

“SONS OF THE SOIL”—MALAYSIA’S PREFERENCE LAWS FOR MALAYS AS A VIOLATION OF EQUAL PROTECTION

*Jasmine Penny**

I.	INTRODUCTION	389
A.	<i>Issue Addressed and Thesis Statement</i>	389
B.	<i>Colonialization, Communism and Independence</i>	390
C.	<i>Riots of 1969</i>	391
D.	<i>1971 Race-Based Affirmative Action</i>	392
E.	<i>“Ban-ICERD” Protests Today</i>	393
II.	SUPPORT FOR THE ELIMINATION OF RACE-BASED AFFIRMATIVE ACTION PROGRAMS	394
A.	<i>International Human Rights Law</i>	394
1.	UN Human Rights	394
2.	European Convention on Human Rights	397
B.	<i>Unduly Lengthy Time Period for Preferential Measures</i>	399
1.	Affirmative Action in South Africa	400
2.	Affirmative Action in India	402
3.	Stipulated End Date	404
C.	<i>Non-Race Based Affirmative Action Programs</i>	406
1.	The Use of Strict Scrutiny	406
2.	The Use of Rational Basis Review	407
III.	CONCLUSION.....	409

* J.D. Candidate, Southwestern Law School (2021); M.B.A., Finance, Pepperdine University (2009); B.S., Business Law & Business Management, California State University, Northridge, (2006). I would like to thank my husband, Dr. Brian Penny, and family for being my pillar of strength throughout my academic endeavors. Thank you also Professor Jonathan Miller, Professor Warren Grimes, and the Southwestern community for the tremendous support.

I. INTRODUCTION

A. *Issue Addressed and Thesis Statement*

Although Article 8 of Malaysia's Federal Constitution provides for the equality of all persons and, to a limited extent, a prohibition on discrimination, Article 153 of the Federal Constitution creates an exception to safeguard the "special position" of the Malays and the natives of the states of Sabah and Sarawak (collectively known as "Bumiputeras" or "sons of the soil").¹ Article 153's "special position" for the Malays resulted from marked economic difficulties endured by the majority ethnic group, comprising largely of Malays, at the time period before Malaysia's independence.²

Malaysia's economic climate has drastically changed since 1957. Today, the preferential treatment of Malays violates fundamental human rights. Malaysia must adopt a solution for its problem of poor Bumiputeras that will eradicate poverty and restructure society, to remove the identification of race or ethnicity with economic status without solidifying the power positions of the Malay elite.

While Malaysia has not ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which establishes that affirmative action programs must have an end date, there is little doubt that progressive international practice requires that it start to dismantle its affirmative action programs.³ International law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. The ICERD, European practice, and United States practice recognize the need to treat affirmative action programs as exceptional measures because they perpetuate stereotypes and race-based politics. Moreover, countries like India, which have used programs like Malaysia's, have had similar problems of corruption and misdirected resources, with South Africa, and its redress-focused approach offering a better model. The terms under which Malaysia's program originally set an end-date have been met—redress has been achieved, as shown by the significant wealth acquired by the native Malay population. Now that basic redress has been achieved, measures focused on income, wealth, family education levels and place of residence will produce greater equity over time than race-based solutions—something that the

1. MALAY. CONSTITUTION Aug. 27, 1957, arts. 8, 153, https://www.constituteproject.org/constitution/Malaysia_2007.pdf?lang=en.

2. *Id.*

3. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, *adopted* Dec. 21, 1965, T.I.A.S. 94-1120, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

United States has increasingly emphasized. Malaysia's present problem simply lacks continuing justification.

In Part II (A), this note demonstrates that international law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. Part II (B) illustrates that, after nearly fifty years, Malaysia can no longer justify preferential measures and the criticality of a stipulated end date. Finally, Part II (C) of this note discusses how measures focused on wealth, place of residence, and other, less problematic, distinguishing features, can accomplish many of the same goals as racial preferences.

B. *Colonialization, Communism, and Independence*

On December 7, 1941, the Japanese invaded from the north and attacked Malaya.⁴ This attack on Malayan shores occurred about an hour before the Japanese surprise aerial attack on Pearl Harbor, a United States naval base in Hawaii.⁵ This marked the start of the Pacific War during World War II.⁶

In 1948, upon the conclusion of the Japanese occupation of Malaya, the Federation of Malaya was created under British protection.⁷ British involvement in Malaya dates back to 1786, when the British East India Company acquired the island of Penang; subsequently, in the early 1800s, Sir Stamford Raffles founded British settlements in Singapore and Penang and the sultans of small Malay states began to accept British "advisers" who, essentially, became the true rulers of the land.⁸ To effectuate colonialization efforts, the British encouraged heavy immigration from India and China to supply labor to British tin mines and rubber plantations.⁹ The British reigned supreme until the 1941 Japanese invasion of Malaya. Japanese troops moved rapidly down the Malay Peninsula resulting in the United Kingdom's surrender of Singapore, where it had established a significant naval base in

4. Rouwen Lin, *Invasion of Malaya: First Shot in the Pacific War*, THE STAR (Dec. 8, 2016 6:45AM), <https://www.thestar.com.my/lifestyle/people/2016/12/08/invasion-of-malaya-the-japanese-arrive>.

5. *Id.*

6. *Id.*

7. See Richard Cavendish, *Malayan Independence*, HISTORY TODAY, Aug. 2007, <https://www.historytoday.com/archive/malayan-independence>.

8. *Id.*

9. *Id.*

1923.¹⁰ The fall of Singapore was touted as Britain's greatest military defeat since the Battle of Yorktown in 1781.¹¹

In 1948, the "Malayan Emergency," a national state of emergency, began when the Communist Party of Malaya, a predominantly Chinese organization, began a guerilla insurgency.¹² British troops fought to quash the Communist insurrection, which lasted until the early 1950s.¹³ Malayan independence was the pivotal solution to the Communists' claim that they were freeing the Malayan people from British rule. In 1957, the Federation of Malaya gained its independence from the British and joined the Commonwealth of Nations as an independent sovereign state.¹⁴ The federation, which included Singapore, was renamed Malaysia in 1963.¹⁵ In 1965, Singapore parted ways to become its own island-nation.¹⁶

C. Riots of 1969

The Malayan Emergency led to Malay unrest, and there was an urgent need to do something about it. Of Malaysia's population of thirty-two million people, ethnic Malay Muslims make up about 60%, while ethnic Chinese and Indians comprise about 30%.¹⁷ Malaysia's history of racial tension dates back to the influx of Chinese workers in the 19th century and was heightened in 1957 after Malaysia gained independence from the United Kingdom.¹⁸ The Japanese occupation and the British rule increased communal distrust. Facing a communist insurgency, Malaysia was a young nation wrought with fragile race relations. During the Malaysian national elections of 1969, the United Malays National Organization (UMNO), the party that has dominated the government since independence, won less than half the popular vote.¹⁹ UMNO's parliamentary seats were significantly reduced after it won less

10. Kelly McLaughlin, *The Surrender of Singapore: Pictures Show The Moment Britain Surrendered Island Territory to Japan in 1942, Leading to Three Years of Hell for 80,000 Prisoners of War*, DAILY MAIL (Feb. 20, 2017, 6:58 AM), <https://www.dailymail.co.uk/news/article-4241644/The-moment-Britain-surrendered-Singapore-Japan-1942.html>.

11. *Id.*

12. *Malayan Emergency*, ENCYC. BRITANNICA (Sept. 27, 2017), <https://www.britannica.com/event/Malayan-Emergency#ref775636>.

13. Cavendish, *supra* note 7.

14. See Commonwealth Secretariat, *Member Countries*, THE COMMONWEALTH, <https://thecommonwealth.org/member-countries> (last visited Dec. 29, 2021).

15. Cavendish, *supra* note 7.

16. *Id.*

17. *Malaysia's New King Calls for Racial Unity at Coronation*, ASSOCIATED PRESS, (July 29, 2019), <https://news.yahoo.com/malaysias-king-calls-racial-unity-050147114.html>.

18. *A Black Day in May for Malaysia*, ASS'N FOR DIPLOMATIC STUD. & TRAINING (Mar. 3, 2016), <https://adst.org/2016/03/a-black-day-for-malaysia/>.

19. *Id.*

than half the popular vote, and while it still held a majority in Parliament, the Chinese-based Opposition Party claimed “victory.”²⁰ As a result, deadly riots ensued.²¹ Malays and Chinese ran amok and wreaked havoc throughout the kampongs, or residential areas.²² The riots, a result of the brewing tensions between the native Malays and the more economically powerful Chinese,²³ continued for weeks and led to a state of national emergency along with the suspension of Parliament until 1971.²⁴

D. 1971 Race-Based Affirmative Action

In 1970, after the 1969 riots, Malaysia adopted a race-based affirmative action program under the New Economic Policy (NEP), known as the pro-Bumiputera policies.²⁵ The NEP sought to eliminate poverty and to reduce wealth and income inequalities between different ethnic groups in Malaysia.²⁶ In Colonial Malaya, “ethnic cartels” prevented the indigenous Malays from venturing into profitable industries. Moreover, the Malays held employment mostly in agriculture and other less-skilled occupations, while the Chinese and Indians were employed in higher skilled and higher-income occupations.²⁷ In 1970, the Malays held just 2.4% of the total share capital of companies in Malaysia while the Chinese and Indians jointly held almost one third, with the remaining 63% owned by foreign interests.²⁸

The NEP sought to rectify these wealth and income disparities between the Malays and non-Malays by restructuring company ownership, control, and employment, by implementing quotas and price discrimination in the commercial and industrial sectors, and by adapting explicit enrollment quotas at institutes of tertiary education.²⁹

For instance, companies today have to allocate 30% of their share capital to Bumiputeras as part of any expansion effort and all construction projects

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Hazlin Hassan, *What Happens If an Emergency Is Declared in Malaysia?*, STRAITS TIMES (Oct. 24, 2020), <https://www.straitstimes.com/asia/se-asia/what-happens-if-an-emergency-is-declared-in-malaysia>.

25. See Zainal Aznam Yusof, Inter-Reg'l Ineq. Facility, Overseas Dev. Inst., *Policy Brief 13*, (Feb. 2006), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4078.pdf>.

26. *Id.*

27. *Id.*

28. *Id.*

29. See *id.*

are required to have 30% Bumiputera participation.³⁰ This has led to the notoriety of “Ali Baba” ventures in Malaysia: joint ventures between a less qualified Bumiputera and a financially well-endowed non-Bumiputera, whereby the unqualified Bumiputera “rents” his ethnic status in exchange for lucrative sums of money.³¹ This rampant practice of selling-off one’s entitlements disguises the actual beneficiaries of these pro-Bumiputera policies. Bumiputera businessmen are also generally granted a 10% discount when bidding for construction projects, and state-sponsored institutions subsidize these individuals’ finance and management training programs.³² There are also race-based quotas for enrollment to assist Malays in gaining admission into coveted Malaysian universities. Race discrimination furthermore persists in the context of hiring and property rentals. Race-based discrimination persists in every aspect of life in Malaysia, and impacts the social, economic, financial, academic, and political climate of the nation.

Malaysia’s affirmative action program favoring the Bumiputera majority was justifiable during the immediate post-colonial period with a market-dominant ethnic minority, but, with no cut-off date or pre-specified intended outcome, the pro-Bumiputera policies have morphed from a necessity to reduce racial economic inequalities to a hallmark of Malay supremacy.

E. “Ban-ICERD” Protests Today

The pro-Bumiputera policies are a heated issue in Malaysia today and it was the cause of recent, major protests in Malaysia. In late 2018, massive protests broke out³³ as a result of a pledge by Malaysia to ratify the ICERD.³⁴ Malay groups feared that Malaysia’s ratification of ICERD would invariably dilute the race-based privileges for the Malay majority as the pro-Bumiputera policies are in direct violation of ICERD. Malaysia would have been compelled to establish an end date to its pro-Bumiputera policies had it followed through with its pledge of ICERD ratification as the ICERD requires a stipulated end date for any special measures taken by its Member States that engage in special measures for the advancement of certain racial

30. *Id.*

31. *Id.*

32. *Id.*

33. See Reuters, *Why Malaysia Backpedalled on ICERD Ratification*, NEW STRAITS TIMES (Nov. 24, 2018), <https://www.nst.com.my/news/nation/2018/11/434078/why-malaysia-backpedalled-icerd-ratification>.

34. *Id.*

groups.³⁵ The protestors at the all-Malay rally were adamant that Malay privileges and Islamic superiority prevail in Malaysia.

The protests, coupled with fear of the loss of the Malay majority vote and the lack of buy-in from its own members, caused the Malaysian government to backpedal on its pledge to ratify the ICERD.³⁶ The office of Prime Minister Mahathir Mohamad issued a statement stating that the Malaysian government would not ratify the ICERD without providing any reason for its decision.³⁷ Clearly, the protests had a significant political impact and caused a drastic shift in the position of the Malaysian government.

II. SUPPORT FOR THE ELIMINATION OF RACE-BASED AFFIRMATIVE ACTION PROGRAMS

A. *International Human Rights Law*

International law requires equal protection, subject only to measures in the period immediately after previous discrimination, during which remedial measures are permitted. As a matter of customary international law, a post-colonial setting requires limits to be imposed on affirmative action programs to avoid it from becoming abusive. This section explains how there is practice and *opinio juris* under customary international law that supports the elimination of race-based affirmative action programs.

1. UN Human Rights

The Office of the High Commissioner for Human Rights (UN Human Rights) is the principal United Nations office that is mandated to protect and promote human rights worldwide.³⁸ The United Nations was established in 1945 and promotes “respect for human rights for all without distinction as to race, sex, language, or religion.”³⁹ The High Commissioner works in close collaboration with governments worldwide to set human rights standards and to subsequently implement and monitor these standards on the ground.⁴⁰ To lessen the burden of governments when transitioning to the implementation of international human rights standards, the High Commissioner “provides

35. ICERD, *supra* note 3, art. 1.

36. *See* Reuters, *supra* note 33.

37. *Id.*

38. *What We Do: An Overview*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> (last visited Dec. 14, 2021) [hereinafter High Commissioner].

39. *Id.*

40. *Id.*

assistance to Governments, such as expertise and technical trainings in the areas of administration of justice, legislative reform, and electoral process, to help implement international human rights standards on the ground.⁴¹

The High Commissioner subscribes ICERD's provisions allowing for, but limiting special measures taken for the sole purpose of advancing certain racial groups as stipulated in Article 1:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . shall not be continued after the objectives for which they were taken have been achieved.⁴²

ICERD clearly stipulates that a defined end date be effectuated in the event a State Party undertakes special measures for the advancement of certain racial groups requiring such protection. Such special measures advancing certain ethnic groups must be discontinued once the objectives for which those measures created have been achieved. Moreover, ICERD unmistakably condemns all forms of racial discrimination and governmental policies that create or perpetuate racial discrimination. State Parties cannot sponsor, defend, or support racial discrimination.⁴³ More proactively, State Parties have the responsibility to review legislative policies to amend, rescind or nullify these policies that perpetuate racial discrimination.⁴⁴ State Parties are responsible for ending any pre-existing racially discriminatory practices.⁴⁵ ICERD's Article 2 states:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

41. *Id.*

42. ICERD, *supra* note 3, art. 1, ¶ 4 (emphasis added).

43. *Id.* art. 2, ¶ 1(b).

44. *Id.* ¶ 1(c).

45. *See id.* ¶ 1(d).

*Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.*⁴⁶

The language in ICERD's Article 2, prohibiting State Parties from enacting regulations that create or perpetuate racial discrimination, is particularly at conflict with Malaysia's pro-Bumiputera policies. The pro-Bumiputera policy essentially promotes racial discrimination in a multi-racial society. The 2018 protests led to the Malaysian government retracting its pledge to ratify the ICERD. The retraction occurred due to the fact that Malaysia would have had to rescind or nullify its pro-Bumiputera policies had it become a State Party to the ICERD. Equality is a highly esteemed virtue for a developing nation. Malaysia's ratification of the ICERD would support the furtherance of Malaysia's economic and social growth on an international level because developed nations typically do not engage in race-based affirmative action programs. Ratification of the ICERD would also bolster Malaysia's standing regionally among the Association of Southeast Asian Nations (ASEAN) because other, more progressive ASEAN nations do not subscribe to race-based affirmative action programs.

Therefore, the pro-Bumiputera policies are in direct conflict with the ICERD. Equal protection calls for governmental policies undertaken by the Malaysian government to nullify the existing pro-Bumiputera policy and to end any direct or indirect forms of racial discrimination within the young nation.

Malaysia, however, must balance any plans of conforming to the UN Human Rights laws and ratifying the ICERD with the violent protests that recently ensued. The violent protests could ensue again upon any plans to ratify ICERD in the near future. The Malaysian government could seek the help of the High Commissioner to lessen its burden when transitioning to the implementation of international human rights standards. The High Commissioner would be able to provide assistance to the Malaysian government, providing its expertise in dealing with the socialization of such changes within the society at large. For instance, the High Commissioner could provide the Malaysian government with technical trainings in the areas of administration of justice, legislative reform, and electoral process. The successful implementation of international human rights standards on the ground is based largely on the successful socialization and adoption of these standards by the people of a nation. Seeking the High Commissioner's assistance to obtain the buy-in of the people is critical. Any rash

46. *Id.* ¶ 1(a)-(d) (emphasis added).

implementation without proper socialization is surely to backfire and likely to result in rampant riots and protests that would jeopardize the safety of the people.

2. European Convention on Human Rights

The European Convention on Human Rights (ECHR) is a convention based in Strasbourg, France that protects the human rights of people in countries that belong to the Council of Europe.⁴⁷ The Council of Europe is an intergovernmental organization created after World War II.⁴⁸ The Council of Europe has forty-seven Member States and is focused on the human rights and social development of its Member States.⁴⁹ The ECHR came into force in 1953 and was adopted by the forty-seven Member States of the Council of Europe, including the United Kingdom.⁵⁰ The ECHR established the European Court of Human Rights, which is an international court that hears cases concerning alleged breaches of human rights provisions.⁵¹ The ECHR focuses on cases related to human rights matters, principally civil rights and political rights.⁵² Section I, Article 14 of the ECHR prohibits both direct and indirect forms of discrimination and states that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured *without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*⁵³

The ECHR is a reputable body of human rights law within Europe. Below is an explanation of how the United Kingdom incorporates the rights set out in the ECHR into domestic British law by way of the Human Rights

47. See European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

48. Eur. Union Agency for Fundamental Rts. & Council of Eur., *Handbook on European Non-Discrimination Law*, at 18 (2018), https://www.echr.coe.int/Documents/Handbook_non_discr_law_ENG.pdf.

49. *Id.*

50. *Id.*; Eur. Ct. of Hum. Rts., *The European Convention on Human Rights a Living Instrument*, at 5, 17, 23 (2020), https://echr.coe.int/Documents/Convention_Instrument_ENG.pdf.

51. Eur. Ct. of Hum. Rts., *Questions & Answers*, at 3-4, https://echr.coe.int/Documents/Questions_Answers_ENG.pdf.

52. ECHR, *supra* note 47.

53. *Id.* art. 14 (emphasis added).

Act that came into force in 1998⁵⁴ and the Equality Act that came into force in 2010.⁵⁵

On the one hand, the United Kingdom's Human Rights Act of 1998 enables cases involving breaches of human rights to be heard domestically in courts within the United Kingdom.⁵⁶ This eliminates the hassle of British citizens seeking justice at the ECHR in Strasbourg, France.⁵⁷ The Human Rights Act also posits that all public bodies within the United Kingdom must respect and protect human rights.⁵⁸ Additionally, the Human Rights Act stipulates that all new laws passed by the British Parliament must comply with the rights set out in the ECHR.⁵⁹

On the other hand, the Equality Act of 2010 brings together 116 pieces of legislation into one single Act.⁶⁰ The Equality Act provides Britain with anti-discrimination laws that serve to further the rights of the ECHR by promoting a more fair and just society and by protecting individuals from unfair treatment.⁶¹ Ironically, the United Kingdom breached the ECHR's Article 14's prohibition against discrimination more than any other country in the European Council.⁶²

The ECHR states that being treated differently due to race may be lawful only in select instances.⁶³ For instance, race discrimination is lawful when an organization is taking positive action to encourage or develop people in a racial group that is under-represented or disadvantaged in a role or activity.⁶⁴

54. Human Rights Act 1998, (UK), <https://www.legislation.gov.uk/ukpga/1998/42/contents>; see also, *The Human Rights Act*, EQUALITY & HUM. RTS. COMM'N (Nov. 15, 2018), <https://www.equalityhumanrights.com/en/human-rights/human-rights-act>.

55. Equality Act 2010, (UK), <https://www.legislation.gov.uk/ukpga/2010/15/contents>; see also, *What is the Equality Act?*, EQUALITY & HUM. RTS. COMM'N (June 19, 2019), <https://www.equalityhumanrights.com/en/equality-act-2010/what-equality-act>.

56. *The Humans Rights Act*, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Id.*

60. *What is the Equality Act?*, *supra* note 55.

61. *Id.*

62. *Article 14: Prohibition of Discrimination*, EACH OTHER, <https://eachother.org.uk/article-14-prohibition-of-discrimination/> (last visited Dec. 15, 2021).

63. See generally Eur. Ct. of Hum. Rts., *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, at 13 (2020), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf (describing situations where positive action discrimination is permitted); see also Eur. Comm'n, *Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/ED*, at 50 (2007), <https://op.europa.eu/s/vfTB>.

64. *Handbook on European Non-Discrimination Law*, *supra* note 48, at 69-80; see also *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, *supra* note 63, ¶¶ 40-43.

In line with international law, Malaysia should impose limits on its affirmative action programs to avoid abuse. Malaysia has already undertaken post-colonialization affirmative action programs by way of the pro-Bumiputera policy to develop the Bumiputera population due to that majority population being disadvantaged during the colonial period in Malaysia. Therefore, Malaysia ought to re-evaluate the under-representation and disadvantages its Bumiputera population faces in light of modern-day circumstances, to ascertain whether that population is currently disadvantaged. There have been substantial changes over the past fifty years, and so today Malaysia is not what it was in colonial times. Mirroring what is prescribed in Article 14 of the ECHR, Malaysia culminated the pro-Bumiputera policy to assist the then-disadvantaged Bumiputera ethnic group, who was disadvantaged by ethnic cartels during the colonial era.

However, the economic sphere of modern-day Malaysia has changed, and the Malays are no longer confined to menial industries. Unlike the colonial British times, the “lucrative” industries in Malaysia are no longer controlled by the Chinese. Although the ECHR allows for such race-based positive action to correct past wrongs to certain racial groups, there is no verbiage within the ECHR to suggest that these positive actions persist indefinitely once the injustice to the disadvantaged group has been rectified.⁶⁵

B. Unduly Lengthy Time Period for Preferential Measures

After nearly fifty years, Malaysia can no longer justify preferential measures. Malaysia should identify an end date for its pro-Bumiputera policy. Preferential measures are a means to an end and, once that pre-determined end goal has been accomplished, the preferential measures should be terminated. An unduly lengthy time period for preferential measures blurs the line between affirmative action and discriminatory practice. While affirmative action may be viewed as partaking in compensatory justice, it nonetheless has negative consequences, since it perpetuates racial division. Compensatory justice seeks to correct past wrongs, but once those wrongs are corrected, furtherance of affirmative action programs subvert those corrective outcomes into the realm of racial supremacy.

This section distinguishes the affirmative action schemes in South Africa and in India with that of Malaysia. Internationally, a plethora of countries deploy affirmative action schemes: neighborhood-based

65. *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, *supra* note 63, ¶ 41; *see also Handbook on European Non-Discrimination Law*, *supra* note 48, at 71.

affirmative action (France), gender-based affirmative action (Germany and China), race/ethnic-based affirmative action (Brazil and Slovakia), and linguistic-based quotas (Finland).⁶⁶ The scope of this section shall be limited to the race-based affirmative action approach employed in South Africa and the social class-based approach implemented in India.

The affirmative action programs in South Africa and in India were set in motion to rectify past disadvantages to select groups of the respective societies. Similar to Malaysia, the affirmative action programs in South Africa and in India are still in force today. However, the dynamics and circumstances surrounding those programs differ significantly from that of Malaysia so while those programs continue due to differing circumstances, the pro-Bumiputera policy enforced in Malaysia should not continue.

1. Affirmative Action in South Africa

While affirmative action programs can be justified in South Africa, where huge racial gaps persist, they can no longer be justified in Malaysia. Similar to Malaysia, South Africa has a racial majority that benefits from affirmative action as a result of disadvantages encountered by the black majority group during the apartheid. Apartheid was a social and political system during an era of white minority rule in South Africa during the period between 1948 and the 1990s.⁶⁷ Established in 1948 by the racist National Party, apartheid means “separateness” in the Afrikaans language.⁶⁸ During the apartheid period, South Africans were divided by race and forced to live separately.⁶⁹ Apartheid meant inferior public services and separate building entrances for non-whites, and it also stripped black South Africans of their citizenship.⁷⁰ Apartheid was abolished in 1994 at which time Nelson Mandela, a key anti-apartheid activist and Nobel Peace Prize recipient, was elected to the Presidency of South Africa.⁷¹

The South African Constitution contains an equality provision that serves a two-fold purpose: first, it is used to redress past disadvantages and past imbalances after the apartheid regime that sought to benefit white South Africans while disadvantaging black South Africans; and, second, it is used

66. Erin L. Nel, *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (2011) (Ph.D. dissertation, Stellenbosch University) (on file with SUNScholar Research Repository, Stellenbosch University).

67. Mark Byrnes, *Life in Apartheid-Era South Africa*, BLOOMBERG (Dec. 10, 2013, 11:52 AM), <https://www.bloomberg.com/news/articles/2013-12-10/life-in-apartheid-era-south-africa>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

to build the vision of an egalitarian society.⁷² “Redress is a backward-looking justification while the creation of an egalitarian society is a forward-looking justification.”⁷³ On the one hand, redress seeks to tip the moral scales so as to position those previously disadvantaged individuals or groups in a position that they would have been in had the injustices not occurred.⁷⁴ On the other hand, building an egalitarian society takes a forward-looking approach focusing on South Africa’s present day dilemmas: poverty and homelessness along with insufficient healthcare and unemployment.⁷⁵

Equality comes in many shapes and forms. While substantive equality recognizes differences, and focuses on *creating* an equal society, “restitutionary” equality recognizes harms done in the past and focuses on *making up* for past injustices.⁷⁶ The main legislative agent for achieving equality in South Africa is the “equality provision” in Section 9 within the Bill of Rights in the South African Constitution that states in part:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

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 of persons, disadvantaged by unfair discrimination may be taken.⁷⁷

The Bill of Rights is the cornerstone of democracy in South Africa and prohibits *unfair* discrimination; yet it is not violated in the event remedial action is taken to rectify past disadvantages to designated categories of persons.⁷⁸ The two most prominent examples of affirmative action legislation that gives effect to equality pursuant to Section 9(2) of South Africa’s Constitution are the Employment Equity Act and the Labor Relations Act.⁷⁹ Per Section 2(b), the Employment Equity Act seeks to achieve equity in the workplace by “implementing affirmative action measures to redress the disadvantages in employment experienced by *designated groups*, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”⁸⁰

72. Nel, *supra* note 66, at 3.

73. *Id.*

74. *Id.*

75. *Id.* at 4.

76. *Id.* at 11.

77. S. AFR. CONST., 1996, ch. 2, § 9(1)-(2).

78. *Id.*

79. See Employment Equity Act of 1998 (S. Afr.), https://www.gov.za/sites/default/files/gcis_document/201409/a55-980.pdf; see also Labor Relations Act of 1995, at 66 (S. Afr.), <http://www.ilo.org/legacy/english/inwork/cb-policy-guide/newsouthafricallra1996.pdf>.

80. Employment Equity Act of 1998, ch. 1, §2(b) (emphasis added).

Designated groups within the meaning of the Employment Equity Act means “black people, women and people with disabilities.”⁸¹ Therefore, perceived discriminatory employment practices in furtherance of the goal of redressing the disadvantages encountered by the majority black people during the apartheid era of white minority rule is permitted. This form of “reverse discrimination” is permitted as it is deemed “positive action.”⁸²

Nonetheless, one can distinguish reverse discrimination practices in South Africa from the Bumiputera policy in Malaysia. While the identified social ills, like poverty, unemployment, and homelessness, are still highly prevalent in South Africa, these have been significantly reduced in Malaysia. Poverty is on the rise in South Africa, and more than half of South Africans were affected by poverty in 2015.⁸³ However, economic statistics show the incidence of income disparities between Bumiputera and non-Bumiputera have narrowed in Malaysia over the past fifty years.⁸⁴ Moreover, “[t]he incidence of absolute poverty in Malaysia fell from about half (49%) of total households in 1970, to 37% per cent in 1980, 17% per cent in 1990 and 5% per cent by 2002.”⁸⁵ Therefore, the rampancy of the social ills still prevalent in modern day South Africa is not encountered in present-day Malaysia. This key distinguishing factor demonstrates why the continuation of Malaysia’s preference laws is not justified although the preference laws of South Africa may still be justifiable.

2. Affirmative Action in India

Affirmative action programs seem to encourage political manipulation to game the system, and benefit individuals who do not deserve it. Malaysia’s experience with affirmative action programs has been similar to India’s where the beneficiaries of these programs are not the truly deserving recipients as explained by the “Ali Baba” schemes above.⁸⁶

Reservation systems in India seek to create social caste-based, affirmative action programs for minorities, namely Scheduled Castes (SCs) and the Scheduled Tribes (STs).⁸⁷ The Hindu caste hierarchy deemed the SCs and STs as “untouchables” and these groups of people have been historically

81. *Id.* ch. 1, §1.

82. Nel, *supra* note 66, at 20.

83. *Poverty on the Rise in South Africa*, STAT. S. AFR. (Aug. 22, 2017), <http://www.statssa.gov.za/?p=10334>.

84. *Policy Brief 13*, *supra* note 25, at 3.

85. *Id.*

86. *See supra* p. 393.

87. *See* Sukhadeo Thorat, Inter-Reg’l Ineq. Facility, Overseas Dev. Inst., *Policy Brief 14*, at 2 (Feb. 2006), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4080.pdf>.

ostracized from society for being “unclean.”⁸⁸ India’s reservation policy is built into the country’s sixty-nine-year-old Constitution. It seeks to improve the lives of these minority castes via three primary methods: appointment and promotion in government services, admissions to public educational institutions, and seats in central, state, and local legislatures.⁸⁹

Initially aimed at promoting social justice and equal rights, India’s affirmative action program has been subject to abuse and its efficacy questioned. While reservations in political representation originally had a ten-year time limit with subsequent extensions every ten years, the reservations in government services and education had no explicit time limit. They were left to the discretion of the government. Without judicial oversight, India’s affirmative action program perpetuates inequality versus redressing it.⁹⁰

The circumstances surrounding today’s socio-economic climate in India are starkly different from 1500 years ago when the caste system was enacted. Then, India’s caste system was created as a way of organizing occupations in a feudal agricultural society.⁹¹ The Brahmins were at the top of the “food chain” and were assigned highly reputable occupations, while the untouchables were at the very bottom and were confined to menial jobs.⁹² Today, however, the exodus of India’s population from villages to sprawling cities negates caste as an economic restriction.⁹³ Population migration and urbanization have led to increased income mobility within India’s castes and the erosion of historical, educational boundaries.⁹⁴

The caste-based quotas have led to inequality and abuse. For instance, children from India’s mega-rich families have secured highly coveted seats reserved for the traditionally “untouchable” castes at India’s top universities simply because they satisfy the requirements of being classified within that historically “untouchable” caste.⁹⁵ These wealthy beneficiaries capitalize upon the universities’ caste-based quotas through fraud and corruption and deny highly intelligent children from poor families the right to secure admission which they would have earned on their own merits in the absence

88. *Id.*

89. *Id.*

90. Gardiner Harris, *With Affirmative Action, India’s Rich Gain School Slots Meant for Poor*, N.Y. TIMES (Oct. 7, 2012), <https://www.nytimes.com/2012/10/08/world/asia/indias-rich-benefit-from-schools-affirmative-action.html>.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

of these mandated quotas.⁹⁶ Additionally, according to a recent BBC News report, India's affirmative action program has become a political gimmick.⁹⁷ Politicians use affirmative action quotas as a tool to win quick votes among their constituents by promoting added caste-based quotas as part of their political campaigns.⁹⁸ These examples show that the true goals of the affirmative action program are not being met. In many instances, the true beneficiaries of these affirmative action programs are not the actual ones benefiting from the fruits of these programs and affirmative action programs and quotas have been rampantly misused by rogue politicians seeking to win quick votes.

Comparing India's affirmative action program with that of Malaysia's, it is clear that the grave consequences of inequality and abuse resulting from India's program ought to be taken into consideration as a reason to halt the unduly lengthy period for preferential measures in Malaysia. An undefined end date not only reduces the efficacy of the pro-Bumiputera program but also undermines the results of the corrective measures undertaken. Moreover, analogizing to the abuse of caste-based quotas in India's higher education system, abusive "Ali Baba" ventures have gained notoriety in Malaysia.⁹⁹ These joint ventures lead to inequality as they involve an unqualified Bumiputera "renting" his ethnic status to a financially well-endowed non-Bumiputera for that non-Bumiputera to engage in that business venture. Although the non-Bumiputera is well-equipped with the assets and the capital to start a business venture in a given industry on his own, he is unable to do so without a Bumiputera business partner. This is pursuant to the pro-Bumiputera policy's designated quotas and total share capital allocations for Bumiputeras. Ali Baba ventures are abusive and unequal because the Bumiputera partner sits back and collects lucrative sums of money simply in exchange for "renting" his ethnic status to the non-Bumiputera business partner who invests his hard work, time, and savings into the business venture. Therefore, similar to India, Malaysia, too, encounters inequality as part of having an undefined end date for its preference laws.

3. Stipulated End Date

The NEP's goals have already been achieved. Therefore, Malaysia needs to define an end date to its preference system. The end date should be based on the achievement of the pro-Bumiputera policy's pre-defined goals, as

96. *Id.*

97. Soutik Biswas, *Is Affirmative Action In India Becoming A Gimmick?*, BBC NEWS (Jan. 10, 2019), <https://www.bbc.com/news/world-asia-india-46806089>.

98. *Id.*

99. *Policy Brief 13*, *supra* note 25, at 4.

stated in the NEP in 1971.¹⁰⁰ In addition to eradicating poverty, the NEP stipulated a 30% Bumiputera ownership of total share capital in Malaysia.¹⁰¹ Today, the 30% Bumiputera equity target has been achieved using the market value calculation. However, this Bumiputera equity target is unlikely to ever be achieved using the flawed par value calculation. Per the NEP, the 30% total share capital is calculated using a stock's par value.¹⁰² Additionally, the valuation of share capital excludes shares held by the federal and state governments.¹⁰³

Par value is a stock's face value.¹⁰⁴ Most stocks are issued a par value at the time of issuance.¹⁰⁵ Usually, corporations issues stocks with a nominal assignment for par value, such as a penny.¹⁰⁶ The par value is a very minimal amount a corporation assigns its shares to prevent legal liability in the event the price of its stock falls below the assigned par value.¹⁰⁷ For stocks, it is the market value that really matters.¹⁰⁸ Market value is a stock's actual value at any given time of trade on the stock market.¹⁰⁹ Market value fluctuates based on market conditions and is a better representation of the company's health along with the micro- and macro-economic conditions.

For illustrative purposes, Apple Inc.'s stock (NASDAQ ticker symbol "AAPL") as of the end of 2018 demonstrates the significantly enormous difference between par value and market value.¹¹⁰ As of the end of 2018, Apple Inc.'s assets totaled \$365.73 billion and its liabilities totaled \$258.58 billion.¹¹¹ While Apple's resulting total stockholders' equity was \$107.15 billion, its par value was just \$40.2 billion.¹¹²

Par value as a basis of valuation of share capital is egregious. As the Malaysia Press has noted, the government's methodology is incomplete because of the use of par value, instead of market price, along with its

100. See Eileen Ng, *New Book on 1969 Race Riots in Malaysia May Be Banned*, *Officials Warn*, TAIWAN NEWS (May 16, 2007, 18:12), <https://www.taiwannews.com.tw/en/news/451017>.

101. *Has 30pct Bumi Equity Target Been Achieved?*, MALAYSIKINI (Dec. 4, 2014, 4:23 PM), <https://www.malaysiakini.com/news/282322>.

102. *Id.*

103. *Id.*

104. Carol Kopp, *Par Value vs. Market Value: What's the Difference?*, INVESTOPEDIA (June 1, 2021), <https://www.investopedia.com/ask/answers/051115/what-difference-between-par-value-and-market-value.asp>.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

exclusion of government shareholding from the computation of equity ownership.¹¹³ An end date based on the achievement of the Bumiputera equity target ought to be implemented with a revised, more rational, calculation of total share capital. Total share capital should be calculated using a stock's market value instead of its par value.

As the example of Apple's stock demonstrates, the par value is an unrealistic basis for the formulation of the true value of a company's total shareholder equity. If Malaysia were to amend its calculation of total share capital to use par value instead of market value, the 30% Bumiputera quota for total share capital holdings would have been long met, thereby negating the continuation of the pro-Bumiputera policy. Not only are adequate goals and targets important in devising preference measures but also the standards and bases of calculations by which one measures how those pre-defined goals are met. Equality and fairness call for fair goals, fair standards, and fair practices in every aspect of society.

C. *Non-Race Based Affirmative Action Programs*

As in the United States, measures not focused on race, but on wealth, place of residence, and other less problematic distinguishing features can accomplish many of the same goals as racial preferences. While race-based affirmative action programs are subject to strict scrutiny in the United States, affirmative action programs focusing on income, family education and wealth are subject to a lower standard of review, namely the rational basis standard of review. This section explains the two standards of review along with alternative non-race-based affirmative action programs that Malaysia could adopt in place of its pro-Bumiputera policies so as to effectively target the categories of people who are expected to benefit from the program.

1. The Use of Strict Scrutiny

The United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,¹¹⁴ posits that strict scrutiny should be used regardless of the level of government whenever any race-based affirmative action is analyzed.¹¹⁵ The burden of proof is on the government to show that the narrowly tailored, race-based affirmative action program serves a compelling government interest. The government would have to show the discrimination is pervasive and would have to consider race-neutral ways to achieve the same goal and find that they are insufficient in order for the government to

113. MALAYSIAKINI, *supra* note 103.

114. 515 U.S. 200 (1995).

115. *Id.* at 201.

remedy it. Malaysia's program certainly fails this part of strict scrutiny. Nevertheless, a strict scrutiny approach is called for given the unique societal tensions and stigmas racial distinctions produce and the possibility of affirmative approaches to produce greater equity.

In *Parents Involved in Community Schools v. Seattle School District*,¹¹⁶ a case involving race discrimination without an invidious purpose, strict scrutiny was applied.¹¹⁷ The United States Supreme Court held that remedying past discrimination could not be used as a compelling interest to justify the Seattle School District's ongoing plans because the School District had remedied the past discrimination.¹¹⁸ This rule is correct because remedied past discrimination cannot be used for the continuation of race-based affirmative action programs. It does not make sense to base an actively ongoing affirmative action program on a past course of discrimination that has been remedied. The Court reasoned that the essence of an affirmative action program is to correct an existing inequality. Similarly, in Malaysia, past discrimination that has been remedied cannot serve as the basis for ongoing race-based preference measures. As explained above, Malaysia has reached 30% using the market value versus the par value of a given stock and past racial inequalities has been rectified with the Malays accumulating a significant amount of wealth. Instead, non-race based affirmative action programs can be adopted as further discussed below.

2. The Use of Rational Basis Review

If Malaysia instead focused on income, place of residence, family education, or wealth, it would be focusing on characteristics more relevant to the sources of inequality. This would make such non-race-based affirmative action programs less questionable because it would be dealing with categories of people the state would be expected to wish to assist because of social and economic disadvantage.

Healthcare, food, shelter, and education are not deemed fundamental rights under the Constitution of the United States.¹¹⁹ Under rational basis review, the burden of proof is on the challenger to show that the government's action is rationally related to a legitimate government purpose. Unlike strict scrutiny where the burden of proof is on the government, rational basis review affords the government more leeway and flexibility. The fit between the law in question and the government's purpose is allowed

116. 551 U.S. 701 (2007).

117. *Id.* at 758.

118. *Id.* at 702-03.

119. *See generally*, U.S. CONST.

to be poor under rational basis review such that any conceivable legitimate purpose suffices, regardless of whether it is the government's actual purpose.

Under rational basis review, it is acceptable to deny one group rights but approve another group those same rights because the relationship only has to be rationally related; thus, over-inclusivity and under-inclusivity of laws are permitted. Laws reviewed using a rational basis standard are allowed to be under-inclusive because the legislature is allowed to take incremental steps, one step at a time. Additionally, cost savings and administrative inconvenience to the legislature are valid excuses in favor of the government under rational basis review.

Therefore, instead of race-based pro-Bumiputera policies, Malaysia could opt to enact affirmative action programs based on income, place of residence, family education, and wealth that are rationally related to any conceivable legitimate government purpose. These laws are allowed to be over-inclusive or under-inclusive allowing for the government to take incremental steps of corrective action. The Malaysian government's policies would then only be subject to a rational basis standard of review, and the legislature would be allowed to account for cost savings and administrative burdens in deciding the acceptability to deny one group rights while approving another group those same rights.

Nonetheless, fear or bare dislike of a group is never sufficient as a legitimate purpose. The only explanation for the Malaysian approach today is a desire of a majority group to dominate minorities for its own benefit. Under rational basis review, any conceivable purpose would work but not where the actual purpose is known and where the challenger has proved actual animus behind the law. In such cases, rational basis review is applied more strictly—with “teeth.” In *United States Department of Agriculture v. Moreno*,¹²⁰ rational basis review with “teeth” was applied to a law that prevented people from obtaining food stamps when they lived with someone in the same house unrelated to them who already claimed food stamps.¹²¹ The law in this case was struck down because the animus against hippies was the actual purpose of the law. While individual citizens may hold their own biases and prejudices based on the circumstances of their upbringing, for instance, the government is not allowed to hold such biases and prejudices toward any specific group of the society. It does not matter if the government is merely mirroring the feelings of the general population. The government is, under no circumstances, allowed to legitimize fear, hate, animus or bare

120. 413 U.S. 528 (1973).

121. *Id.* at 535-36.

dislike toward any selected group of people regardless of whether it is based on the group's mutable (e.g., wealth) or immutable (e.g., race) traits.

III. CONCLUSION

Given the analysis between strict scrutiny and rational basis review, Malaysia should use a rational basis review approach and implement affirmative action measures focused on income, family education, or wealth. For instance, affirmative action programs could target those with a combined household income below a certain designated threshold; this would assist and better the lives of citizens of limited means regardless of race. The prevalence of misuse via "Ali Baba" antics would be reduced via wealth-based affirmative action measures. Moreover, wealth-based affirmative action programs would still further of the objective of eradicating poverty, which was the original goal of the pro-Bumiputera policy.

To combat the extreme human rights violations of non-Malays in Malaysia, Malaysia should engage in non-race-based affirmative action programs and stipulate an immediate end date of pro-Bumiputera policies given that the Bumiputera total share capital in Malaysia has reached 30% under a market value calculation.