Affirmative Action Regime Formation in Malaysia and South Africa

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Abstract
This paper examines the formation of majority-favouring affirmative action (AA) regimes in Malaysia and South Africa. Malaysia’s Constitution premises AA on a group’s special position; South Africa’s refers to unfair discrimination. Malaysia established AA amid continuation of a political order and consolidation of executive power, while South Africa democratized and transitioned from minority- to majority-rule. Minority groups held less economic power in Malaysia than in South Africa. Consequently, AA in Malaysia is characterized by discretionary decision-making, and quota-based, centralized programs, whereas South Africa has followed a legislative route involving negotiation and enforcement of target-based, statutory requirements, under less centralized oversight.

Keywords: Affirmative action, Malaysia, South Africa, ethnicity, race, inequality, disadvantage, discrimination
Introduction

Malaysia and post-apartheid South Africa are commonly paired in discourses on affirmative action (AA), sharing a rare trait as upper-middle income countries implementing affirmative action in favour of a politically dominant and economically disadvantaged majority ethnic group. The Bumiputera in Malaysia comprise the politically predominant Malays and other indigenous groups, constituting 67 per cent of the population in 2010, while the ‘black’ category in South Africa, conventionally referring to Africans, Coloureds and Indians, make up 91 per cent of the population in 2011. Colonial and Apartheid legacies of exclusion, discrimination and repression entrenched systemic forms of disadvantage, resulting in severe group under-representation in socially esteemed and economically influential positions. Gross under-representation of Bumiputeras in Malaysia and blacks in South Africa in tertiary education, high level occupations, and ownership and control of capital have compelled state action to redress these disparities, with far more extensive interventions than in countries with disadvantaged minority groups. In the wake of social unrest in 1969 in Malaysia, and in the face of uncertainty in South Africa’s mid-1990s transition from Apartheid to democracy, both countries expanded or introduced majority-favouring affirmative action. This paper enquires into the similarities and differences in the formative conditions of affirmative action regimes and in their resultant characteristics.

Affirmative action regimes in Malaysia and South Africa have been viewed from particular angles, which have framed and limited comparative analysis in two notable aspects. First, Malaysia’s long experience and considerable achievements in redressing socio-economic disadvantage of the majority population have led cross-country work to be approached predominantly in one direction, with Malaysia as a reference point for South Africa, not with both countries as mutually informing experiences. In the early- to mid-1990s, when South Africa enquired into other countries’ experiences for devising its economic policies, Malaysia stood out
as a potential model of majority-favouring affirmative action. A number of observers and scholars outlined possibilities for South Africa of adopting Malaysia’s policies, pointing out similarities and differences in economic structure and performance, in global macroeconomic conditions and in the extent of unemployment and poverty (Hart, 1994; Emsley, 1996; Southall, 1997). In recent years, attention in South Africa has fallen again on Malaysia, as affirmative action legislation and programmes have become established and debated (Hermann, 2007). In contrast, reference to South Africa is entirely absent in any literature focusing on affirmative action in Malaysia. By now, South Africa’s near two decades-long experience with AA provides material for a two-way study vis-à-vis Malaysia.

Second, there has been inadequate attention to the formation of affirmative action regimes and their consequent characteristics. AA was established in particular political, social and economic contexts, which have shaped the orientation and structure of laws, policies and instruments. In Malaysia and South Africa, constitutional provisions for affirmative action, political transitions and concomitant ethnic dynamics, and the relative economic power of majority and minority groups, have fundamentally and distinctively impacted on AA. Attention to these conditions and factors enhances our understanding of the forms and logistics of policies, as well as the outcomes and implications.

This paper offers perspectives on affirmative action in Malaysia and South Africa that extend from the limitations outlined above. I explore three aspects of the formation of AA. First, the constitutional provisions for AA contain some fundamental differences. Second, while the transition to intensive AA in Malaysia from the early 1970s was underpinned by continuation of Malay political power and consolidation of the group’s primacy, South Africa in the early 1990s witnessed the shift in the electoral power base from white minority to black majority, and the declaration of non-racialism and non-sexism as pillars for constructing a new democratic polity.
The political structure in Malaysia, where the executive is dominant and authority centralized, notwithstanding its federated composition, contrasts with South Africa, which transitioned from a fragmented polity to a new federation with comparatively more devolved authority and more balance and independence of legislature, executive and judiciary. Third, minority economic power was less pervasive in Malaysia and foreign ownership was high, whereas in South Africa minority control was comprehensive, spanning all industries and both public and private sectors, except for the Bantustans.

Differences in political economic context correspond with AA regimes that can be contrasted in the following areas. First, Malaysia is characterized by discretionary decision-making by a dominant executive branch of government, whereas South Africa has followed a more legislative route involving negotiation and enforcement of statutes and codes. Second, the scope and intensity of AA varies broadly by sector. In Malaysia, preferential programs in tertiary education and asset ownership have been direct and extensive, but interventions in employment have been limited to the public sector. South Africa has intervened less intensively and more indirectly in tertiary education and asset ownership, but enforces employment equity across all sectors. Third, the instruments of AA differ, with Malaysia oriented toward quotas or ethnically-exclusive programs administered by federal government against South Africa’s codified, statutory requirements to meet targets for equitable group representation under less centralized oversight. At the same time, we can also note some commonalities between our countries, particularly in the prominent role played by the public sector and public enterprises in employment and upward advancement of the beneficiary group, and in the business-political nexus that has become entrenched in distribution of state largesse.
Affirmative Action Regime Formation: Political Economic Context

Affirmative action in this paper refers to preferential measures to redress systemic disadvantages faced by a population group that is under-represented in socially esteemed and economically influential positions. This definition, drawing on a broad literature, encapsulates measures targeting group representation in higher socioeconomic strata (Brown, Langer and Stewart, 2012; Fryer and Loury, 2005; Sabbagh, 2003; Weisskopf, 2004). Some degree of group preference is required, because high barriers to entry compound and perpetuate group under-representation: entry requirements for university admission, degree qualifications for professional occupation, and work experience for promotion to management. AA policies thus substantially emerge out of the political unsustainability of particular groups’ under-representation in the above positions, as well as the propensity for such inequities to persist without coordinated action.

Accordingly, this study’s demarcation of AA will encompass areas that impute social esteem and/or economic influence, chiefly tertiary education, high level occupations, and ownership and management. Maintaining our focus on regime formation, I offer explanations for the historical fact that AA became established in Malaysia and South Africa, leaving normative questions affirmative action and detailed analyses of policy outcomes to be taken up in other spaces. This section proceeds to discuss major areas of contrast in AA regime formation and institutional framework, summarized in Table 1.
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Constitutional Provisions

Malaysia and South Africa are exceptionally distinguished, even among countries practising affirmative action, by the fact that their respective founding Constitutions set out the justification and scope of these policies. Beyond this commonality at the broadest level, however, the contents of the law and implications on AA substantially differ. Malaysia’s Constitution stipulates safeguarding Bumiputera ‘special position’, while South Africa’s 1996 Constitution premises its provision for AA on being disadvantaged due to unfair discrimination.

The Malaysian Constitution establishes both the principle of equality and provisions for affirmative action. Individual equality and prohibition of discrimination are set out in Article 8, ‘[e]xcept as expressly authorized by this Constitution’. Article 153 grants such authorisation, through provisions for the Yang Di-Pertuan Agong (the national king) to ‘exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak [i.e. the Bumiputera] and the legitimate interests of other communities’, by reserving places for the designated group in public sector employment, scholarships, training programs, and licenses (Malaysia, 2006).

The South African Constitution also articulates equality with qualifications, with distinct terms of reference (South Africa, 1996). While equality is a basic right, Article 9 stipulates, ‘[t]o 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’. In the spheres of education, employment and contracting, the Constitution provides for selection criteria that take into account redress of past discrimination or broad group representation. The most outstanding landmark must be the Employment Equity Act (1998), which distinguishes two
stages to the process of attaining equity: legislation of non-discrimination, and official provision for affirmative action to correct historical unfair discrimination.

What implications do these constitutional provisions hold for the practice of affirmative action in Malaysia and South Africa? First, they grant AA a considerable measure of legitimacy, but at the same time increase the latitude for political manipulation and perpetuation of group preference. Debates over the constitutionality of AA policies are basically settled, although the mechanism, scope and duration of AA have been contested. Nonetheless, the promotion of Bumiputera and black interest can be taken to much greater lengths than in other countries. As noted by Sabbagh (2004: 5), in reference to these two countries, ‘the constitutionalization of affirmative action has probably facilitated its radicalization’.

Of course, it is not just the existence of legal safeguards, but the exercise of such provisions by a political majority, that shape and consolidate AA policies. In Malaysia, the Constitution’s precise stipulation that particular reservations and quotas can be implemented to safeguard the ‘special position’ of the Bumiputera has transmuted in political and popular discourses – even in school syllabuses – into a general and permanent guarantee of ‘special privileges’ or ‘special rights’ (Brown, 2007). In South Africa, Article 9’s designation of beneficiaries based on disadvantage due to unfair discrimination avoids explicitly identifying an ethnic group, clearly allows for gender- and disability-based AA, and formally constrains claims for permanent entitlements. Preferential treatment has in practice applied predominantly to blacks – i.e. ethnic groups that have been unfairly discriminated against. However, the difference in the explicit and implicit elements of the above Constitutional articles remains clear. Whereas Malaysian law designates Bumiputera as recipients of preference and implies they face disadvantages, South African law designates persons disadvantaged through unfair discrimination, with the connotation of primacy to ethnic discrimination as the basis for redress.
Second, following their distinct Constitutional frameworks for AA, Malaysia and South Africa negotiate in particular ways the tensions between preference and equality, and between majority and minority interest. In Malaysia, the ethnic identification of preference directly translates into an ethnic framing of the contending interests associated with AA. The exercise of ethnic preference is constitutionally countervailed by a proviso that the legitimate interests of non-Bumiputera groups also be safeguarded, without referencing those interests to the principle of equality or fairness. The administration of AA has largely undertaken the form of bargains between discriminatory practices in some spheres, most saliently the public sector, for relative non-intervention in other spheres, particularly small and medium scale business. Malaysia’s complex of communal accommodations has also involved social and political platforms – notably, cultural and religious space, Chinese- and Tamil-medium schools – which have moderated grievances against unequal opportunity due to AA.

In South Africa, legislation substantively incorporates tensions between equality and affirmative action. The Constitution articulates non-racialism and non-sexism as founding principles. Some universities have had to answer in court for giving preference to African applicants (February, 2010). The Employment Equity Act (EEA), in specifying that ‘suitably qualified’ disadvantaged persons be accorded preference, also opens the way for legal challenge. Lawsuits have been brought against employers, especially public departments, for unfairly discriminating against whites by appointing less qualified blacks, by not filling positions even while qualified candidates were available, or by continuing to conduct AA after group representation targets were met.

Third, the laws orient AA regimes toward particular modes of operation. Malaysia’s interventions preponderantly take the form of quotas and reservations, while South Africa employs goals and targets (Sabbagh, 2004). Quotas and targets are not mutually exclusive;
indeed, targets are meaningless unless attached to a quantifiable allocation, and in this sense are akin to quotas (Fryer and Loury, 2005). However, they are differentiable in the degree to which the designated portion is fixed and mandatory. A case in point is the implementation of South Africa’s employment equity, which applies pressure on employers to attain a composition in high level positions proportionate to the economically active population, but not strictly reserving a fixed share for beneficiaries.

**Structure and inter-ethnic dynamics of political transition**

Affirmative action is invariably driven by political pressures and imperatives, which were exceptionally strong in the Malaysian and South African contexts. The political establishments of Malaysia and post-apartheid South Africa were clearly able to exert AA agendas of greater scope and scale than in most countries, due to both the majority group’s political strength and the magnitude of their under-representation and disadvantage. It is worth reiterating that the primary purpose of this paper is to observe and analyse the formation of regimes, not to probe the normative basis for AA or to give a full account of debates at its inception. While acknowledging the momentous political pressures compelling AA in Malaysia and South Africa and the policy’s controversies, this paper focuses attention on where and how AA has been implemented, not whether it should have been initiated.

Affirmative action became established amid political transitions. Malaysia sustained a Malay-based political order and bureaucracy throughout post-Independence nationhood from 1957, then reasserted Malay political dominance and increased executive powers while expanding and intensifying AA from 1971. South Africa transformed from Apartheid minority rule to democratic majority rule through a negotiated transition, culminating in the 1994 elections.
and a comprehensive transformation of polity, society and economy (Marais, 2001; Terreblanche, 2002).

Malaya’s 1957 Independence Constitution arose from an ‘elite pact’ arranged among the three ethnically constituted parties of the Alliance government, the United Malays National Organisation, the Malaysian Chinese Association and the Malaysian Indian Congress. In the economic policy sphere, non-Malays accepted Malay preferential programs, concentrated in the public sector, in exchange for largely hands-off relationship between state and private enterprise. With the formation of Malaysia in 1963 and the incorporation of Sabah and Sarawak, two states with large indigenous populations, the category of beneficiaries was broadened to include Malays and other indigenous groups under the Bumiputera label. Malay precedence in politics and the bureaucracy, together with a range of AA programs, were in place from 1957 in public sector employment, scholarships, licenses, and financial assistance. However, the scale of interventions was limited, and became a source of disaffection in sections of the Malay community. While the causes of the May 13, 1969 post-election riots in Kuala Lumpur are complex, persistent inter-ethnic disparity is acknowledged as a major contributing factor (Khoo, 2005; Gomez and Jomo, 1999). Little is documented about the policy process in the 1969-1971 interregnum, besides brief account of the debates that took place between schools of thought, both backed by international advisory services, with one side arguing for a growth-centred strategy and the other side – which ultimately prevailed – pressing for pro-Malay affirmative action (Faaland, Parkinson and Saniman, 1990).

The continuity in Malay-majority political power and the existence of AA policies throughout Malaysia’s post-Independence period must be noted as a point of contrast to the South African experience. At the same time, promulgation of the New Economic Policy (NEP) in 1971 marked a turning point, after which the affirmative action regime within the NEP’s broad
developmental vision burgeoned to vastly greater scale and force. Importantly, this shift took place in the context of a reassertion of Malay primacy and promotion of more overtly pro-Malay policies, as well as an expansion and centralization of discretionary executive power, capitalizing on the political uncertainties in the aftermath of the May 13th upheavals (Khoo, 2005). Economic planning and information was placed more tightly under the Prime Minister’s control. A range of legislative changes constricted dissent and broadened executive power, including the Sedition Act 1948, which proscribes questioning of Article 153, along with vaguely defined seditious tendencies.

Inter-group configurations also came to bear on the formation of Malaysia’s AA regime. Unlike in many countries with AA, Bumiputera and non-Bumiputera in Malaysia were not in the past engaged in direct, harsh discriminatory relationships. Hence, measures that were premised on reparation for past unfairness, such as general requirements that employers hire more Bumiputera, could not gain traction, since non-Bumiputera had not in the past systematically marginalized Bumiputera. Overall, minority economic interest was also not as widespread and powerful in Malaysia compared to South Africa, as discussed in the next segment. Thus, in some areas, especially the labour market, the scope for Malaysia’s AA interventions were narrower. Moreover, boundaries for AA have in large part been marked by compromises, in line with the Constitution, allowing group quotas in public education, public sector employment, and government licensing and contracting, while limiting interventions in private business. The introduction of the Industrial Coordination Act (ICA) in 1975 requiring manufacturing firms to allocate 30 per cent of equity to Bumiputeras met with strong resistance, especially from Chinese business, due to the material interests at stake as well as the infringement on the hitherto restraint in ownership regulations. The ICA galvanized protest, resulting in the exemption of most firms from having to redistribute equity and steady dilution of its role.
In marked contrast, South Africa democratized and grappled with balancing black advancement against potential alienation or backlash from a white population dominant in every industry and across public and private sectors. The South African Constitution set out non-racialism and non-sexism as national founding principles, and supplied a framework for democratic governance and checks on executive power. Spatially, existing provincial power structures, and the established autonomy of public institutions, especially universities, compelled less centralization of authority. To illustrate the difference in the countries’ democratic space, we can note that, unlike Malaysia, challenging provisions for affirmative action in South Africa is not prohibited, and emphatically not legislated as punishable, seditious offenses.

In South Africa’s circumstances, the black population, while constituting an overwhelming demographic majority, negotiated from a relatively weak position, having been previously excluded from high level positions in government, the bureaucracy, and the private sector. The ‘sunset clause’, an agreement to retain senior government officials in the five years following the 1994 elections, was both a bargaining move and an acknowledgment that qualified and experienced non-whites were simply not available in sufficient numbers to fill those spaces if a more aggressive redistribution had taken place that could trigger a rapid exodus of whites. In addition, transition authorities in the early 1990s were engaged in various high-priority conflicts and negotiations. The need to quell social instability and violence, merge a fragmented public service, integrate separate education systems and address workers’ basic demands took precedence over direct interventions in redistributing upward mobility opportunities in favour of blacks, and compelled a more conciliatory posture and a less dominant executive.

On the other hand, the South African state could engage white economic and governmental entities from the standpoint of directly correcting previous discrimination, whereas in Malaysia, Bumiputera and non-Bumiputera establishments were not historically opposite sides of
exploitative relationships. Thus, while South Africa adopted a more legislative route with more constraints on executive power, the scope of some of its AA institutions, notably employment equity, are broader than in Malaysia.

An ‘ethnic bargain’ of sorts also accompanied South Africa’s post-apartheid transition. However, in contrast to Malaysia’s negotiation between ethnicity-based political parties and constitutional provisions for Bumiputera special position and legitimate interests of other communities, South Africa’s bargain was more implicit and, arguably, more malleably renegotiated. An accommodation coalesced in the 1990s, in which ‘whites/the NP/large-scale capital conceded formal political power, while blacks/the ANC/the incoming political elite agreed to the continuance of white domination of the economy’ (Southall, 2007: 83). Slow progress in advancing black ownership and wealth accumulation, however, induced pressures from the late 1990s for more direct and effective interventions, out of which Black Economic Empowerment became mainstreamed and formalized. Thus, South Africa saw the formation of the BEE Commission, industry-led charters which set industry-specific targets for black advancement, and the Broad-Based BEE Act of 2003 that sought to harmonize the terms across industries and incentivize BEE among private, predominantly white, capital.

The political transitions undertaken in Malaysia and South Africa impacted on AA programs in two key aspects. The first pertains to the mode of governance. The greater latitude of the executive branch of government in Malaysia facilitated discretionary, top-down AA policy, whereas the relatively more constraints on executive power in South Africa presaged a more legislative route compelling the pursuit of AA through statutes and codes. The second revolves around general forms of AA programs. The ‘ethnicization’ of Malaysian politics and policy discourses in the wake of the 1969 unrest, coupled with constitutional sanction, provided a context for the introduction of quota-based measures, creation of Bumiputera-exclusive AA
programs, and more direct state intervention in creating a Bumiputera capitalist class. The founding principle of non-racialism in South Africa, reinforced by the dangers of alienating the minority white population, inclined the AA regime toward the objectives of representativeness and diversity through targets and incentives.

Encroachment of political partisan agendas on affirmative action warrants a brief discussion. Personnel appointments and promotions in the public sector and public enterprises or government-linked companies, as termed in Malaysia – being directly under the Executive’s control, pivotal to policy implementation, and exploitable for dispensing patronage – would be politicized to some degree, regardless of the extent and form of affirmative action. However, unchecked capture by political interest can undermine policy efficacy, through excessive pursuit of representation targets and especially where loyalty and party connection supersede competency and non-partisan professionalism. In Malaysia, loyalty to the ruling National Front, specifically to the coalition’s dominant United Malays National Organisation (UMNO), has become deeply embedded and indoctrinated in the civil service. Problems arising from this practice regularly surface in popular discourses, though arguably not as saliently as in South Africa, due to the manufactured consent of the state-party nexus that obviates explicit demonstration of party allegiance.

In South Africa, the ANC’s ‘cadre deployment’ has featured prominently and consistently. This de facto practice can be traced to the ANC’s 1985 National Consultative Conference which focused on the liberation movement’s internal organization, and discussion documents of 1996 which raised the issue of “cadre development” and called for more attention to “strategic deployments” to positions in the civil service, the military, police and intelligence services (Mkongi 2013, Netshitenzhe 1996). The impetus of those galvanizing efforts is understandable, taking into account the political necessity of cohesively securing levers of power, at a time that
administrators from the Apartheid era were retained and cohorts of the liberation struggle were seeking influential positions while lacking governmental experience. However, the pervasiveness and duration of such a campaign are questionable, and contrary to the democratization process. Cadre deployment, persisting into the 2010s, has been singled out in academic analysis as a major problem of public administration (Kanyane, Houston and Sausi, 2012).¹

**Inter-ethnic socioeconomic disparity and minority economic strength**

Differences in the disparity between majority and minority groups, and in the magnitude of minority economic strength, played a part in shaping majority-favouring AA regimes in Malaysia and South Africa. The gulf in political-economic power and social status between the majority blacks and minority whites in South Africa was substantially greater than that between majority Bumiputeras and minority Chinese and Indians in Malaysia. South Africa’s, mining rights white population owned virtually all capital, mining rights and productive land, held all senior positions in government and in business across all industries, and reserved access to the best schools and universities, whereas Malaysia’s Chinese and Indians held substantial but not entirely dominating positions in education, employment and ownership.

Socioeconomic indicators at the inception of AA reflect the exclusion of Bumiputera from the Malaysian mainstream, and the more severe, systematic repression of the black population under Apartheid. In Peninsular Malaysia in 1967, the Chinese: Malay household income ratio was recorded at 2.47, and the Indian: Malay household income ratio at 1.95 (Anand, 1981). In South Africa, household income ratios in 1991 were 11.1 for white-African, 5.7 for white-coloured, 3.0 for white-Indian (Whiteford and van Seventer, 2000). Access to education reveals a similar pattern of worse ethnic disparity in South Africa. The ethnic composition in 1970 at the University of Malaya – Malaysia’s then sole higher education institute – generally reflected the
national population, although Malay representation in some fields was exceedingly low. Differentials in the participation rate – the percentage of 20-24 year olds enrolled in higher education – in South Africa in 1993 show how opportunities were overwhelmingly narrower for Africans, who registered 12 per cent participation, compared to 70 per cent for whites (Department of Education, 1997). Moreover, black students were concentrated in the systemically inferior historically black/disadvantaged institutes, while historically white/advantaged institutes catered abundantly for the minority.

Perhaps most politically consequential was the under-representation of the majority group in decision-making positions, especially in the private sector, and in equity ownership. While Malays constituted 52.7 per cent of the Malaysian population in 1970, they represented 22.4 per cent of management and administrative positions. In the top rungs of the civil service, Malays filled 39.3 per cent of positions (Malaysia, 1976; Khoo, 2005). The South African population of 1996 consisted of 76 per cent Africans, but among senior management in the private sector, Africans accounted for an estimated 3 per cent. In 1995, blacks constituted 40 per cent of managers in the public service (Adam, 2000; Naidoo, 2008). With regard to equity ownership, Bumiputera interests owned 2.4 per cent of total share capital, while non-Bumiputera Malaysians held 28.3 per cent and foreigners 63.4 per cent. Blacks held virtually zero equity. Furthermore, South Africa’s white-owned conglomerates amassed gargantuan shares of wealth. In 1992, six conglomerates controlled companies accounting for 85.7 per cent of market capitalization of the Johannesburg Stock Exchange (Hirsch, 2006).

The scope and capacity of the state to redistribute opportunity and engage with economic interests differed across countries, with particular implications on education, employment and ownership. The dearth of tertiary education in Malaysia, with just one university in 1970, required the creation of new universities. This in turn provided conducive conditions for
university administration to be centralized, for admissions quotas to be embedded from the start, and for the establishment of Bumiputera-only institutions. In contrast, South Africa’s chief objectives in higher education were to increase black entry to the existing and autonomous historically white institutions and to help historically black institutions close the quality gap. In these conditions, efforts focused on existing institutions, to which the government decentralized the AA agenda and devolved implementation to the individual universities and tertiary institutes. Toward the objective of increasing participation in high level occupations, Malaysia’s public sector had constantly applied ethnic preference – with greater intensity from the 1970s – which solidified the designation of the public sector, and state largesse more generally, as avenues for Bumiputera advancement. With the black population systemically denied access to high level occupations in public and private sectors, South Africa adopted policies and legislation encompassing both.

In the area of equity distribution, minority economic strength played a pivotal role. The minority groups in Malaysia, especially the Chinese, had gained economic footholds in some sectors, but not comprehensive power. Thus, the state was in a fairly strong position to extract concessions. Additionally, large foreign holdings in Malaysia presented an external target for equity transfer to Bumiputera interests, thereby defusing domestic conflict to some extent. White-owned big business, leveraging its dominance over the South African economy, manoeuvred to secure its interests and to exert influence over economic policy from the 1980s. The template for a neoliberal macroeconomic framework was laid before the political transition, through private, closed-door, sometimes clandestine meetings between representatives of the apartheid government, business, and the liberation movement. The threat of capital flight, and pressure to assimilate South Africa into the global economy, gave rise to measures guaranteeing capital mobility. Hence, the incipient democratic South African state engaged with domestic capital from
a relatively weak position, allowing capital to set the agenda (Sparks, 2003; Gqubule, 2006). Towards the late 1990s, fears of more aggressive state-sanctioned redistribution spurred industry-based initiatives and charters to promote black economic opportunity and interest, which later evolved into the Black economic empowerment (BEE) ‘scorecard’ framework (Southall, 2004; Ponte, Roberts and van Sittert, 2007).

**Affirmative Action Programmes**

The preceding discussion leads to a threefold comparison of affirmative action programmes (Table 2). First, in terms of the overall framework, Malaysia has prosecuted AA primarily through a strong state exerting discretionary power, while South Africa has compelled or induced compliance with AA objectives through statutes and legal codes of practice. Second, interventions exhibit variation in intensity and sectoral focus. Malaysia directly and intensively implemented ethnic quotas and ethnically exclusive programs in tertiary education, equity ownership, and employment – although only in the public sector. South Africa enforced employment equity across private and public sectors, but less intensively and more indirectly endeavoured to transform tertiary education and equity ownership. Third, the instruments of AA vary, with Malaysia’s regime generally applying group quotas or ethnically-exclusive programs under central administration, whereas South Africa has gravitated toward targets and more decentralized authority. Specific affirmative action programs in the three principal areas – tertiary education, high level occupations, and ownership and enterprise development – help illustrate these distinctions, to which we now turn for brief discussion.
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In tertiary education, Malaysia has maintained a centralized administration of affirmative action in tertiary education and, to a lesser extent, in secondary education. The main instruments consist of access quotas and Bumiputera-exclusive institutes and scholarships. Since the 1970s, university admissions, public service scholarships, even academic appointments, have been administered with adherence to ethnic representation by the federal government (Leete, 2007).

MARA (Majlis Amanah Rakyat, or Council of Trust for the People) residential colleges and matriculation colleges offer alternate routes to degree-level education, while MARA scholarships have funded degree-level enrolment for Bumiputera students, with top scholars sent abroad. South Africa has adopted a more decentralized framework in implementing AA programs in tertiary education. Through the democratic transition, universities had their autonomy preserved and were mandated to pursue broadly defined redress agendas. Having inherited vast inequalities between historically white institutions (HWIs) and historically black institutions (HBIs), much focus was placed on increasing black representation in HWIs and on narrowing disparities between HWIs and HBIs. Institutions admit students autonomously, accounting for transformation or redress as a criteria in the overall student composition. Little comparative attention has been paid to AA in education, with rare exceptions such as van der Westhuizen (2002) who maintains that Malaysia’s enrolment quotas are ‘far more discriminatory’ than corresponding programs in post-Apartheid South Africa.

Toward increasing representation of the beneficiary group in upper-level occupations, AA in Malaysia was relatively narrow in scope, and implemented through a less formalized and codified process. The guideline for group representation in employment at all levels and in all sectors, as stipulated in the New Economic Policy from 1971, is the ethnic composition of the population (Malaysia, 1971). The predominant locus of intervention has been the public sector, which has abided by de facto quotas in recruitment and promotion. There is also no broad private sector and
cross-industry program along the lines of employment equity legislation, although some sectors appear to have adopted *ad hoc* targets for increasing Bumiputera representation in management.

In marked contrast, South Africa passed the Employment Equity Act (EEA) (1998) requiring employers to increase the proportion of previously disadvantaged individuals and provide training where they are under-represented, chiefly in professional and managerial positions. The legislation, backed by monitoring mechanisms and punitive consequences for non-compliance, covers all industries and encompasses private and public sectors, forming the bedrock of affirmative action in the labour market. South Africa adopts as a baseline that the ethnic and gender composition of organisations should reflect the economically active population. The EEA requires medium and large scale companies, in consultation with employees, to submit employment equity reports that record the current composition of their workforce and set targets for increasing the proportion of blacks, women and disabled persons. In recruitment, promotion and training decisions, the Act requires prioritizing suitably qualified members of the disadvantaged groups. Black economic empowerment (BEE) sets out a framework for scoring firm performance in advancing black interests across a range of criteria, including employment equity and skills development. Firms’ scores are factored into public procurement and licensing decisions. This program reinforces employment equity by offering inducement for firms to increase their efforts in hiring and promoting disadvantaged persons through allocation of public funds and access to state largesse. Overall, Malaysia’s and South Africa’s respective approaches to the employment branch of AA serve as dissimilar case studies.

Affirmative action in equity ownership and in enterprise development overlap with occupational representation, but focus on commercial production of goods and services, as distinct from public administration. Malaysia’s passage towards cultivating Bumiputera owned and operated enterprises followed a rather fluid, experimental and heavily state-led path, from
emphasis on state-owned enterprises (SOEs) to takeover of foreign-owned companies and mandated equity transfers (1970s to early 1980s), followed by heavy industries (early to mid-1980s), then massive privatisation of SOEs (late-1980s to 1990s). The aftermath of the financial crisis saw the renationalization of previously privatized entities from the late 1990s and their reconstitution as government-linked companies, or government majority-held corporations (Tan, 2008). Government procurement and licensing have also been structured around affirmative action objectives in managerial and enterprise development, through exclusion of non-Bumiputera in allocation of small contracts, application of handicaps to Bumiputera bidders in medium to large contracts, and requirement of Bumiputera business partners in awarding licenses.

South Africa’s approach has also been incremental, but in contrast to Malaysia, leans more on statutory and market-based instruments. Formal programs did not take shape until the late 1990s, with the establishment of the BEE Commission in 1998 and passage of the BEE Act in 2003, which mandated a framework for evaluating empowerment. The BEE Codes, passed in 2007, schematized a ‘scorecard’ for granting preference in public procurement and licensing based on a company’s performance in advancing black persons across seven criteria, especially ownership and control, as well as enterprise development. On another front, South Africa indicated in the mid-1990s that privatisation of parastatals, initiated in the 1980s, would proceed. Nonetheless, the policy largely did not materialize, and public enterprises – corporatized entities under government ownership – have imbibed the BEE mandate.

Policy Implications

The discussion above underscores the importance of institutional history and country specificity of AA regimes. Four policy implications stand out. First, the transferability of policies
across countries is limited. Malaysia preceded South Africa chronologically and advanced further in redressing ethnic disparity. Research on these countries has typically positioned Malaysia as a case study for South Africa to emulate or avert, with no consideration of the converse. However, Malaysia’s implementation of quota-based hiring and admissions and creation of ethnically exclusive institutions present modalities that are neither politically viable nor socially desirable. South Africa has also looked to the Malaysian developmental state as a reference, but the context must not be forgotten, i.e. a strong executive operating with minimal parliamentary accountability. On the other hand, South Africa’s affirmative action regime, being embedded in a democratic system, offers some pointers for Malaysia to draw on, to the extent that Malaysia shifts toward an institutional framework with more balance between legislature and executive.

Second, on the issue of duration and efficacy of AA, we find interesting parallels. The ultimate objective of affirmative action is to redress systemic disadvantage and raise group representation to an extent that preferential treatment becomes redundant. Constitutionally, Malaysia and South Africa do not specify time frames for AA to be scaled back or eliminated. However, in both cases, constitutional provisions for preferential programs are arguably contingent and transitory, not absolute and permanent. Malaysia’s Article 153 stipulates safeguarding Bumiputera ‘special position’ as one to be conditionally invoked – ‘as may be necessary’. South Africa’s legal establishment of disadvantage due to unfair discrimination as the basis for AA is worded to statutorily limit the scope and duration of policies. Thus, in both countries, the pursuit of AA – but not its perpetuation – is constitutionally legitimated, although for the moment the possibilities for substantively dismantling policies seem politically intractable, in spite of marginal modifications from time to time. It is imperative for AA to be effective in cultivating capability and self-reliance, in order for its eventual termination to be socio-politically viable.
Third, Malaysia’s and South Africa’s AA regimes are more effective and constructive when implementing measures that build productive capacity and averting interventions that are prone to acquisitive, rent-seeking behaviour and political patronage. Education is most crucial for progressing AA effectively and sustainably. The challenge, however, differs across countries. Malaysia’s reforms need to invigorate the exclusive tracks in schooling and pre-university programs that entail less rigorous entry requirements for Bumiputera, and formulate a long-term plan to increase competition and reduce preferential admission to university. South Africa’s principle problem is discernibly the abject failure of secondary schooling to supply qualified entrants to tertiary-level study. While pockets of urban middle class public schools and private schools are diversifying and sustaining more representative student bodies in the elite HWIs, mass delivery of adequate schooling, and the lagging quality of HBIs, are critically wanting (Morrow, 2008; du Toit, 2010). In both countries, efforts must be multiplied to raise education quality and to exercise restraint in AA in accordance with the capacity of public schooling system to equip capable university entrants. The field of education also uniquely provides a coherent framework for targeting the socioeconomically needy, thus enhancing the social mobility objective of AA. Preference to the socio-economically needy, on the other hand, cannot coherently serve as a basis for targeting group representation in high-level positions, enterprise development or ownership transfers. Hence, need-based preference, sometimes termed class-based preference, can play a role in select policy spheres, especially education, but cannot systemically and comprehensively substitute for ethnicity-based affirmative action.

Affirmative action in employment presents the prospect of productive gains, although its efficacy of course depends on policy implementation. Malaysia’s public sector and government-linked companies have significantly nurtured a Bumiputera professional and managerial class. At the same time, reservation of these spheres for Bumiputera and implementation of preference
through quotas has embedded dependency, undermined government service delivery, and perpetuates government departments of vastly different ethnic composition from the population. Assuredly, resistance to change from within Malaysia’s public sector, will require massive political will and concerted effort in negotiating measures to increase non-Malay representation, perhaps starting with open and transparent contest for senior government positions. South Africa’s much deeper skills scarcity in the beneficiary group has heightened the challenge of implementing employment equity. Specifically, black representation targets have exceeded the availability of suitably qualified persons. Referencing the economically active population as the benchmark for all levels is emphatically inappropriate, leading to undue tensions over unmet targets. A gradually escalating benchmark, such as the proportion of blacks among university - specifically non-teaching profession – graduates, could serve a better means of targeting and planning an exit from employment equity. Political interference in public service and public enterprise appointments also warrants restraint, particularly in the more overt form of the ANC’s cadre deployment, to mitigate efficiency losses and democratic retrogression that percolate when party loyalty supersedes professional competency.

Preferential selection that involves ownership and control over assets, wealth or business opportunity facilitates entry to strata with the highest barriers to entry, but at the same time presents greater scope for wealth acquisition, rent-seeking and corruption. The failures and shortfalls of Malaysia’s privatisation and government procurement programs to development Bumiputera enterprise demonstrate the pitfalls of granting privileged access to equity, contracts and licenses. Similarly, South Africa has also seen the formation of a state-capital nexus, steady flow of corrupt dealings, and wealth accumulation of politically connected elites. Recent policy templates emphasizing merit in selecting Bumiputera contractors and a ‘major re-think’ prioritizing employment creation, productive
capacity of black entrepreneurs and small business development inescapably concede past failures and commit to new modes of operation stressing capability and delivery (NEAC, 2009; South Africa, 2010; South Africa, 2012). Both countries will likely depend on increased leverage of public enterprises or government-linked companies to cultivate managers and subsidiary firms, and more stringent selection and productive incentives for government contracts and licenses, while circumscribing private wealth accumulation and curbing rent-seeking.

Fourth, dilemmas continue, between exclusivity and cohesion, and between preference and self-reliance (Brown, Langer and Stewart, 2012; Gomez and Premdas, 2013). Unavoidably, the specification of one group as beneficiaries excludes other groups. Denial of opportunity and discontent toward AA have undeniably triggered emigration of members of minority groups, magnifying the urgency of tempering current implementation of AA and formulating exit strategies. In terms of the domestic population, segments of Malaysia’s Indian community have historically been marginalized and continue to lag in access to opportunities for advancement. Although South Africa’s classification of persons disadvantaged through unfair discrimination subsumes blacks, women and disabled persons, ethnicity effectively overrides the other categories.

The institutionalization of preference can also breed a sense of entitlement and primacy, and can be distorted to disproportionately benefit particular ethnic or other sub-groups within the designated group. Unequal distribution of benefits among those equally classified as beneficiaries is documented in Malaysia, between Malay and non-Malay Bumiputera (Lee, 2005). It is widely observed, though not systematically documented, that Africans are prioritized over Coloureds and Indians, and disparities exist between ethnic groups within the African category (Southall, 2007). These inequalities underscore the importance of equitable distribution of benefits within the beneficiary group. Checks and balances are also warranted to safeguard against overreach in
policy implementation, such as legal recourse to dispute outcomes of preferential selection processes, which are formalized to some extent in South Africa.

**Conclusion**

Malaysia and South Africa are exceptional middle-income countries in which political imperatives have compelled majority-favouring affirmative action. However, this paper has outlined and discussed important distinctions in regime formation and continuation. In spite of massive political behind preferential policies for the Bumiputera and black populations, historical and institutional conditions have shaped policy frameworks and instruments in some fundamental, country-specific ways. AA in Malaysia is embedded in its constitution, based on Bumiputera special position, and has been prosecuted since 1957 in the context of political dominance of the majority Malay/Bumiputera. The post-1969 intensification of AA came on the heels of the expansion and centralization of executive power and assertion of pro-Bumiputera policies, consolidating a system revolving around discretionary executive power and quotas or ethnically exclusive programmes. South Africa underwent multiple and complex transitions in its passage out of apartheid, of which the most germane to our consideration are the constitutional provisions for AA – on the grounds of group disadvantage through unfair discrimination – and the democratisation of institutions, the shift from white minority to black majority rule, and the all-encompassing dominance of minority interests. Consequently, AA followed a legislative path that sought to reallocate opportunities from whites to blacks through compliance with legal codes, guided by targets and the concepts of redress or transformation.

The gulf between ideals and implementation is undeniably greater in affirmative action than in most national policies. The problems being grappled with are deep-seated. Yet countries engaged in AA must maintain clarity and focus on its principal objective – increasing
representation of a disadvantaged group in socially esteemed and economically influential positions – while complementing and reinforcing AA by addressing poverty, basic education, corruption, and other supplementary policies. It is crucial for affirmative action to be impermanent. Even if ethnic group representation will continually need to be a policy consideration, AA in its current, extensive and manifestations in Malaysia and South Africa is surely undesirable in perpetuity, given high propensities to generate dependency on preferential treatment, tension between beneficiaries and non-beneficiaries, and rent-seeking by political-business elites.

However, transition paths require more than setting deadlines. Countries must strive for a balance of robust action and restraint, by improving quality of education and augmenting university admissions to encompass socioeconomic background, academic merit, and equitable representation, and by emphasizing capability development in the public sector, public enterprises and public procurement, while at the same time limiting interventions and setting modest targets in ownership and control of assets. Ultimately, affirmative action needs to be implemented reasonably and effectively, in order that the majority group gains sufficient capability and confidence to countenance meaningful change and reform.
References


Notes

1 The ANC declared 2013 the start of a “Decade of the Cadre”, specifically referring to a reinvigoration of internal ANC cadre development. Subsequently, however, cadre deployment beyond the party was publicly endorsed and provoked debate. The subject arose within a public duel between two political heavyweights on the National Democratic Revolution, with the ANC’s Deputy President Cyril Ramaphosa defending the party’s vision and practices, while former President F. W. de Klerk denouncing them and challenging their constitutionality (Cyril Ramaphosa “Why FW de Klerk is wrong about the NDR and the Constitution”, 24 February 2014, available at: www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=551675&sn=Detail&pid=71619; F. W. de Klerk “NDR ‘state campaign of racial domination’ unjust”, March 18, 2014, available at: www.dispatchlive.co.za/opinion/ndr-state-campaign-of-racial-domination-unjust).

2 In 1970, the university student population comprised 40.2 per cent Bumiputera, 48.9 per cent Chinese and 7.3 per cent Indian. However, Malay graduates numbered 22 out of a total 493 in science, 1 out of 67 in medicine, 1 per 71 in engineering, 15 per 49 in agriculture (Khoo, 2005; Selvaratnam, 1988).

3 Southall (1997) noted that, unlike Malaysia, South Africa lacked a substantial corps of highly qualified and experienced administrators positioned for appointment to public enterprises. In 1998, the public services set a 50% target for blacks in management by 1999, requiring a virtually impossible increase from 33% in December 1997 (DPSA, 1998).