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Op-ed

BEE Needs An Outcomes-Based Sunset Clause

By Daryl Swanepoel

More than three decades into democracy, South Africa remains caught in an increasingly sterile argument about the future of race-conscious economic transformation. On one side are those who argue that 30 years is long enough. Apartheid ended in 1994, they contend, and policies based explicitly on race should therefore now come to an end. On the other are those who point to continuing racial disparities in ownership, wealth, management, skills, access to capital and economic opportunity as evidence that transformation remains unfinished.

Both arguments contain an element of truth. Neither provides a satisfactory way forward.

The passage of time cannot determine whether redress is still necessary. Thirty years, forty years or even fifty years tell us nothing, by themselves, about whether the disadvantage an intervention was intended to overcome has actually disappeared. If substantial racial inequality remains, the calendar does not cure it.

But the opposite proposition is equally problematic. The fact that apartheid created profound and enduring inequality cannot mean that every race-conscious remedial measure should continue indefinitely in substantially the same form, regardless of the progress achieved.

What South Africa lacks is a bridge between redress and the non-racial society that redress is ultimately intended to help create. That is why we should consider introducing an outcomes-based sunset framework for race-conscious economic policy.

The distinction between an automatic sunset date and an outcomes-based sunset framework is fundamental. A provision declaring that BEE or race-conscious preferential procurement must end in 2035, 2040 or 2050, irrespective of the outcomes achieved, would substitute chronology for evidence. It could terminate legitimate remedial measures while substantial disadvantage remains.

An outcomes-based sunset would work differently. Instead of asking how many years have passed, it would ask what has changed. Has ownership broadened? Has access to finance improved? Has participation in management and professional occupations increased? Are black-owned enterprises surviving and growing beyond protected markets? Are skills, employment and productive capacity expanding? Are racial disparities in particular sectors materially narrowing?

As those outcomes improve, the nature and intensity of intervention should change.

Where substantial exclusion remains, strong remedial measures may still be justified, including targeted preferences, set-asides, development finance and sector-specific interventions. As participation and capability improve, policy should progressively move away from absolute or

exclusionary measures towards preference combined with enterprise development, investment, skills transfer, employment creation and supplier development.

As racial disparities narrow further, assistance should increasingly be determined by present circumstances, poverty, geography, access to capital, enterprise size, youth, disability and exclusion from opportunity. Race may remain relevant for as long as the evidence shows that it remains a significant predictor of disadvantage, but it should become progressively less determinative as that relationship weakens.

Ultimately, once the measurable disadvantage that justified a particular race-based intervention has substantially been overcome, that intervention should fall away. This would provide something conspicuously absent from South African transformation policy: a destination.

It would also provide greater certainty to those South Africans and investors who worry that racial classification will remain a permanent feature of economic participation. An outcomes-based sunset would make clear that race-conscious measures are not intended to organise the economy indefinitely. The state would specify the outcomes being pursued, how progress will be measured, when it will be reviewed and what improvement would trigger movement towards a less intrusive form of intervention.

Alternatively, Parliament could establish a provisional sunset date, subject to renewal on clearly defined and evidence-based grounds. Such a date would not automatically terminate transformation policy. It would instead create a statutory decision point at which government would have to demonstrate whether the relevant measures remained necessary. If the specified outcomes had not been achieved, the measures could be renewed for a further defined period, with their scope and intensity determined by the evidence and, where appropriate, by sector-specific circumstances. This would preserve the outcomes-based character of the framework while providing greater policy certainty and potentially generating less opposition.

But there is another, potentially more important, benefit. A properly designed sunset framework could create a powerful incentive to accelerate transformation itself.

Businesses and sectors that have resisted transformation, or treated it largely as an exercise in minimum compliance, would confront a different proposition. If they want race-conscious interventions to become less intrusive or disappear, the most effective way of achieving that would be to help overcome the measurable disadvantage that continues to justify them.

In other words, those who most want race-conscious economic policy to end should have the greatest incentive to help make it unnecessary. That changes the dynamic of the debate considerably.

A sector in which ownership, management participation, skills development, enterprise formation and access to capital remain profoundly racially skewed could hardly demand the removal of remedial measures simply because enough years had passed. But neither could government justify maintaining the same intervention indefinitely once credible evidence showed that the disparity it was intended to address had substantially diminished.

The sunset would therefore work in both directions. It would protect necessary redress against arbitrary termination, while protecting society against the permanent institutionalisation of racial intervention. It could also turn transformation from a compliance exercise into a measurable national project. Instead of arguing endlessly about whether one is “for” or “against” BEE, the more useful

question becomes: what outcomes must South Africa achieve for a particular intervention to become unnecessary?

Those outcomes should be established transparently and in advance. They could include sector-specific measures of productive-asset ownership, management participation, access to commercial and development finance, enterprise survival and growth, professional and technical skills, employment and apprenticeship creation, participation in private-sector supply chains, and income and wealth disparities.

No single measure should determine the result, nor should national averages dictate policy across every industry. Transformation may advance much faster in one sector than another. A sector demonstrating substantial, sustainable and broad-based participation should not necessarily remain subject to the same intensity of intervention as one in which historical exclusion remains entrenched. Independent measurement and periodic review would therefore be essential. Otherwise, the sunset itself risks becoming another political argument, with government claiming transformation remains inadequate and opponents claiming it has already been achieved. The credibility of the system would depend on evidence that both sides can interrogate.

There is also constitutional logic to this approach. South Africa's constitutional order embraces both substantive equality and non-racialism. These are sometimes treated as competing principles when they should instead be understood as points along the same journey. Remedial measures exist precisely because formal equality alone cannot overcome the consequences of past exclusion. But those measures are instruments for achieving a different society; they cannot sensibly become the permanent definition of that society.

The Constitutional Court has itself emphasised that remedial measures are not ends in themselves. Their ultimate objective is a more equal, fair, non-racial, non-sexist and socially inclusive society.

Public policy should therefore be capable of explaining how we move from one condition to the other. An outcomes-based sunset offers such a pathway. It says to historically disadvantaged South Africans that redress will not simply disappear because an arbitrary number of years has elapsed. Where measurable disadvantage remains, the case for intervention remains. At the same time, it says to those who fear that racial economic policy has no endpoint that there is one, and that progress towards it can be objectively measured.

Most importantly, it gives both groups an interest in the same outcome.

South Africa should not be asking when transformation has been around for long enough. We should be asking when it has achieved enough.

Whether it operates through continuous outcomes-based adjustment or through a provisional date subject to evidence-based renewal, a sunset clause should not allow transformation to end merely because time has passed. It should establish how we will determine whether a particular form of redress remains necessary, should be modified, or has succeeded. Successful transformation should ultimately make the most intrusive forms of transformation policy less necessary.

That should be the destination.

Daryl Swanepoel is the Chief Executive Officer of the Inclusive Society Institute (ISI). This article draws on the Institute's assessment of South Africa's preferential procurement regime and its proposal for an outcomes-based sunset framework for race-conscious economic redress.