morris. Therefore, one could interpret that comprehensive schools do not place emphasis on the academic success or achievement of the students.

In fact, this can also be substantiated by the latest admission of students into Cambridge University. In 2009 alone, 58% of the undergraduate places are secured by independent elite schools⁵⁶⁸ and other overseas educational institutions. Meanwhile, 614 grammar school children secured undergraduate places at the University, accounting for 19% of the total places despite only educating 5% of England's secondary age children. Over 90% of the total number of comprehensive schools in England could only secure a total of 23% of places in Cambridge University⁵⁶⁹. From this evidence, it appears that the local education authority's long term plan to create a successful comprehensive school system appears to have a long way to go. One could also therefore refute Wilson's earlier claim about the living legacy of the grammar school in a comprehensive system.

As a consequence, if we are to apply all these factors into the general model depicting the relationship between affirmative action / equal opportunity and sporting success, it fits nicely with the comprehensive / grammar schooling system and academic success. With more than 90% of the English schools being classified as comprehensive in nature, this would imply a strong affirmative action measure taken by the government in the local education system. Hence, a general trend towards affirmative action will reduce the academic success rate of the children in the country. This could perhaps explain one of the primary reasons behind the inability of a larger amount of students being successful in entering one of the top Universities in England. In summing up, Cameron stressed that, '... (The present education system) helps to explain why the number of young people not in education, employment or training ... University have to provide remedial education for some first year students, and why employers

⁵⁶⁸ Independent Schools only form 3% of the total secondary school children in England.

⁵⁶⁹ Julie Henry, 'Grammar school pupil surge at Cambridge University – The number of Cambridge University places won by grammar school pupils has almost doubled in a year, according to new figures.' *The Daily Telegraph* (London, 25 April 2009)
<<http://www.telegraph.co.uk/education/educationnews/5219915>> accessed 29 June 2009

consistently highlight a damaging lack of basic skills, even among some graduates'.⁵⁷⁰

8.4.2 Appointment of Judges in England

'Women, solicitors and ethnic minority candidates in particular lacked confidence about applying and were more likely to feel that being a judge were 'not for them'. In all, four out of ten candidates overall said they would not apply unless they knew they would succeed'.⁵⁷¹

Appointment of judges has previously been viewed as secretive, one-sided and tending to favour certain parties through political connections. Throughout the years, judges appointed to their respective position within the judicial hierarchy tend to be from a white background, male, middle aged and previously educated in the top Universities in England⁵⁷². Into the 21st century however, there are increasing arguments about reforming the English judiciary system when it comes to the appointment of judges. The Constitutional Reform Act 2005 for instance is introduced in order to provide a greater transparency and to increase confidence in the English Legal System. As stated, '(The 2005 Act) created the Judicial Appointments Commission to select people for judicial appointments in England and Wales, and provides for judicial discipline in England and Wales'.⁵⁷³

On the contrary, there have been many criticisms surrounding the new appointment system. Besides the continued utilisation of a secret sounding system, the practical effect of the 2005 Act remained unchanged to its predecessor. For example, the first 10 High Court judges appointed under the new diversity rules '[failed] to break the stranglehold of privately-educated white males ... The only unusual appointment was

⁵⁷⁰ David Cameron, 'This sterile fixation with grammar schools is a dead end – Here's how to increase the number of places in good schools' *Times Online* (London, 22 May 2007) <http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article1821282.ece> accessed 28 June 2009

⁵⁷¹ Frances Gibb, 'Judge Selection still perceived as unfair' *Times Online* (London, 4 June 2009) <http://business.timesonline.co.uk/tol/business/law/article_6432913.ece?> accessed 29 June 2009

⁵⁷² Catherine Elliott and Frances Quinn, *English Legal System* (8th edn, Pearson Longman 2007) 153

⁵⁷³ 'Explanatory Notes to the Constitutional Reform Act 2005' (Office of Public Sector Information) <http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen_20050004_en_1.htm> accessed 15 July 2009

that of Ross Cranston who comes from Australia and was educated there first'.⁵⁷⁴ Applications from ethnic minorities and females were unsuccessful. According to Vaz, 'It is actually worse, I would say, than when both Charlie Falconer and Derry Irvine [former lord chancellors] made the appointments'.⁵⁷⁵ There has since been increased pressure for further reform of the judicial appointment system in England. Some critics such as Gibbs have suggested that the Judicial Appointments Commission (JAC) must change if they wish to retain their credibility.

This can be substantiated through the statistics issued by the Judiciary of England and Wales. It appears that there are only 9 women judges from a total of 119 judges sitting in the High Court, Court of Appeal and the House of Lords. In addition, there are only 2 ethnic minority judges from a total of 119 judges⁵⁷⁶. In terms of percentage, women only comprised 7.5% while blacks and other ethnic minorities only constituted 1.7% of the total number of judges in England.

By May 2009, a government adviser gave an indication that quotas might be introduced in order to increase the participation of ethnic minorities and women judges in the English Legal System. The main objective was to remove 'blockages' faced by some applicants for judicial posts and to make judges more representative of society⁵⁷⁷. Effectively, this can be seen as one of the quickest ways to increase the appointment of judges from other groups. Through this suggestion therefore, one can hypothetically assume that 10% of the judicial positions would be reserved for blacks and other ethnic minorities since this figure resembles the number of overall ethnic minorities in England. Similarly, one could also witness a potentially drastic increase in women's roles as judges. On the one hand, such steps could reflect the government's seriousness in tackling the issue of racial and gender under-representation in the English judicial system. In contrast, this measure could also be

⁵⁷⁴ Clare Dyer, 'First 10 new High Court judges appointed under the new diversity rules' *The Guardian* (London, 28 Jan 2008) <<http://www.guardian.co.uk/politics/2008/jan/28/uk.immigrationpolicy1>> accessed 16 July 2009

⁵⁷⁵ *ibid* Dyer

⁵⁷⁶ 'Statistics – Minority Ethnic Judges in Post' (*Judiciary of England and Wales*) <<http://www.judiciary.gov.uk/keyfacts/statistics/ethnic.htm>> accessed 10 July 2009

⁵⁷⁷ Tom Whitehead, 'Quotas could be introduced for judges to increase ethnic minorities and women' *The Daily Telegraph* (London, 28 April 2009) <<http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/5237953/>> accessed 29 June 2009

viewed as being supportive of the theory of affirmative action or positive discrimination.

By implementing quotas, it appears that the government is moving from the application of the principles of equal opportunity to affirmative action measures. Politically, the government might be successful in integrating more ethnic minorities and females. Similar to the earlier observation involving the theory of affirmative action / equal opportunity and success rates however, any measure akin to affirmative action would be likely to see a gradual decline in confidence in the English judiciary. Quoting the above instances, the introduction of quotas could be viewed as a medium affirmative action. Reflecting this as a general trend, the success rate in achieving justice would be comparatively lower than the ones under equal opportunity.

In addition to the above, the method of implementing quotas would also be matter of importance. Thus, merely appointing female judges and ethnic minorities to fill the percentages without considering their abilities would generally result in a steep or quicker decline of confidence in the English judicial system. On the other hand, careful selection based on the individual backgrounds and abilities of the selected groups (female and ethnic minority groups) would, in general, sustain a higher level of confidence and success in delivering justice to members of the public. As a consequence, this correlates with the general model or trend highlighted under Sub-Chapter 8.3.

Maintaining the present state of the appointment system via equal opportunity would largely preserve and generally increase the level of success and confidence in terms of achieving justice. As Slapper echoed:

The composition of the judiciary will change slowly, because judges' educational background lags about 30 years earlier than their appointment to the Bench. So, changes in access to legal education today will become manifest on the Bench about 2037 ... If someone strides towards you at night holding a knife, you are likely to flee with the sensible prejudice that the

approach is not a proposed cutlery sale. But unjustified assumptions about who makes a good judge are on their way out.⁵⁷⁸

In summing up, Slapper is giving a clear indication that any short-cut measures to fill the position of judges by female or ethnic minorities would almost certainly result in a decline in the efficacy of English judicial system. These issues are similar to those pertaining to racial discrimination in sport, indicating the flexibility of the model in relation to non-sporting applications.

8.5 Moving On – The Final Observation

In conclusion, the general trend highlighting the correlation between sporting success and affirmative action / equal opportunity can be applied in other areas as well. Similar to sports, it would be a daunting task to seek a specific quantifiable correlation due to various factors affecting these areas, despite reports and observations made by various organisations. The end result would however enable readers to appreciate the general effects of affirmative action and equal opportunity.

Referring back to sport, the outcome is clear. The theory of affirmative action or positive discrimination, with the exception of the United States' model (the primary and secondary theory) which gives emphasis or priority to the public who form the majority or the minority of the population, ought to be re-considered when it comes to their involvement in sports. While this research is not attempting to dismiss the benefits of the theory of affirmative action, it has proven that this theory could cause harm to general international sporting success for a nation if it is not properly nurtured by the government of the day. Constant politicking for the benefit of certain groups is one of those instances. Citing Malaysia as an example, one would be able to appreciate the different outcome for both badminton and field hockey. South Africa's sport has largely maintained its sporting success. Conversely, it would be interesting to evaluate the outcome of affirmative action in sport in years to come. Credit

⁵⁷⁸ Gary Slapper, 'The Law Explored: Ethnic Minorities and the Judiciary' *Times Online* (London 4 July 2007) <<http://business.timesonline.co.uk/tol/business/law/columnists/article2025618.ece>> accessed 17 July 2009

however ought to be given for demonstrating that the theory of affirmative action can be used successfully for achieving overall equality between citizens in a country.

On the other hand, the theory of equal opportunity has demonstrated a general tendency to promote international sporting success and the ability to sustain them. Selection through merit would ensure that every individual from different racial and ethnic backgrounds would be given the chance to be represented in sport, but may have a negative effect on the population as a whole. The United States and England have thus far provided a clear precedent in this area. The inclusion of ethnic minorities has maintained the overall standard of sporting success. Hence, this research shows that equal opportunity appears to have a better outcome in terms of promoting sporting success than affirmative action.

History has always played an important role in shaping a country's destiny and the way it should be governed. In many aspects, it has had an influence on how participation in sports should be regulated in every country. In Malaysia and South Africa, it was the case of inevitable policies implemented to favour the majority group in the country as they had suffered internally and externally as a result of colonial suppression towards them. For other countries, which still indulge in tribal and racial clashes or practising the theory of affirmative action, it is time to realise the unavoidable fact that this theory could potentially lead to reverse discrimination or even direct discrimination against the other races in a country if the theory is not properly executed. As echoed by the Olympic Charter⁵⁷⁹, fair play will always bring true glory to the winners. Similarly, fair chances and opportunities afforded to every race in a country signify a country's glory in achieving the dream of uniting the people under one umbrella together in sporting glory.

To conclude this thesis, a number of issues have arisen from the research and the following discussion highlights these. With affirmative action, it becomes evident that you can pursue equality of participation, leading to internal political success but not necessarily sporting success. On the other hand, equal opportunity approaches tend to increase, or at least retain, sporting success but not necessarily equality of

⁵⁷⁹ Olympic Charter (n69)

participation. This latter point can also be developed further, not least in terms of the long-term nature of the research and the fact that much of the interesting discussion to come from it falls beyond the initial aims and objectives of the study. Using the England case study as a key example, it is evident that racial discrimination is not necessarily a direct or conscious form of discrimination but one that can be described as indirect and covert in long-standing social structures and policies. Take the example of schools. As earlier discussions alluded to, the existence of public and grammar schools can be seen to contrast with those of comprehensive schools, not least in their access to sporting activities. While comprehensive education can tend to minimise the importance of sport, relegating it to a largely extra-curricula activity, public and grammar schools generally retain it as an essential part of a balanced curriculum. This situation means that pupils studying in the comprehensive school system can fall behind other children in the other school sectors and therefore lack the same opportunities to compete at the top level. This issue remains strongly linked to social status and economic ability and may be a contributing factor in the participation of young people at the upper echelons of sporting success in both rugby and cricket. This is an interesting theme and one which would benefit from further research.

This discussion may also act to illustrate the effectiveness of the model that has been produced, not least in its application as a theoretical tool for analysing anti-discriminatory measures but also as an effective workable model applied to other situations in which law or regulation needs to strike a balance between opportunity and effectiveness. This therefore, represents a key contribution to knowledge in this important subject area.

It must be recognised, however, that selection can never be wholly objective and the greater freedom offered by subjectivity in the process can also provide avenues for particular biases to emerge. This represents an evident dilemma in determining who the best players are in any given sport and it is difficult to fully objectify such decisions on the grounds of basic statistical information. For example, cricketers with higher batting averages do not necessarily make the best test batsmen as other characteristics such as temperament and experience also come into play. Potentially, the theme of ‘unconscious’ discrimination may also emerge in which subjective stereotypes may be employed in preference to objective selection criteria.

It is unlikely that potential biases in selection can ever be fully addressed through equal opportunities as this is designed primarily as a means to provide opportunities for traditionally under-represented groups to compete for selection rather than actually being selected. On the other hand, the notion of affirmative action may be deemed to be more inclusive in the final event as it does force selectors to select players from groups that they may tend to be biased against.

The research contained in this thesis has been subject to certain limitations, not least the need to recognise certain political sensitivities, particularly those corresponding to the Malaysia and South Africa jurisdictions. Equally, given the restrictions in financial budgets it has not been possible to travel to all jurisdictions selected and this has precluded the researcher's ability to undertake full in-depth focus group or face-to-face interview sessions. These limitations have had an effect upon the methodology selected. In the former case, political sensitivities have not only limited the range of questions that could be posed but have also created shortfalls of certain existing statistical information, thereby restricting the potential application of quantitative approaches. For this reason, the selected methodology has leaned heavily towards multi-method rather than mixed-method enquiry.

BIBLIOGRAPHY

Books

- Abdullah A and Pedersen P, *Understanding Multicultural Malaysia* (Pearson 2003)
- Ahmad Sarji bin Abdul Hamid, *The Encyclopedia of Malaysia Sports and Recreation* (Vol. 15, Archipelago Press 2008)
- Anderson J, *Modern Sports Law – A Textbook* (Hart Publishing 2010)
- Barker R, Gledhill A and Lydon C, *BTEC National Sport* (Heinemann 2007)
- Beamish R and Ritchie I, *Fastest, Highest, Strongest: A Critique of High Performance Sport* (Routledge 2006)
- Beloff M, Kerr T and Demetriou M, *Sports Law* (Hart Publishing 1999)
- Bentham J, *An Introduction to the Principles of Morals and Legislation* in Burns and Hart (eds) (Athlone Press 1970)
- Berger F, *Happiness, Justice and Freedom: The Moral and Political Philosophy of John Stuart Mill* (University of California Press 1984)
- Bergmann B, *In Defense of Affirmative Action* (Basic Books, 1996)
- Birley D, *Land of Sport and Glory- Sport and British Society 1887-1910* (Manchester University Press 1994)
- Birley D, *Sport and the Making of Britain* (Manchester University Press 1993)
- Brailsford D, *British History – A Social History* (The Lutterworth Press 1997)
- Brasch R, *How did Sports Begin?* (Tynron Press 1986)
- Brown C, 'Ethnic Pluralism and Public Policy' in *Ethnic pluralism in Britain: the demographic and legal background* by Glazer N and Young K (eds) (Aldershot 1986)
- Brownlie I and Goodwin-Gill G, *Brownlie's Documents on Human Rights* (eds) (6th edn, Oxford University Press, 2009)

- Butler J and Lopiano D, *The Women's Sports Foundation Report: Title IX and Race in Intercollegiate Sport* (Eisenhower Park 2003)
- Cahn S, *Affirmative Action and the University: A Philosophy Inquiry* (Temple University Press 1993)
- Cahn S, *Coming on Strong: Gender and Sexuality in the Twentieth Century Women's Sport* (The Free Press 1994)
- Charlesworth L, *On Historical Contextualisation: Some Critical Socio-Legal Reflection* (Crimes and Misdemeanours 2007)
- Cloete R and Cornelius S, *Introduction to Sports Law in South Africa* (Lexis Nexis Butterworth 2009)
- Comber L, *13th May 1969 – A Historical Survey of Sino-Malay Relations* (2nd edn, Graham Brash Ltd 2001)
- Commission for Racial Equality; Positive Action and Equal Opportunity in Employment* (2nd edn, Interlink Longraph 1985)
- Cotterrell R, *Law's Community: Legal Theory in Sociological Perspective* (OUP 1995)
- Cotton D and Wolohan J, *Law for Recreation and Sports Managers* (4th edn, Kendall and Hunt Publishing 2006)
- Creswell J, *Research Design – Qualitative, Quantitative and Mixed Methods Approaches* (2nd edn, SAGE 2003)
- Crisp R, *Mill on Utilitarianism* (Routledge Philosophy Guidebooks 1997)
- Deakin S and Morris G, *Labor Law* (5th edn, Hart Publishing 2009)
- Denscombe M, *The Good Research Guide* (2nd edn, Open University Press 2004)
- Dworkin R, *As a Matter of Principle* (Clarendon Press 1986)
 -- *A Matter of Principle* (OUP 1985)
 -- *Law's Empire* (Fontana Press 1986)
 -- *Taking Rights Seriously* (Duckworth 1977)
 -- 'Liberalism' in Stuart Hampshire (eds), *Public and Private Morality* (University of Cambridge Press 1978)
- Eitzen S and Sage G, in Delaney T and Madigan T (eds), *Sports: Why People Love Them?* (University Press of America 2009)
- Elliott C and Quinn F, *English Legal System* (8th edn, Pearson Longman 2007)

Entine J, *Taboo – Why Black Athletes Dominate Sports and Why We're Afraid to Talk About It* (Public Affairs Publication 2000)

Fenton S, *Ethnicity – Racism, Class and Culture* (MacMillan Press Limited 1999)

Finley P and Finley L, *The Sports Industry's War on Athletes* (Praeger Publishers 2006)

Fisher C and Lovell A, *Business Ethics and Values – Individual, Corporate and International Perspective* (3rd edn, Pearson 2009)

Foster K, 'Developments in Sporting Law' in Luke Addison, *The Changing Politics in Sport* (eds) (Manchester University Press 1993)

Fredman S, *Discrimination Law* (OUP 2002)

Freeman M, *Llyod's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001)

Gardiner S, James M and O'Leary J, *Sports Law* (3rd edn, Cavendish 2006)

Glass R, *The Newcomers: The West Indians in London* (Allen and Unwin 1960)

Goldman A, 'The Justification of Equal Opportunity' in Ellen Frankel Paul et al (eds), *Equal Opportunity* (Basil Blackwell Inc 1997)

Guttmann A, 'The Development of Modern Sports' in Coakley J and Dunning E, *Handbook of Sports Studies* (Reprinted SAGE 2010)

Heywood A, *Political Theory* (3rd edn, Palgrave Macmillan 2004)

Hill C, *Olympic Politics* (Manchester University Press 1992)

Houlihan B, 'Politics and Sport' in Coakley J and Dunning E (eds), *Handbook of Sports Studies* (Reprinted SAGE 2010)

Hwang I.W, *Personalized Politics – The Malaysian State under Mahathir* (Institute of Southeast Asian Studies 2003)

Jack Williams, *Cricket and England – A Cultural and Social History of the Inter-war Years* (2nd edn, Frank Cass 2003)

Jarvie G, 'Sport, Racism and Ethnicity' in Coakley J and Dunning E, *Handbook of Sports Studies* (eds) (Reprinted, SAGE 2010)

Kelly P J, *Utilitarianism and Distributive Justice – Jeremy Bentham and the Civil Law* (Claredon Press 1990)

Kevin Tan Y.L and Thio L.A, *Tan, Yeo and Lee's Constitutional Law in Malaysia and Singapore: Positive Discrimination under the Constitution* (2nd edn, Butterworths 2007)

Kyle D, *Sport and Spectacle in the Ancient World* (Blackwell Publishing 2007)

Lapchick R, Elkins C and Matthew R, *The 2008 Racial and Gender Report Card – National Basketball Association* (University of Central Florida 2008)

Lapchick, R et al, *2006-07 Racial and Gender Report Card; The Institute for Diversity and Ethics in Sports* (University of Central Florida 2007)

Larson M S, *The Rise of Professionalism: A Sociological Analysis* (Harper and Row 1977)

Le Roux R and Cornelius S, *Sport: The Right to Participate and Other Legal Issues* (University Document Management Services 2003)

Lester A and Bindman G, *Race and Law in Great Britain* (Longman 1972)

Lucas J, *Future of the Olympic Games* (Human Kinetics Books 1992)

McColgan A, *Discrimination Law – Text, Cases and Materials* (2nd edn, Hart Publishing 2005)

McConville M and Chui W H, *Research Methods for Law* (Edinburgh University Press 2007)

McCrudden C, 'Rethinking Positive Action' in McColgan A, *Discrimination Law: Text, Cases and Materials* (2nd edn, Oxford and Portland, 2005)

Miles R, 'Apropos the Idea of Race ... Again' in Back L and Solomos J, *Theories of Race and Racism – A Reader* (eds) (Routledge 2000)

Mill J S, *On Liberty and other Writings* (Cambridge University Press 1989)

Mosley A and Capaldi N, *Affirmative Action: Social Justice or Unfair Preference?* (Rowman and Littlefield 1996)

Nijhoff M, *Phenomenological Perspectives: Historical and Systematic Essays In Honor Of Herbert Spiegelberg* (The Hague 1975)

Nolan D, 'A Right to Meritorious Treatment' in C. Gearty and A. Tomkins (ed.), *Understanding Human Rights* (Cassell 1996)

Oborne P, *Basil D'Oliveira – Cricket and Conspiracy: The Untold Story* (Little Brown Publication 2004)

- Parekh B, *Bentham's Political Thought* (Groom Helm 1973)
- Parrish R, *Sports Law and Policy in the EU* (Manchester University Press 2003)
- Polkinghorne D, *Methodology for the Human Sciences: System of Inquiry* (New York Press 1983)
- Rawl J, 'Theory of Justice' in Bamforth N, Malik M and O'Cinneide C, *Discrimination Law: Theory and Context* (Sweet and Maxwell 2008)
- Rawls J, *John Rawls – A Theory of Justice* (10th edn, OUP 1990)
- Rigauer B, 'Marxist Theories' in Coakley J and Dunning E (eds), *Handbook of Sports Studies* (Reprinted, SAGE 2010)
- Roger Rees and Andrew Miracle, 'Education and Sport' in Jay Coakley and Eric Dunning, *Handbook of Sports Studies* (eds) (Reprinted SAGE 2010)
- Ross C, *Outside the Lines: African Americans and the Integration of the National Football League* (New York University Press 1999)
- Salinas M, *The Politics of Stereotype – Psychology and Affirmative Action* (Praeger 2003)
- Salter M and Mason J, *Writing Law Dissertations* (Pearson 2007)
- Scales A, 'The Emergence of Feminist Jurisprudence: An Essay' in M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001)
- Sewell T, *Civil Rights: Rhetoric or Reality?* (Quill Paperbacks, 1984)
- Sheng Y.L, *The Chinese Dilemma* (East West Publishing 2003)
- Siekman R and Soek J W, *The European Union and Sport: Legal and Policy Documents* (The Hague 2005)
- Simpson G E and Yinger M, *Racial and Cultural Minorities – An Analysis of Prejudice and Discrimination* (5th edn, Plenum Press 1985)
- Smith D, *Racial Disadvantage in Britain* (Penguin 1977)
- Solomos J, *Race and Racism in Britain* (2nd edn, London MacMillan 1993)
- Stake R, *The Art of Case Study Research* (SAGE 1995)
- Stockwell A, 'Power, Authority and Freedom' in Marshall P J (ed), *The Cambridge Illustrated History of the British Empire* (Cambridge University Press 2001)
- Vandenhoe W, *Non Discrimination and Equality in the view of the UN Human Rights*

Treaty Bodies (Intersectia 2005)

Vohrah K.C, Koh, P and Peter Ling S.W, *Sheridan and Groves on The Constitution of Malaysia* (5th edn, Malayan Law Journal 2005)

Wacks R, *Understanding Jurisprudence* (OUP 2005)

Williams J, *Cricket and England: A Cultural and Social History of the Inter-war Years* (2003, Frank Cass)

Woods R, *Social Issues in Sport* (Human Kinetics 2007)

Woolgar J, *England Rugby –The Official Rugby Football Union History* (Virgin Production 1999)

Yin R, *Case Study Research: Design and Methods* (2nd edn, SAGE 1994)

Young I M, 'Justice and the Politics of Difference' in Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law – Theory and Context* (Sweet and Maxwell 2008)

Journals

Abbott K et al, 'The Concept of Legalisation' (2000) 54(3) International Organisation 401-419

Anderson E, 'Integration, Affirmative Action and Strict Scrutiny' [2002] New York University Law Review 1195

Beauchamp T, 'In Defense of Affirmative Action' (1998) 2 Journal of Ethics 143, 143

Beckwith F, 'The "No One Deserves His or Her Talents" Arguments for Affirmative Action: A Critical Analysis' (1999)

Bell D, 'Xerxes and the Affirmative Action Mystique' (1989) 57 George Washington Law Review 1595, 1597

Blumer H, 'Race Prejudice as a Sense of Group Position', The Pacific Sociological Review, Vol. 1. No. 1 1958

Booth D, 'Hitting Apartheid for Six? The Politics of the South African Sports Boycott' (2000) 38 Journal of Contemporary History 477, 480

Brest P, 'In Defense of the Anti-Discrimination Principle' (1976) Harvard Law Review 1

Cornelius C, 'Levelling the Playing Field: Affirmative Action in Sport in South Africa' [2002] ISLJ 2

Cowan, 'Inverse Discrimination' (1972) 33 Analysis 10

Crenshaw K W, 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101, 7 HLR

Daniels N, 'Merit and Meritocracy' (1978) 7 Philosophy and Public Affairs 203, 210

Davis T, 'The Myth of the Superspade – The Persistence of Racism in College Athletics' (1995) 22 Fordham URB L.J 615, 5

Delgado R and Matsuda M, 'Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground' (1988) 11 Harvard Women's Law Journal 1, 2-4

- Delgado R, 'Affirmative Action as a Majoritarian Device: Or, do you really want to be a role model?' (1991) *Michigan Law Review* 89, 1224
- Fombad C M, 'The Unconstitutional Protection Against Discrimination in Botswana' (2004) 53 *International and Comparative Law Quarterly* 139
- Frey J and Eitzen S, 'Sport and Society' (1991) 17 *Annual Review of Sociology* 503
- Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (Cmd7431, June 2008)
- Houlihan B, 'Sport, National Identity and Public Policy' (1997) 3 *Association for the Study of Ethnicity and Nationalism* 1, 121
- Jones T, 'The Race Directive: Redefining Protection from Discrimination in EU Law' (2003) 5 *EHRLR* 515
- Kahn L, 'Discrimination in Professional Sports: A Survey of the Literature' (1991) 44 *Industrial and Labor Relations Review* 395, 397
- Lewis A, 'Group Child Interviews as a Research Tool' (1992) *BERJ*, Vol. 18 413
- Lin s and Kelsey J, 'Use of Race and Ethnicity in Epidemiologic Research: Concepts, Methodological Issues and Suggestions for Research' (2000) 22 *Epidemiologic Reviews* 187, 188
- Longley N, Crosset T and Jefferson S, 'The Migration of African Americans to the CFL during the 1950s: An Escape from Discrimination?' (2007) *IASE/NAASE Working Paper Series*, Paper No 07-13, June 2007, 5 – 6
- Malamatenious D, 'Discrimination - Redressing the Balance' (2003) 153 *NLJ* 1181
- Mautz D, 'Public Accounting: Which kind of professionalism' (1988) 2 *Accounting and Horizons*, 75
- Monaghan K, 'The Equality Bill: A Sheep in Wolf's Clothing or Something More?' [2009] *European Human Rights Law Review* 1
- Moodley K and Adam H, 'Race and Nation in Post-Apartheid South Africa' (2000) 48 *Current Sociology* 51, 59
- Ndee H, 'Sport as a Political Tool: Tanzania and the Liberation of Africa' (2005) 22 *International Journal of the History of Sport* 671
- Parrish R, 'The Birth of European Union Sports Law' (2003) 2 *Entertainment Law* 2, 21
- Pojman L, 'The Moral Status of Affirmative Action' (1992) 6 *Public Affairs Quarterly* 181
- Stanley J, 'Equality of Opportunity as Philosophy and Ideology' (1977) 5 *Political*

Theory 61

Tatz C, 'Race, Politics and Sport', The Journal of the Australian Society for Sports History, Vol. 1. No. 1 1984

Tervo M, 'Nations and Nationalism – "Sports, 'Race' and the Finnish National Identity in Helsingin Sanomat in the early 20th century"' (2003) 8(3) Association for the Study of Ethnicity and Nationalism 335

Vick D, 'Interdisciplinary and the Discipline of Law' (2004) 31 JLS 163, 174

Warrior B, 'Reflections of an education professional' (2002) 1 Journal of Hospitality, Leisure, Sport and Tourism Education, 57

Weirich, P, 'Exclusion from the Social Contract' [2010] 4 Politics, Philosophy and Economics

Internet Resources

‘10 Key Moments in UK Race Relations’ (*British Broadcasting Corporation*, 2009)

<<http://news.bbc.co.uk/1/hi/uk/1517672.stm>>

accessed 5 April 2011

‘1965: New UK Race Law ‘Not Tough Enough’ (*British Broadcasting Corporation*, 2007)

<http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_4457000/4457112.stm> accessed 19 August 2010

‘2005/06 – 2012/13 RFU Strategic Plan – Community Rugby. Inclusive Participation’ (*RFU*)

<http://www.rfu.com/index.cfm/fuseaction/RFUHome.simple_Detail/StoryID/11104>

accessed 20 January 2008

‘33 Sports’ (*Olympic.org*) <<http://www.olympic.org/en/content/Sports>>

accessed 17 October 2009

‘A brief history of Cricket’ (*ESPN Cricinfo*)

<<http://www.cricinfo.com/ci/content/story/239757.html>> accessed 18 October 2009

‘ABN-AMRO Men’s World Ranking Updated 1st September 2009’ (*International Hockey Federation*, September 2009)

<<http://www.fihockey.org/vsite/vfile/page/fileurl/0,11040,1181-192169-209392-141540-0-file,00.pdf>>

accessed 18 October 2009

‘African-Americans in Pro Football – Pioneers, Milestones and Firsts; “Firsts” by African Americans in the Modern Era’ (*Pro-Football Hall of Fame*)

<<http://www.profootballhof.com/history/general/african-americans.jsp>>

accessed 2 February 2008

‘Aliens Act 1905 and 1919’, (*Exploring 20th century London*)

<<http://www.20thcenturylondon.org.uk/server.php?show=conInformationRecord.35>>

accessed 14 August 2007

‘Ancient Olympic Games 776 BC-393 AD’ (*Olympic.org – Official Site of the Olympic Movement*) <http://www.olympic.org/uk/games/ancient/index_uk.asp>

accessed 23 July 2009

‘Annual Estimates of the Population by Sex, Race, and Hispanic or Latino Origin for

the United States: April 1, 2000 to July 1, 2006' (*U.S Census Bureau*, 2006)
<<http://www.census.gov/popest/national/asrh/NC-EST2006-srh.html>>
accessed 1 February 2008

'Apartheid holding back English cricket' (*British Broadcasting Corporation*, 1 April 1999) <<http://news.bbc.co.uk/1/hi/sport/cricket/309449.stm>>
accessed 6 February 2008

'Brief Record of Malaysia's Participation in the Past Olympic Games since 1956' (*The Olympic Council of Malaysia*)
<<http://www.olympic.org.my/web/gamesrecords/olympicg/history.htm>>
accessed 26 July 2009

'Bring back grammar schools' (*British Broadcasting Corporation*, 12 June 2008)
<<http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/4714019.htm>>
accessed 29 June 2009

'British Cycling: Equality Policy' (*British Cycling*, December 2010)
<http://www.britishcycling.org.uk/zuvvi/media/bc_files/policies/British-Cycling-Equality-Policy.pdf> accessed 31 March 2011

'British Olympic Movement – Revivalist Games' (*British Olympic Association*)
<<http://www.olympics.org.uk/contentpage.aspx?page=307>>
accessed 23 July 2009

'BWF Statutes 2009 – Constitution' (*Badminton World Federation - BWF*)
<<http://www.internationalbadminton.org/page.aspx?id=10513>>
accessed 11 October 2009

'Caribbean Studies Black and Asian History – Records of the Commission for Racial Equality and Predecessors' (*CASBAH – Caribbean Studies and Black and Asian History*); <<http://www.casbah.ac.uk/cats/archive/138/PROA00002.htm>>
accessed 15 October 2009

'Charles 'Chuck' Cooper Biography – Played for West Virginia State College and Duquesne, formed friendly relationship with Celtics Players' (*Brief Biographies*)
<<http://biography.jrank.org/pages/2339/Cooper-Charles-Chuck.html>>
accessed 8 September 2009

'Comprehensive Success Story' (*Campaign for State Education – CASE*)
<<http://www.campaignforstateeducation.org.uk/Comprehensive%20Success%20Story.pdf>> accessed 29 June 2009

'Constitution of the Republic of Singapore' (*Singapore Statute's Online*)
<http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-CONST&doctitle=CONSTITUTION+OF+THE+REPUBLIC+OF+SINGAPORE%0A&date=latest&method=part&sl=1>
accessed 29 July 2010

'Constitution of the Republic of South Africa 1996' (*South African Government Information*, 2007) <<http://www.info.gov.za/documents/constitution/1996/index.htm>>

accessed 3 September 2007

‘Cricket leads in Achieving Racial Equality’ (*The Professional Cricketer’s Association*) <http://www.thepca.co.uk/ecb_racial_equality_vision.html>
accessed 25 January 2008

‘CSA best ever season brings financial turnaround’ (*Cricket South Africa*)
<<http://www.cricket.co.za/csa-best-ever-season-brings-financial-turnaround.html>>
accessed 17 October 2009

‘Dasar-dasar Kerajaan Malaysia – Tinjauan Menyeluruh’ (Policies of the Malaysian Government – A Complete in depth Overview), (*Jabatan Kerja Rakyat*)
<<http://rakan.jkr.gov.my/cawangan/Cjalan/documentation/documentation/PTK/DasarKerajaan.pdf>> accessed 20 September 2007

‘Definition of Sport’ (*Regional Support Centre*) <http://www.rsc-sw-scotland.ac.uk/project_pages/docfiles/sport_fitness/Definition%20of%20Sport/Definition%20of%20Sport.doc>
accessed 21 March 2011

‘Document Number: PL88-352 - Civil Rights Act 1964’ (*U.S Department of State*)
For the entire text of the Act, see
<<http://usinfo.state.gov/usa/infousa/laws/majorlaw/civilr19.htm>>
accessed 12 October 2007

‘ECB Equity Cricket Policy: Actions’ (*England and Wales Cricket Board - ECB*, October 2007) <<http://static.ecb.co.uk/files/ecb-cricket-equity-policy-10085.doc>>
accessed 1 November 2007

‘Empowering SA Cricket’ (*Cricket South Africa*, 1999)
<<http://www.cricket.co.za/empowering-sa-cricket.html>>
accessed 1 November 2010

‘England’s Men Senior Team’ (*TheFA.com*)
<<http://www.thefa.com/England/MensSeniorTeam/Players.aspx>>
accessed 28 October 2009

‘Equal Opportunity Publication Policy’ (*Missouri State University*, June 2007)
<http://www.missouristate.edu/assets/equity/BOG_Resolution_-_Equal_Opportunity_Publication_Policy_updated_91506.doc>
accessed 30 July 2010

‘Executive Order 11478’ (*United States Department of Labor*)
<<http://www.dol.gov/oasam/regs/statutes/EO11478.htm>>
accessed 16 October 2009

‘Explanatory Notes to the Constitutional Reform Act 2005’ (*Office of Public Sector Information*)
<http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen_20050004_en_1.htm>

accessed 15 July 2009

‘Federation of Malaya Constitutional Proposal’ (*Malaysian Chinese Association*, April, 2004) <<http://www.mca.org.my/English/HistoryArchive/Pages/FederationofMalayaConstitutionalProposals.aspx>> accessed 11 August 2009

‘FIFA/Coca-cola FIFA world ranking’ (*FIFA.com*)
<<http://www.fifa.com/worldfootball/ranking/lastranking/gender=m/fullranking.html#confederation=0&rank=186&page=3>> accessed 28 October 2009

‘Finance and Funding for Community Rugby Clubs’ (*Rugby and Football Union – RFU*);
<<http://www.rfu.com/ManagingRugby/ClubDevelopment/FinanceAndFunding.aspx>>
accessed 17 October 2009

‘Football For Disable People’ (*The FA.Com*) <http://www.thefa.com>; ‘Football for Disable People’,
<<http://www.thefa.com/GetIntoFootball/GetIntoFootballPages/Disability%20Football.aspx>> accessed 30 July 2007

‘Funding Boost for English Cricket’ (*Sportbusiness*, 9 February 2006)
<<http://www.sportbusiness.com/news/159336/funding-boost-for-cricket>>
accessed 17 October 2009

‘Further Amendment to Executive Order 11478, Equal Employment Opportunity in Federal Government’ (*U.S Government Printing Office*, 2008)
<http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr04my00-118.pdf>
accessed 16 October 2009

‘Government Gazette – Republic of South Africa’ (*Southern African Legal Information* (SAFLII)) <http://www.saflii.org/za/legis/num_act/pacocaa2004470.pdf>
accessed 12 February 2011

‘Grammar School Statistics’ (*House of Commons Library*, June 2008)
<<http://www.parliament.uk/commons/lib/research/briefings/snsg-01398.pdf>>
accessed 14 July 2009

‘History of Badminton’ (*British Broadcasting Corporation*)
<http://news.bbc.co.uk/sport1/hi/other_sports/badminton/4163074.stm>
accessed 17 October 2009

‘History of Football’. <<http://www.historyoffootball.net>> accessed 30 January 2008

‘Hockey History’ (*Field Hockey Equipment*)
<<http://www.southafrica.info/about/sport/sportsa.htm>> accessed 18 October

‘Hockey in Malaysia – The Previous Teams’ (*Malaysian Hockey Federation*)
Available at <<http://www.malaysiahockey.com.my/pastteams>>

accessed 18 October 2009

‘How we recognise sports’ (*Sport England*, 2010)
<http://www.sportengland.org/about_us/recognised_sports/how_we_recognise_sports.aspx> accessed 15 February 2011

‘ICC Anti Racism Code’ (*International Cricket Council - ICC*) <http://static.icc-cricket.yahoo.net/ugc/documents/DOC_F97840A2DC1953F7C5DD8EBBE3BA2E25_1255255919036_72.pdf>
accessed 11 October 2009

‘International Hockey Federation – Statutes and Bye-Laws’ (*WorldHockey.org*, 2009)
<<http://www.fihockey.org/vsite/vfile/page/fileurl/0,11040,1181-171175-188393-98639-0-file,00.pdf>>
accessed 11 October 2009

‘Is Affirmative Action Fair?’ (*Sacramento State*)
<<http://www.csus.edu/indiv/g/gaskilld/SocialIssues14/Affirmative%20Action.htm>>
accessed 22 July 2007

‘Israel is not an Apartheid State’ (*Jewish Virtual Library*, 2009)
<http://www.jewishvirtuallibrary.org/jsource/History/Human_Rights/Israel_&_apartheid.html> accessed 8 September 2009

‘Law of Malaysia – Federal Constitution’ (*Attorney General’s Chambers Malaysia*, 2007) 21
<[http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20(BI%20text).pdf)> accessed 3 September 2007

‘Malaysian Badminton to launch multi-million dollar programme’ (*Badders.com*)
<<http://www.badders.com/news/item/21/malaysian-badminton-to-launch-multi-million-dollar-programme.html>>
accessed 17 October 2009.

‘Minority Players and the American Football League’ (*CognilioFamily*)
<www.cogniliofamily.com/MinorityPlayers.htm> accessed 5 February 2008

‘No Maoris – No Tour’ (*New Zealand History Online*)
<<http://www.nzhistory.net.nz/media/photo/no-maoris-no-tour-poster>>
accessed 18 October 2009

‘Note on the Law Commission and Statute Law Society Seminar on Post-Legislative Scrutiny’ (*Law Commission*, 31 January 2006)
<http://www.lawcom.gov.uk/docs/pls_seminar_010306.pdf>
accessed 14 August 2009

‘Official RBS 6 Nations Rugby’ (RBS) <<http://www.rbs6nations.com/en/home.php>>
accessed 28 October 2009

‘Olympic Charter’ (*Olympic.org – Official Site of the Olympic Movement*, 2009)
<http://multimedia.olympic.org/pdf/en_report_122.pdf>
accessed 23 July 2009

‘On this day 17 July – 1976: African Countries Boycott Olympics’ (*British Broadcasting Corporation* 2011)
<http://news.bbc.co.uk/onthisday/hi/dates/stories/july/17/newsid_3555000/3555450.stm> assessed 9 February 2011

‘Origins of Rugby’ (*ESPN Cricinfo*)
<<http://www.cricinfo.com/ci/content/story/239757.html>> accessed 18 October 2009

‘Player’s Profile’ (*Malaysian Badminton Association*)
<http://www.bam.org.my/index.php?option=com_content&task=view&id=89&Itemid=99> accessed 18 October 2009

‘Race / Colour Discrimination’ (*U.S Equal Employment Opportunity Commission - EEOC*) <<http://www.eeoc.gov/types/race.html>>
accessed 15 October 2009

‘Race Relations Act 1976 as amended’ (*Office of Public Sector Information*, 2008)
<http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1976/cukpga_19760074_en_1>
accessed 27 September 2009

‘RaceUK – Short History of Immigration’ (*British Broadcasting Corporation*, 2007)
<http://news.bbc.co.uk/hi/english/static/in_depth/uk/2002/race/short_history_of_immigration.stm> accessed 10 October 2010

‘Segregation 1924-1948’ (*South African History Online*, June 2006).
<<http://www.sahistory.org.za/pages/hands-on-classroom/classroom/pages/projects/grade12/lesson3/unit1-descrim-legislation.htm>>
accessed 12 April 2011

‘Sejarah Hoki di Malaysia’ (History of Malaysian hockey) (*Malaysian Hockey Federation – MHF*, 2008) <<http://www.malaysiahockey.com.my/historysport>>
accessed 12 October 2009

‘South African’s People’ (*South African Government Information*, 5 July 2010)
<<http://www.info.gov.za/aboutsa/people.htm>>
accessed 12 February 2011

‘Sport England’s new direction and definition for National Indicator’ (*Department for Culture, Media and Sport*, 8 Dec 2007)
<<http://www.culture.gov.uk/images/publications/SportEnglandsnewdirectionanddefinitionofsportforNationalIndicator8.pdf>>
accessed 21 March 2011

‘Sport in South Africa’ (*South Africa Info*, March 2009 Updated)

<<http://www.southafrica.info/about/sport/sportsa.htm>>

accessed 15 December 2007

‘Statistics – Minority Ethnic Judges in Post’ (*Judiciary of England and Wales*)

<<http://www.judiciary.gov.uk/keyfacts/statistics/ethnic.htm>>

accessed 10 July 2009

‘Stopping the 1972-1981 Springbok Tour’

<<http://www.nzhistory.net.nz/culture/1981-springbok-tour/1973-springbok-tour>>

accessed 18 October 2009

‘Team GB – Athlete Profile’ (*British Olympic Association*, 2009)

<<http://www.olympics.org.uk/profiles.aspx>>

accessed 26 July 2009

‘The Biography of James Naismith’ (*Naismith Museum*)

<http://www.naismithmuseum.com/naismith_drjamesnaismith/main_drjamesnaismith.htm> accessed 30 January 2008

‘The Case Against Affirmative Action’ (*Sacramento State - Leadership Begins Here*)

<http://www.csus.edu/indiv/g/gaskilld/business_computer_ethics/The%20Case%20Against%20Affirmative%20Action.htm>

accessed 4 February 2009

‘The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission’

(*The National Archives*) <<http://www.archives.gov/education/lessons/civil-rights-act>>

accessed 2 October 2009

‘The Civil Rights Act of 1st March 1875’ (*Center for History and New Media*)

<<http://chnm.gmu.edu/courses/122/recon/civilrightsact.html>>

accessed 1 October 2009

‘The History of Participation’ (*Olympic Council of Malaysia (OCM)*)

<<http://www.olympic.org.my/web/>>

accessed 28 July 2009

‘The Meaning of Positive Action’ (*Centre for Partnership and Equality*)

<http://www.cpe.ro/english/index2.php?option=com_content&do_pdf=1&id=21>

accessed 28 July 2008

‘The Modern Olympic Games’ (*Olympic.org – Official Website of the Olympic Movement*, 2010)

<http://multimedia.olympic.org/pdf/en_report_668.pdf>

accessed 20 March 2010

‘The Olympic Movement – What is the Goal of the Olympic Movement?’

(*Olympic.org – Official Site of the Olympic Movement*, 2009)

<http://www.olympic.org/uk/organisation/index_uk.asp>

accessed 23 July 2009

‘The Racial and Gender Report Card’ (*University of Central Florida – College of*

Business Administration, June 2009)

<<http://web.bus.ucf.edu/sportbusiness/?page=1445>>

accessed 28 October 2009

‘The South African Rugby Constitution adopted on 28th March 2008’
(*SuperSport.com*)

<<http://images.supersport.co.za/SARugbyConstitution28Mar08.doc>>

accessed 20 October 2009

‘The Springboks – History and Profile’

<<http://www.sarugby.co.za/boks.aspx?section=boks>> accessed 22 October 2009

‘The Union of South African Act 1909’ (*South African History Online*, June 2006)

<<http://www.sahistory.org.za/pages/library-resources/official%20docs/sa-act-1909.htm>> accessed 12 April 2011

‘The Way Forward – Vision 2020’ (*Vision 2020*)

<<http://www.wawasan2020.com/vision>>

accessed 22 August 2007

‘These Men developed the Double V Idea’ (*Smithsonian National Air and Space Museum*)

<<http://www.nasm.si.edu/blackwings/hdetail/detailbw.cfm?bwID=BW0034>>

accessed 16 August 2009

‘Title II of the Civil Rights Act 1964’ (*United States Department of Justice*)

<<http://www.usdoj.gov/crt/housing/title2.php>>

accessed 15 October 2009

‘Transformation Charter: The South Africa’s Cricket Pledge to the Nation’ (*Cricket South Africa*, 1999) <<http://www.cricket.co.za/default.asp?cId=3234&cl=yes>>

accessed 1 November 2010

‘US Basketball’ <http://www.usabasketball.com/men_team.php?page=msnt_history>

accessed 28 October 2009

‘Viv Anderson – First black footballer to represent England’ (*100 Great Black Britons*) Available at

<http://www.100greatblackbritons.com/bios/viv_anderson.html>

accessed 21st August 2009

‘Walter A. Brown Bibliography’ (*Naismith Memorial Basketball Hall of Fame*)

<<http://www.hoophall.com/hall-of-famers/tag/walter-a-brown>>

accessed 8 August 2009

‘Wealth and Poverty – The Malaysian Perspective’ (*APRODEV*)

<<http://www.aprodev.net/files/CPW/Malaysia.pdf>>

accessed 20 December 2007

‘What is Phenomenology?’ (*Center for Advance Research in Phenomenology*)

<<http://www.phenomenologycenter.org/phenom.htm>>

accessed 8 August 2009

‘White Paper – Getting the Nation to Play’ (*Sport and Recreation South Africa*, 2007)

<<http://www.srsa.gov.za/WhitePaper.asp>>

accessed 8 September 2008

‘Who is a British Subject?’ (*UK Border Agency*, 2009)

<<http://www.ukba.homeoffice.gov.uk/britishcitizenship/othersnationality/britishsubjects>> accessed 26 July 2009

Ameem A, ‘Positive Discrimination’ (*Malaysia Uncut – A Malaysian Repository and More*, 19 February 2007) <<http://mymalaysia.wordpress.com/2007/02/19/positive-discrimination-2>> accessed 2 January 2008

Andrew H, ‘Circular 10/65 12th July 1965’ (*Old Monovians*)

<<http://www.oldmonovians.com/comprehensive/circular1065.htm>>

accessed 14 July 2009

Baldini P, ‘Pistorius fails to make South Africa’s team for Beijing’ *The Guardian* (London, 18 July 2008)

<<http://www.guardian.co.uk/sport/2008/jul/18/olympicgames2008.athletics2>>

accessed 26 July 2009

Beloff M, ‘Is there a Lex Sportiva?’

<<http://login.westlaw.co.uk/maf/wluk/app/document?&src=rl&srguid=ia744d0650000012fdbfb3ce22dca1295&docguid=IC3123BA0E72111DA9D198AF4F85CA028&hitguid=IC3123BA0E72111DA9D198AF4F85CA028&spos=11&epos=11&td=15&cru mb-action=append&context=8&resolvein=true>>

assessed 5 February 2009

Borque S, ‘Peru: Affirmative Action for the Majority’ (*Education Resources Information Center (ERIC)* May 1985)

<http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED249304&ERICExtSearch_SearchType_0=no&accno=ED249304>

accessed 26 July 2007

Bridgland F, ‘Black Coach Peter De Villiers wins Springboks job as rugby bosses admit his colour settle decision’ *The Times* (London, 10 January 2008)

<<http://www.timesonline.co.uk/tol/news/world/africa/article3162167.ece>>

accessed 22 October 2009

Brown C, ‘Spain’s Basketball Kings’ (*Aljazeera News Network*, 29 May 2007)

<<http://english.aljazeera.net/NR/exeres/5B87FFD8-1142-4747-B483->

_____ > accessed 2 February 2008

Byrnes R, 'The Voortrekker Republics and British Policies' (*Country Studies*, 1996)
<<http://countrystudies.us/south-africa/13.htm>>
accessed 11 August 2009

Cameron D, 'This sterile fixation with grammar schools is a dead end – Here's how to increase the number of places in good schools' *Times Online* (London, 22 May 2007)
<http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article1821282.ece> accessed 28 June 2009

Cash B, 'Brussels set to interfere on sports autonomy' (Bill Cash's European Journal, 21 January 2011) <http://www.europeanfoundation.org/my_weblog/2011/01/brussels-set-to-interfere-on-sports-autonomy.html> accessed 17 March 2011

Chappell D, 'If Affirmative Action Fails ... What Then?' *The New York Times* (New York, 8 May 2004) <<http://www.nytimes.com/2004/05/08/books/an-essay-if-affirmative-action-fails-what-then.html>>
accessed 17 July 2007

Chappell R, 'Race, Gender and Sport in Post-Apartheid in South Africa' (2005) 8(4) *The Sport Journal* <<http://www.thesportjournal.org/article/race-gender-and-sport-post-apartheid-south-africa>> accessed 11 September 2010

Coalter F, Taylor J and Jarvie G, 'Culture of Winning in Scottish Sport – Report to the Scottish Institute of Sport Foundation' (*In the Winning Zone – The passionate face of Scottish sport*) <<http://www.inthewinningzone.com/wz/media/docs/StirlingReport-part1.pdf>> accessed 13 April 2010

Coates S, 'Grammar Schools 'give a lift to results of all around them' *Times Online* (London, 28 May 2007))
<<http://www.timesonline.co.uk/tol/news/uk/education/article1848439.ece>>
accessed 30 June 2009

Collins T, 'Inaugural Lecture: 1895 and all that: the past, present and future of rugby' (Carnegie Faculty of Sport and Education, Leeds, August 2007)
<<http://www.leedsmet.ac.uk/carnegie/tcollins.htm>>
accessed 10 March 2008

Cricket South Africa. Andre Odendaal, 'Transformation and Nation Building – An Ongoing Concern in Cricket'
<<http://www.cricket.co.za/default.asp?cId=3252&cl=yes>>
accessed 15 December 2007)

Davies M, 'Case Study Analysis and Case Study Method' (*The University of Melbourne – Faculty of Economics and Commerce*)
<<http://tlu.ecom.unimelb.edu.au/pdfs/crals/Lecture%205->

> accessed 30 October 2009

Deol H, 'We need matured and thinking players' *Malay Mail* (Kuala Lumpur, 19 August 2009) <<http://www.mmail.com.my/content/11040-we-need-matured-and-thinking-players-%E2%80%94-arul>> accessed 18 October 2009

Deshpande A, 'Affirmative Action in India and the United States' (*The World Bank*, January 2005)
<http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative_Action_India_Ashwini.pdf>
accessed 3 April 2011

Dworkin R, 'Distributive Justice' <<http://www.distributive-justice.com/theory/dworkin-en.htm>>
accessed 17 July 2009

Dyer C, 'First 10 new High Court judges appointed under the new diversity rules' *The Guardian* (London, 28 Jan 2008)
<<http://www.guardian.co.uk/politics/2008/jan/28/uk.immigrationpolicy1>> accessed 16 July 2009

Fernandez J, 'Simply not interested – MHF treat Razak Cup like a chore' *Malay Mail* (Kuala Lumpur, 24 August 2008) <<http://www.mmail.com.my/content/11459-simply-not-interested>> accessed 18 October 2009

Ferraton M, 'World War II and Deconolisation – Rise of African Nationalism in the Post-Second World War Era' (*Suite101:Online Magazine and Writer's Network*, 16 December 2009) <http://african-independence.suite101.com/article.cfm/world_war_ii_and_decolonization>
accessed 27 March 2010

Franke J, 'Does Affirmative Action Reduce Effort Incentives? – A Contest Game Analysis' (*Ruhr Economic Papers*, 2010)
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618243>
accessed 20 March 2011

Fredman S, 'Reversing Discrimination'
<<http://login.westlaw.co.uk/maf/wluk/app/document?&src=rl&srguid=ia744dc3e0000012389e6062339c6b019&docguid=ICCDE2AE0E72111DA9D198AF4F85CA028&hitguid=ICCDE2AE0E72111DA9D198AF4F85CA028&spos=183&epos=183&td=229&crumb-action=append&context=7>> accessed 15 July 2007

Gibb F, 'Judge Selection still perceived as unfair' *Times Online* (London, 4 June 2009) <http://business.timesonline.co.uk/tol/business/law/article_6432913.ece?>
accessed 29 June 2009

Goh L and Gomez G, 'All those with CGPA of 4.0 get to study medicine' (*TheStar Online*, 25 June 2005) Available at
<<http://thestar.com.my/news/story.asp?file=/2005/6/25/nation/11321972&sec=nation>

> accessed 25 August 2007

Henry J, 'Grammar school pupil surge at Cambridge University – The number of Cambridge University places won by grammar school pupils has almost doubled in a year, according to new figures.' *The Daily Telegraph* (London, 25 April 2009)

<<http://www.telegraph.co.uk/education/educationnews/5219915>>

accessed 29 June 2009

Historical nature (With reference to countries) can be defined as 'Natural development of something over a period of time' (*MSN Encarta*, 2007)

<http://encarta.msn.com/dictionary_1861696701/natural_history.html>

accessed 9 December 2007

Hofheinz W, 'Legal Analysis' (*Law Office of Walter Hofheinz*)

<<http://www.hofheinzlaw.com/LANLSYS.php#anchor43700>>

accessed 7 August 2009

Infantina G, '*Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport*' (*Union of European Football Association*, 2 October 2006)

<http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.OAD.pdf> accessed 20 March 2010

Irons A, 'The Economic Inefficiency of Title IX' (2006) Spring, Major Themes of Economics <<http://www.cba.uni.edu/economics/Themes/irons.pdf>>

accessed 2 April 2011

James M 'Liability for Professional Athletes' Injuries: A Comparative Analysis on where the risk lies' (2006) 1 Web JCLI

<<http://webjcli.ncl.ac.uk/2006/issue1/james1.html>>

accessed 18 December 2008

Kimber N, 'Race and Equality' in Pat Thane, Tanya Evans, Liza Filby et al. in *Equalities in Great Britain 1946 – 2006* (The Equalities Review, March 2007)

<<http://webarchive.nationalarchives.gov.uk/20100807034701/http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>>

accessed 30 March 2011

Kua K. S, '1Malaysia – Beyond the Hype' (*SUARAM – Suara Rakyat Malaysia*, October 2009) <<http://www.suaram.net/node/238>>

accessed 21 October 2009

Lamont J and Favor C, 'Distributive Justice' (*The Stanford Encyclopedia of Philosophy* 2007) <<http://plato.stanford.edu/entries/justice-distributive>>

accessed at 14 July 2007

Lars Blichner and Anders Molander, 'Juridification' (Arena: Centre for European Studies) <http://www.arena.uio.no/publications/working-papers2005/papers/wp05_14pdf> accessed 5 February 2009

Macaluso J, 'Eddie Robinson 1919-2007' *The Advocate* (Los Angeles, 5 April 2007)

<<http://media.2theadvocate.com/documents/070405robinsongraphic.pdf>>

MacDonald J, 'Looking at Phenomenological Qualitative Research Methods' (*Associated Content*)

<<http://www.southalabama.edu/coe/bset/johnson/lectures/lec12.htm>>

accessed 8 August 2009

Marqusee M, 'Two Cultures of English Cricket' (*Campaign Against Racism and Fascism – CARF*, July 1998) <<http://www.irr.org.uk/carf/feat23.html>>

accessed 10 March 2008

Mashishi M, 'Towards Equity and Excellence in Sport' (*SASCOC*, 30 August 2005)

<<http://images.supersport.co.za/Towards%20Equity%20&%20Excellence%20in%20Sport.doc>> accessed 14 September 2007

McArdle D, 'Just One of the Challenges of 21st Century Life': Oscar Pistorius in the Court of Arbitration for Sport' (2008) 5 (2) *A Journal of Law, Technology and Society* <<http://www.law.ed.ac.uk/ahrc/script-ed/vol5-2/mcardle.asp>>

accessed 31 March 2011

McEwen N, 'The UK Constitution: Governing the UK' (*British Broadcasting Corporation*, 2007)

<http://news.bbc.co.uk/1/hi/programmes/bbc_parliament/2561719.stm>

accessed 10 October 2010

Mieceyole S, 'The Most Popular Sport in the United States' (*Articlebiz.com*)

<<http://www.articlebiz.com/article/968-1-the-most-popular-sports-in-the-united-states>> accessed 20 December 2009

Murphy A, 'Affirmative Action in a Deeply Divided Society: Lessons from SA from Malaysia's Successful Redistribution Policies' (*All Academic Incorporated*, 1 September 2005)

<http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/0/4/0/pages40408/p40408-10.php> accessed 10 March 2011

Noon M, 'The Shackled Runner: Time to rethink positive discrimination?' (*British Sociological Association*, 2010)

<<http://wes.sagepub.com/content/24/4/728.full.pdf+html>>

accessed 24 March 2011

Olympic Council of Malaysia. 'Commonwealth Games – Previous Medal Tally'

<<http://www.olympic.org.my/web>> accessed 18 October 2009

Paule A, 'How Title IX impacts women of color' (*The Women Sports Foundation*, March 2009)

<<http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/H/How-Title-IX-Impacts-Women-of-Color.aspx>>

accessed 2 April 2011

Pistorius v IAAF (Hunter, Rivkin and Rochat). For full outcome of the case, see 'Arbitration CAS 2008/A/1480 Pistorius v IAAF, award of 16 May 2008' (*Court of Arbitration for Sport*) <<http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf>> assessed 9 Feb 2011

Pring R and Walford G, 'Comprehensive Schools: The History.' *Times Higher Education* (London, 12 June 1996)
<<http://www.timeshighereducation.co.uk/story.asp?storyCode=92186§ioncode=26>> accessed on 29 June 2009

Radmer K B, 'When Sports Becomes a Political Tool' (*Sport and Development*)
<www.sportanddev.org/data/document/document/173.pdf>
accessed 23 August 2007

Reddy M, 'Affirmative action policies and poverty alleviation in Fiji: An examination of post-coup policies and programmes' (*Australian National University* 1 June 2004)
<<http://devnet.anu.edu.au/online%20versions%20pdfs/60/1660Reddy.pdf>>
accessed 26 July 2007

Rogers S, 'England's population by sex and race' *The Guardian* (London, 9 March 2009) <<http://spreadsheets.google.com/pub?key=phNtm3LmDZENxj9B3Ujnfew>>
accessed 26 October 2009

Singh A, 'Ex-star laments culture of mediocrity in Malaysian Hockey' *The StarOnline* (Kuala Lumpur, 30 November 2008)
<<http://thestar.com.my/sports/story.asp?sec=sports&file=%2F2008%2F11%2F30%2Fsports%2F2683409#>> accessed 18 October 2009

Slapper G, 'The Law Explored: Ethnic Minorities and the Judiciary' *Times Online* (London 4 July 2007)
<<http://business.timesonline.co.uk/tol/business/law/columnists/article2025618.ece>>
accessed 17 July 2009

Smith D W, 'Phenomenology', *The Stanford Encyclopaedia of Philosophy* (Summer edn 2008) <<http://plato.stanford.edu/entries/phenomenology/>>
accessed 15 February 2011

Soek J W, 'Sport in National Sports Acts and Constitutions: Definitions, Ratio Legis and Objectives' (*CBS Interactive Business UK*)
<http://findarticles.com/p/articles/mi_m2ABX/is_3-4/ai_n25012280>
accessed 24 July 2009

Sri Rahayu Ismail, 'Ethnic Relations in Malaysia: Problems and Prospects' (*World Civic Forum* 2009) <http://www.wcf2009.org/program/down/049_S5-I06-3_Zaid_Ahmad.doc> accessed 8 September 2009

Sundaram J K, 'The New Economic Policy and Interethnic Relations in Malaysia' (*United Nations Research Institute for Social Development*, 1 September 2004)

[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/A20E9AD6E5BA919780256B6D0057896B?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/A20E9AD6E5BA919780256B6D0057896B?OpenDocument)>
accessed 10 September 2007.

Tatz C, 'Race, Politics and Sports' (*LA 84 Foundation*)
<<http://www.la84foundation.org/SportsLibrary/SportingTraditions/1984/st0101/st0101c.pdf>> accessed 10 March 2011

Taylor D, 'An Oxfordshire Tomb' (*The Orwell Prize*, 2003)
<<http://www.theorwellprize.co.uk/the-award/works/djtaylor1.aspx>>
accessed 10 August 2009

Tooley J, 'USA Basketball Partners with Sports Museum of America' (*USA Basketball*)
<http://www.usabasketball.com/news.php?news_page=08_SportsMuseumofAmerica>
accessed 15 October 2009

United States Department of Justice (n352). 'Title VI of the Civil Rights Act 1964 as amended' <<http://www.usdoj.gov/crt/cor/coord/titlevi.php>>
accessed 16 October 2009

Werz M and Margetta J, 'Affirmative Action in the United States' (*Heinrich Boll Stiftung*, July 2010) <http://www.migration-boell.de/web/diversity/48_2621.asp>
accessed 4 April 2011

Whitehead T, 'Quotas could be introduced for judges to increase ethnic minorities and women' *The Daily Telegraph* (London, 28 April 2009)
<<http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/5237953/>>
accessed 29 June 2009

Williams R, 'Cricket, Football, Rugby – England and the art of losing ignominiously' *The Guardian* (London, 7 December 2006)
<http://blogs.guardian.co.uk/sport/2006/12/07/cricket_football_rugby_the_eng.html>
accessed 25 January 2008

Woodward J, 'An Examination of a National Football League College Draft Publication: "Do Racial Stereotypes still Exists in Football; Department of Sociology and Anthropology"' 2002 Sociology and Sport Online, 5 no. 2
<<http://physed.otago.ac.nz/sosol/home.html>>
accessed 17 September 2009

Yates S, 'Affirmative Action: The New Road to Serfdom' (1990) 40(12) *The Freeman* – Ideas on Liberty <<http://www.thefreemanonline.org/columns/affirmative-action-the-new-road-to-serfdom/>> accessed 25 March 2011

APPENDICES

Appendix 1

Telephone Interview with Donald Craib (Attorney at Law – Craib Law Office) – Conducted on the 30th July 2009

How does the United States deal with the issue of racial discrimination in general?

- ✚ There are many journal articles available in the website in relation to this. At present however, things are getting better if we were to compare with the past.

Are there any examples with relation to your statement and its relevant to sport in the United States?

- ✚ In Virginia for instance, women and blacks were excluded from sport's participation. From 1972 onwards however, the Department of Justice forced the state to assimilate these groups in all sectors.
- ✚ Once implemented, the number of black players for instance has increased even to the extent of surpassing their white counterparts. These black players (Not all but most) were drafted by professional leagues such as the NBA and AFL / NFL.
- ✚ In sports and when we look back to the 1940s, almost all players are white. During the 1960s however, black / Afro-American players started coming in and increase the pool of talents. They made it through from college ranks.

Is / Are there any specific laws or regulations / regulations relating to prohibition of racial discrimination in sports?

- ✚ Discrimination is prohibited in the United States and admittedly, there are affirmative action programmes in force to increase the number of Afro-American and other ethnic minorities in employment sector.
- ✚ Generally, there are no Affirmative Action measures when it comes to selection of players. However, it is equally essential to note some rules such as the Rooney Rule or the Rozelle Rule. Rooney Rule in particular is related to participation in sport.
- ✚ With this, it is important to note that this rule is not a legal force / legislation but rather a rule created by the league in alleviating the participation from other ethnic backgrounds.

How the Rooney Rule does assists in improving the rate of participation amongst the Afro-American and other ethnic minorities in sport? How does the rule work?

- ✚ With the Rooney Rule, the Commissioner of the NFL has responsibility to increase the number of black / Afro-American coaches in NFL. If one look at the statistics, there are limited number of Afro-American coaches or administrators in the NFL.
- ✚ Also, there are societal pressures to see more ethnic minorities participate in sports.
- ✚ For instance, if vacancy arise (i.e.: - Coach or any position within the management level), one of the interviewee must be black or other ethnic minorities. The main aim of this exercise is to get coaches to some high ranking position.

Does Rooney Rule apply to the grassroots level / collegiate level?

- ✚ No. The Rooney Rule does not include college football although there are great pressures to implement this or any equivalent rule at collegiate level.

There are also numbers of arguments that this rule should be extended to player's selection at the professional level.

How far / to what extent does the federal / state law or regulation step in to assist the participation of ethnic minorities in sports (Specifically on US Basketball and NFL)? Does the Civil Rights Act 1964 play any part in sports or it is not relevant?

✚ As mentioned, affirmative action does not generally apply in sport. However ... Civil Rights Act 1964 as amended did assist in assimilating and increasing the number of ethnic minorities being employed in different areas.

✚ That is a good question ... and admittedly, I am not too sure in relation to this area... I would however argue that Civil Rights Act 1964 did ... indirectly affect the issue of racial participation in sports – as in US Basketball and NFL. As mentioned, football or basketball players are usually drafted from college level.

✚ In that sense, yes – I would regard that the law did play its part although not directly.

Finally, are you suggesting that Affirmative Action does actually play its part in US Sports?

✚ It would appear to be affirmative action (indirect) in a way ... but I would still argue that selection process for players are still based on merits and clubs are more interested to look at the financial implications that the player might contribute to the team.

Appendix 2

Telephone Interview with Jim Gray (Attorney at Law – Milwaukee Law Office) **– Conducted on the 20th July 2009**

How does the United States deal with the issue of racial discrimination in general?

- ✚ Traditionally, not very well. But things are getting better since the end of the World War II. Under the Equal Protection Clause of the 14th Amendment and Title VII of the Civil Rights Act 1964 as amended, no individuals can be discriminated based on their colour, ethnic or background.

Is / Are there any specific laws or regulations / regulations relating to prohibition of racial discrimination in sports? Does Affirmative Action apply in all sectors?

- ✚ Generally, affirmative action applies in order to provide more opportunity for the ethnic minorities to be included in employment as an instance ... and yes, many of the professional sports leagues have affirmative action rules and regulations to increase minority representation within in sport. For example, Rooney Rule was implemented by the NFL to increase the number of non-white head coaches. An ethnic minority chosen for the interview would not necessary be selected since it is primarily based on meritocracy.
- ✚ Otherwise, the general anti-racial discrimination laws apply to sport as it does to general American society. When it comes to selection of players however, players are selected based on their merits and affirmative action is not used. It has been the view that if it goes beyond player's selection, there would be fewer meritocracies. So, there is no affirmative action based in selection process or recreation specifically.
- ✚ It will be essential to highlight the problem of unconscious racism as well. Certain ethnic groups tend to be associated with certain characteristics. When

it comes to selection of players, it is inevitable that this factor (of unconscious racism and selecting person of certain ethnic background) might arise.

- ✚ In the United States, having mentioned all these, affirmative action as applied to sport has been effective when combined with economic and social pressure, as compared to using the law alone.

How far / to what extent does the federal / state law or regulation step in to assist the participation of ethnic minorities in sports (Specifically on US Basketball and NFL)?

- ✚ As far as the plaintiff wants to push it. There is a balance to be struck. Those plaintiffs who desire more racial equality are the ones who are later marginalised within sport.
- ✚ Sport organisations are conservative and shy away from controversy, and, as a result, do not hire litigious people as employees. It is an ongoing struggle and issue relative to social change as to who will be sacrificed for the betterment of society.

How the process of selection does takes place in relation to these sports? Essentially, where do they get their players (College or University)? Cross referencing to the above points, does law in any way influence the selection criteria?

- ✚ As it pertains to players, it is, generally, a meritocracy, although “stacking” does occur even today. For examples, quarterbacks are mainly occupied by white players and these positions require quick thinking, mental ability to decide. Blacks or Afro-Americans are mainly confined to positions such as receiver, runner backs which require physical abilities.
- ✚ More or less if you can play, you get a roster spot. Again, it is the question who can contribute more revenue to the team? Therefore, issues such as revenue maximisation, fan based popularity and attitude of the general manager and coaches towards the player(s) are taken into consideration.

- ✚ With respect to coaches, managers, general managers, owners, it is tougher to address due to a variety of social and personal factors.

Finally, would you be able to explain the statement that ‘affirmative action as applied to sport has been effective when combined with economic and social pressure, as compared to using the law alone’?

- ✚ As mentioned, affirmative action is not used when it comes to selection players. In order to maximise a club’s potential, they could not compromise on field success. The basic fundamental theory of economics work here – If you want to win, you need to select the best.
- ✚ Having said this, there has been pressure or increasing social pressure to see that ethnic minorities are given the chance as well. Problems concerning stacking (With NFL) and unconscious racism have prompted more calls to resolve this problem by affirmative action.
- ✚ There were no racial report cards available in the 1960s and 1970s. None were needed really. Non whites in general had to be superior or superstar athletes to make in professional sports. Otherwise, they did not make the team as a lesser player as did many of their white counterparts.

Appendix 3

Telephone interview with John Wolohan (Professor of Sports Law and Chair of the Sport Management and Media Department at Ithaca College, the US) – Conducted on the 15th of September 2009

How does the United States deal with the issue of racial discrimination in general?

- ✚ Better than before. Under the Employment Protection Clause, no state shall deny any person to equal protection of the laws. Therefore, no individuals must be discriminated based on their race, origins and colour.

Is / Are there any specific laws or regulations / regulations relating to prohibition of racial discrimination in sports?

- ✚ In general, there are affirmative action measures when it comes to employment and admission into colleges. This can be one of the factor but not the only factor. For example, the issue of Asian Americans fighting for places in University admission. It should be based on test scores and best students rather than affirmative action.

- ✚ When it comes to sports at the professional level, teams pick the best athletes and disregard the colour of the skin. As long as the player brings finance and skills to the team, that would suffice. There are no quota systems for player selection in NFL or any other professional sport or even at college level.

- ✚ There are however rules such as the Rooney Rule to increase the participation of other ethnic minorities in sport.

How the Rooney Rule does assists in improving the rate of participation amongst the Afro-American and other ethnic minorities in sport? How does the rule work?

- ✚ Rooney Rule is part of the NCAA (National Collegiate Athletics Association) wide policy to improve the participation of ethnic minorities in sport. Under this rule, they will have to interview at least an individual from an ethnic minority before hiring him as a coach. Obviously, this includes office staff, general managers or any member of the administrative team.
- ✚ This does not necessarily mean that the individual will secure the job. The best individual who fits the portfolio will be selected. In the past, teams have ignored the rule and consequently were fined by the Commissioner of the NFL. Also note that the Rooney Rule is not applicable when it comes to the selection of players.
- ✚ They are thinking of implementing it at college level. So far, only 1 or colleges out of 120 have adopted the rule.

How far / to what extent does the federal / state law or regulation step in to assist the participation of ethnic minorities in sports (Specifically on US Basketball and NFL)? Does the Civil Rights Act 1964 play any part in sports or it is not relevant?

- ✚ During the 1950s and 60s, the southern states such as Kentucky, Western Texas and Alabama tend to practice racial segregation. Until the mid 1960s, schools were keeping out blacks from the school.
- ✚ When the Civil Rights Act of 1964 as amended was put in force, the barrier came down and every individual has the equal opportunity to enter the schools. From that moment, Afro-Americans were drafted to professional leagues due to their skill and when they started winning, the race barrier came down.
- ✚ The 1964 Act arguably has indirectly affected when it comes to the issue of participation in sports. However, it is still mainly based on merits.

- ✚ In relation to the problems of stacking with NFL (where quarterbacks are white and the rest are mainly Afro-Americans), it could be due to certain characteristics. It is about seeing people who you are associated with.

What is your assessment of the issue of racial discrimination in the US sports at present?

- ✚ We are performing well. Whites and blacks are seen on televisions. For instance, Tiger Woods and Le Braun James. Although blacks still remains a small minority, it is now an accepted fact they are part of the American society.

Appendix 4

Telephone interview with Douglas Frame (Solicitor – Passmore’s Solicitor) – Conducted on the 15th of September 2009

How does England deal with the issue of racial discrimination in general?

- ✚ Generally, discrimination is prohibited under English Law. This can be found under the Race Relations Act 1976 as amended.

Is / Are there any specific laws or regulations / regulations relating to prohibition of racial discrimination in sports?

- ✚ As mentioned, the 1976 Act does not permit any discriminatory act. It is however a grey area in sport.
- ✚ Generally, English Cricket Board (ECB) does not discriminate. For instance, we pick Ravi Bopara to be included as part of the English Cricket team.

How far / to what extent does the English law or regulation step in to assist the participation of ethnic minorities in sports (Specifically on English Cricket and Rugby)?

- ✚ Although the law prohibits discrimination, what they did not do (With regards to ECB) is to encourage the members of the ethnic minorities to participate. For example, county cricket got South African cricketers rather than local players. They failed to promote local players and minorities. It appears that they are more interested in financial implication rather than developing the game for the ethnic minorities.

Why? Could you give any examples?

✚ During the 1990s until the early 2000, there are 5-6 ethnic minority cricketers. During the last 4-5 years however, they have 'push out' the Asian cricketers.

✚ Another example would include the recent Middlesex Cricket Competition targeted as Asian cricketers. There are many good Asian cricketers; however, they have been ignored. Rather, the County Cricket is sticking to the old cliché that 'No Public School, No Cricket'. It is clear that County Cricket is sticking to private school children. If one is to look at the English Cricket team, all cricketers hailed from the public school background except Steve Harmisson.

In view of this, why the ECB is not taking any proactive steps in monitoring the County Cricket teams?

✚ It is important to realise that both ECB and County Cricket are separate entities. While ECB allocates funding and generally ensures that rules and regulations are being adhered to, ECB does not instruct them how to spend the money or interfere with the programmes organised by the County Cricket Clubs.

What about the theory of 'positive action' when it comes to encouraging ethnic minorities in participating in sport?

✚ While equal opportunity ensures that every individual is given equal chance to be part of the sport, positive action can only work if it is accessible and realistic. In my view, positive action has failed to lower the barrier between ethnic participation.

✚ The issue of funding for instance remain as one of the problem. Sport England for instance has allocated more funding to ladies team but not alleviating the standard of ethnic minorities.

✚ Since parents cannot afford to send their children to play, they could not be involved in sport. Public Schools for instance practised cricket every

Wednesdays and Fridays. On the contrary, state schools only concentrated on school work and emphasised little on sport. Since cricket is considered an affluent sport, ethnic minorities have little chance to be part of it.

Appendix 5

Telephone interview with Ian Blackshaw (Member of the Court of Arbitration of Sport, UK Sports Dispute Resolution and International Sports Lawyer, Visiting Lecturer in various Universities in England, France and the Netherlands) – Conducted on the 10th of October 2009

How does England deal with the issue of racial discrimination in general? Is / Are there any specific laws or regulations / regulations relating to prohibition of racial discrimination in sports?

✚ Before we look into this, allow me to use South Africa as an example. Affirmative action can be seen from all level of societies. This certainly contradicts the provisions set out by the IOC. IOC's setting of standard must be followed by International Sporting Federation and subsequently by National Federation. This is however not happening in South Africa. So far, there is no ruling as yet pertaining racial discrimination.

✚ As far as I'm concern, England has an anti-discrimination law which equally apply in all sectors.

How far / to what extent does the English law or regulation step in to assist the participation of ethnic minorities in sports (Specifically on English Cricket and Rugby)?

✚ Very little. In relation to both cricket and rugby, there are little chances for other races. Unless it is applied across the board and reflects the multi-cultural society in England, there is no point in having a well written paper or legislation on anti-discrimination law. This includes getting rid of the **WASP** (White Anglo-Saxon Protestant) mentality.

Why do you think that the English law / regulation are not affording any chances to the ethnic minorities? How about positive action?

- ✚ The law is rather weak on Equal Opportunity. The test to decide on merits is an objective one. The question is whether the Objective test is applied in the proper manner. As mentioned, England is a multi-racial country.
- ✚ In relation to funding, it is a mere lip service. The question here involves whether they are putting resources or money to the ethnic minorities? They are still obtaining players from the WASP region.
- ✚ There is also problem from the high management i.e.: failure to choose players from the wider pool. Since it is an affluent sport, does this mean that no ethnic players should be selected?
- ✚ The similar situation can be observed from rugby. As long as we retain the social stature or differences between English societies, it would not be easy to achieve an equal playing field for all.

Appendix 6

Interview with Vladimir Trninic (Coach – Senior South African Water Polo National Team) Conducted on the 24th June 2008

How does South Africa deal with the issue of racial discrimination in general?

✚ I believed there are provisions when it comes to prohibiting discrimination in sport but as a coach, I can only give more pictures in relation to the water polo sport in the country.

✚ South African Water Polo is part of the South African Swimming Association (SASA) which is affiliated to Federation Internationale de Natation (FINA). Generally, we do not agree with imposing quota in water polo. However, the South African Sports Confederation and Olympic Confederation (SASCOC), with government support, dictated this policy to SASA and then to us.

While there are legislations to combat racial discrimination, are you suggesting that affirmative action applies to the selection process involving the South African water polo team?

✚ Yes ... we can put it that way. Officially, there is no quota system in place for the World Championship in Roma next year (2009). Under political pressure however, we are required to ensure that the team consists of 50% blacks / ethnic groups. As to our position, we disagree ... and the process and negotiation has now been stalled for the past four months since we are trying to resist such measures which I believe would bring no benefit to our team.

✚ SASA had directed us to achieve a 17% participation of black players for domestic competition and now we are required to give 50%. In fact, SASCOC threatened not to let the whole team compete in the World Championship unless we achieved the quota. To be honest, **SASA** could not do anything

about this since the directive comes from the 'above'. I do not see ourselves (in Water Polo) playing future international tournament in the future if they insisted on putting the 50% cap on black players.

How far / to what extent does the government or sports regulation step in to assist the participation of blacks / ethnic groups in sports?

✚ The way in which they are pushing it (affirmative action) ... I am worried. The South African water polo team is ranked 14th in the world, which is quite an achievement. If the politicians pushed it too far, in which they are, they would not obtain the desired results. Sport is very competitive. Current black or coloured players are not even on a par with that of the national standard. As a coach, I would feel disappointed if the team was not picked based on its merits. I am predicting that we would not be even in the top twenty if they persisted on pushing it too far.

✚ For example, there are only 20 black registered water polo players out of possibly 7000 in South Africa. What would be the impression if we choose them based on the policy? I'm sure some of them would not even wish to be categorised as an affirmative action appointee. Here, we are not even talking about selection process; we are looking at appointment to the position.

It appears that there is no official selection process. Does the International governing body (FINA) give any suggestions, advice to SASA or even SASCOC on this? How about South African Water Polo?

✚ No interference from FINA. On our part, we have given suggestions on developing some programmes such as sending coaches to townships and rural areas to scout for potential talents. We believed that if one talented black swimmer can be identified, the idea is that we can see the number increase in foreseeable future. Obviously, this comes with proper training. However, we need money and financial resources.

✚ Due to this, it was flatly rejected by politicians, SASCO. SASA has no option but to take on the decision passed by the higher authorities. It does not matter who is being chosen – black, coloured, Asian, whites but it has to be based on merits. As a matter of comparison, Chinese and Japanese water polo obtained the best coaches but in South Africa, the government is stopping our advance.

✚ How are we going to look for talents when the pool is so small? It is illogical to put 7 whites (chosen on merits) and 6 blacks (AA appointee) in a team when these 6 only feature on the bench. Everything is going to ground zero.

Finally, what is your assessment of sports in South Africa in the future?

✚ Australia with 15-17 million people can produce talents. Australian Water Polo used to be far behind us. Now, they have well and specialise programmes to help scout, groom up future talents. I've been three times and witnessed it with my own eyes. Why South African can't do that in terms of development programme?

✚ I am envious that selection process for cricket and rugby especially are still mainly based on merits although some of their transformation plans are starting to take shape – giving more slots to black players. Hopefully, these sports would not go down the same route with water polo.

Appendix 7

Interview with Barend van Graan (Chief Executive Officer of Blue Bulls Company, South Africa) – Conducted on the 29th June 2008

How does South Africa deal with the issue of racial discrimination in sport?

- ✚ I will give you the general view on rugby. Traditionally, only a limited amount of black rugby players ever get involved in the sport. Before the unification, we used to have white rugby union and black rugby union.
- ✚ In the past, most of the national rugby players come from the Eastern, Western and Northern Cape where there are more white players. After 1992 and especially in 1995, provinces where there are traditionally lots of black rugby players started to upgrade and with improved infrastructure, black players are trying to participate on the equal level playing field.

Does affirmative action applies in South African rugby?

- ✚ At this moment, 70% of blacks and other ethnic groups are playing rugby at club levels. Out of fourteen provinces in South Africa, nine provinces consist of majority black rugby players ... I could not talk about this matter nationally or en masse, but I will talk about this with reference to the Blue Bulls rugby team.

How far / to what extent does the government or sports regulation step in to assist the participation of blacks and other ethnic groups in sports?

- ✚ Since rugby becomes professional, we have started improving by introducing leagues (Super 14 competition and the National Competition – CURRIE Cup) and managed to obtain sponsorships.

- ✚ The government used the white rugby players as role models. In addition, they also used soccer as means to get blacks to be involved in the sport of rugby. This is all part of the transformation plan. Essentially, we are trying to get rugby as part of their culture. The government and provisional government have try and encourage more people to participate. For example, the Gauteng Provisional Government has given three million to this district in order to assist more black players to be involved.
- ✚ The South African rugby team obtained players from clubs. For instance, we, the Blue Bulls have contributed 13 out of 22 rugby players for the World Cup last year (2007).

What are the programmes being undertaken or transformation plan as mentioned earlier? How does the selection process take place?

- ✚ Again, I can only speak in relation to our club; and not nationally. Blue Bull have contributed majority of players to the South African national team. So, I believed this can help you to understand the area better.
- ✚ We go around the country to scout and select the talented blacks and we put them in a special school. Basically, in an academy. We provided them with hostels they can then progress on to the University where they further their studies. The idea is that they are properly trained and groomed in order for them to contribute to the sport. This year, we have 53 graduates and 17 of them have become rugby coaches, first-aiders and members of the rugby management team. This is a window of opportunity for them. As at 2008, they are participating at various levels.
- ✚ With the help from Gauteng Provisional Government, we have also conducted Leadership Mentor Programme for three years. We focus mainly on the blacks although the whites are also permitted to apply for this programme. Again, we put them in our specialised schools / academies and transformed them into a

useful asset for the sport. Now, we are reaching out for the poor and poverty groups.

What is your assessment of rugby in South Africa for the future?

- ✚ Since 2004, we have been focusing on quality rather than quantity. However, we still need to sell the game to the masses. In terms of development, it is not as focused enough as yet. It is still not possible at this stage. The government should try to improve, growing the number of black rugby players.

Appendix 8

Interview with Patience Shikwambana (SASCOC General Manager; Operations and National Federations Support) – Conducted on the 27th June 2008

What is SASCOC and its role in promoting sport in South Africa?

- ✚ SASCOC is a sport confederation previously consisted of six previous organisations. Basically, we consisted of a few groups and assimilate into two structures – namely SASCOC and Sports Education Department.

Is / Are there any specific laws or regulations relating to prohibition of racial discrimination in sports? Does affirmative action apply in South African sports?

- ✚ We do not discriminate anyone when it comes to sports. However, we need to understand that South Africa had gone through some rough patches during the past. There is a need to transform South African sport to make it representative. This is the very challenge we faced at this moment.
- ✚ The whole concept is to reaffirm our commitment that everyone who is a South African be it black or white (Also other ethnic minorities) are entitled to play. As a result, our main aim is to get the whole nation to play.
- ✚ It is very important for one to note that ... when we talk about transformation, we are not only talking about race but this also encompass gender and disability. When it comes to race, SASCOC plan by 2014 is to have more multiracial teams to reflect the population's representative. One of the purposes of transformation is to ensure equity and this must be taking into consideration that blacks were previously sidelined. It would then be fair to say that everyone is involved in any kind of sport.

Referring to SASCOC's commitment, how are you going to achieve the 2014 target? Does the organisation have any plans, programmes or just appointing some race to the position?

✚ No. We certainly do not merely appoint a person to the post or be as part of the team. When we mention transformation, we ensure that the selections of players are based on merits. For instance, we go to the very core of every province to scout for South African blacks.

✚ We identify athletes at the highest level. For instance, we have Operation Excel which is funded by OPEX. In addition, with National Academy Programme, we tap and identify talents (athletes and officials) from all villagers from all provinces. We also have development programmes for those who wished to be coaches. We at SASCOC provide funds to run coaching course, technical courses and administrative courses. Also, we mediate any dispute between sports organisation in the country.

Could you please explain more on how people are selected in terms of participation? Does the law in any way influence the way how selection process is taking place?

✚ As I've mentioned, we have transformation plans covering all aspect of sports in South Africa. You will be able to see all the objectives, plans and future visions in our website.

✚ When it comes to selection process, we have South African Games for the Under 18 age group. This is where all the provinces throughout the country will send members to participate in various sports. We will then identify talents from the event. This is what we known as identification process.

✚ Together with the other talents we have earlier identified from small and poor villagers; where they are deprived of any chances to take part, we would then put them under the development programmes designed at grooming them for the future.

- Now, this identification stage is available for any South African. At the end of it, they will still be participating based on merits. Again, you may wish to find out more about this on our SASCOC website.

Appendix 9

Interview with Kallie Kriel (Chief Executive Officer of Afri-Forum, South Africa) – Conducted on the 29th June 2008

How does South Africa deal with the issue of racial discrimination in sport?

- The new South African Constitution (of 1996) provided a new equality clause which aims to protect the rights of all races in this country. The main issue at this moment is whether we are moving in the right direction.
- Do not get me wrong – I am in agreement with the need to get all races to the same level where every individual is afforded equal chance and opportunities and this includes improving the participation of ethnic groups previously deprived during the apartheid years.

Under the Section 9 of the South African Constitution, the Act also legitimises affirmative action. For a country with the history of excluding opportunities for certain groups, surely this is acceptable?

- I am not against the Constitution and do equally recognise the right of those ethnic groups (As in previously disadvantaged groups). I am however concerned with the implementation of the affirmative action provisions in sport. Sport is not a tool where anyone can simply be chosen to be part of the team.

Would you like to explain more on the implementation of affirmative action in South African sport – specifically on rugby and cricket?

✚ The transformation programme mainly covers all sports in this country. Transformation is only good for the sport if it is implemented properly. In relation to rugby and cricket there is a need to differentiate between quota and target.

✚ Quota involves making firm decision to allocate certain places or percentages for a designated group. On the contrary, target is more flexible – effectively giving opportunities for the transformation to take place in proper manner. Implementing quota in sports will do more harm than any good to this country. With target, we can work towards achieving the goal.

This is interesting since under the transformation programme for cricket and rugby, the sports governing bodies have a long term plan to achieve the target. Surely, it is more on realising the target rather than quota?

✚ Yes, I agree with this. Anything could be said and mentioned under the transformation plan. When it comes to the practical bits, things are not as what it should be. With increasing political and legislative interference I am doubtful whether the plan might work. We have seen in recent years where the idea of imposing quota in sport has been swirling around.

✚ For example, the National Sport and Recreation Amendment Act 2007 basically infringed the rights and freedoms of those involved in participation and governance of sport. The Act empowers the Minister of Sport to interfere in the sport. You would be able to see from these documents how this Act could potentially cause serious damage to these sports.

✚ This also raises serious questions about the participation of other groups which are not benefiting from the affirmative action programmes.

In light of the transformation process in South African sport, could you please explain more on how people are selected in terms of participation?

✚ Transformation programmes have been misused to benefit one party. We must be able to differentiate between transformation and racialisation. When we talk about transformation, it means that we are reaching out to the whole country, scouting and identifying talents from these groups (previously disadvantaged groups), grooming them and making them successful. This refers to that which I have mentioned earlier, about the need for us to be flexible by setting realistic targets.

✚ The transformation in this country is moving towards racialisation. This simply means picking up individuals based on race or ethnic groups with no effort whatsoever to poach the young or those from poor backgrounds. What is happening right now is that they are only interested in looking at one section of the population and not the entire country. Again, this is tied up with what I describe as the need to come to their senses i.e. not implementing quota.

Copyright of Theses

Attention is drawn to the fact that the copyright of this thesis rests with

- (i) Anglia Ruskin University for one year and thereafter with
- (ii) Teng Guan Khoo

This copy of the thesis has been supplied on condition that anyone who consults it is bound by copyright.