

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

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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

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.

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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

*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

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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>.

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

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

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

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

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

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

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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.