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The Socioeconomic Right to Education: Accessibility and its Implications for the Validity of Affirmative Action Measures

In 2012, Black, Brown, and Indigenous students made up over 60 percent of students enrolled in primary and secondary education in Brazil; yet, they made up only 40 percent of the student population in higher education.¹ This underrepresentation of minority students indicates that these students face additional barriers, such as the effects of systemic racism, to accessing higher education in Brazil. The human rights framework has sought to address such inequalities in various ways, including by recognizing the right to education in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Under the ICESCR, state parties are obligated to dismantle structural barriers that hinder full educational participation and establish equitable education policies. As Brazil is a state party to the ICESCR, it is crucial to further investigate persistent barriers to education.

This paper will analyze the international community's construction of the accessibility feature of the right to education. The Brazilian Supreme Federal Court's ruling in *Arguição de Descumprimento de Preceito Fundamental (ADPF) 186* will be analyzed to explore how domestic legal action can affirm or weaken the enforceability and public legitimacy of a human right. The ruling's successes, critiques, and impact on future litigation involving the right to education will be discussed. This paper will draw on scholarship from human rights activists and legal scholars to examine how *ADPF 186* contributed to the implementation of accessible education in Brazil. It will also explore how the presence of rights-affirming norms in domestic contexts (non-discrimination, universality, and interdependence) impacts the efficacy of introducing human rights principles into domestic legislation, arguing that both international and domestic action is necessary for the realization of human rights.

International Human Rights Law and the Right to Education

¹ "Brazil's Supreme Court Upholds the Use of Affirmative Action in Higher Education." Equal Rights Trust, July 10, 2015. <https://www.equalrightstrust.org/news/brazils-supreme-court-upholds-use-affirmative-action-higher-education>.

The adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly (UNGA) in 1948 enshrined the universal right to education. As a non-binding declaration, the UDHR articulated a shared commitment to realizing equitable education for all, but it did not establish a legal obligation to ensure it.² Nevertheless, the UDHR remains influential by outlining the basic elements of the right to education, asserting that education must be equally accessible.³ It also established that education in the “elementary and fundamental stages” should be free to all.⁴

In 1966, the UNGA adopted the ICESCR, establishing a stronger international legal framework for the right to education. While the UDHR is not legally binding, states that have ratified the ICESCR are legally bound by its obligations. The right to education is codified in Article 13 of the ICESCR.⁵ Paragraph 1 obligates state parties to recognize the right of all individuals to education,⁶ while Paragraph 2 defines the non-derogable elements of the right, obligating states to provide free, accessible primary education.⁷

The Committee on Economic, Social, and Cultural Rights (CESCR) further clarified states’ obligations regarding the right to education through Special Rapporteur Reports and General Comments (GC). Katarina Tomasevski, the first UN Special Rapporteur on the right to education, introduced the “4-A Schema” in 1999.⁸ This schema established four essential features of the right to education: (1) availability, (2) accessibility, (3) acceptability, and (4) adaptability.⁹

As established by Tomasevski, the accessibility feature of the right to education must be interpreted broadly to be effective, encompassing a range of potential barriers to schooling.¹⁰ Tomasevski declared that states must endeavor to remove legal, financial, physical, and cultural

² United Nations Treaty Collection, “Glossary of Terms.”

³ United Nations, *Universal Declaration of Human Rights*.

⁴ Ibid.

⁵ Office of the High Commissioner for Human Rights, *International Covenant on Economic, Social, and Cultural Rights*.

⁶ Ibid.

⁷ Ibid.

⁸ Tomasevski, E/CN.4/1999/49, 21.

⁹ Ibid.

¹⁰ Ibid.

barriers to schooling.¹¹ These efforts could include steps such as establishing schools within a safe or reasonable distance of students' homes and providing resources, such as transportation, to facilitate attendance when necessary.¹² Additionally, Tomasevski identified protecting students against discrimination as a key element of accessibility.¹³ Non-discrimination, as an overriding principle of the international human rights framework, is not subject to progressive realization.¹⁴ This required states to take immediate action to fully realize non-discriminatory access to education.

The CESCR further elaborated on the concept of accessibility in its GC No. 13 (1999), clarifying that accessibility is a necessary feature of education “in all its forms at all its levels.”¹⁵ This expanded states' obligations beyond primary education, requiring states to now ensure the accessibility of secondary and tertiary education. The CESCR also clarified, however, that tertiary education shall be available on the basis of capacity.¹⁶ Thus, states are obligated to provide accessible tertiary education only to individuals deemed “capable.” According to the CESCR, capacity should be determined based on an individual's “expertise and experience.”¹⁷

While the concept of “individual capacity” introduces a merit-based element to accessing education at the tertiary level, GC No. 13 (1999) highlights the importance of ensuring that the conditions used to assess capacity do not exclude marginalized or vulnerable groups. Three specific dimensions of accessibility are outlined in the GC: (1) non-discrimination, (2) physical accessibility, and (3) economic accessibility.¹⁸ In regards to non-discrimination: all individuals must have access to education regardless of any individual or group characteristic.¹⁹ Additionally, the CESCR established that individuals from disadvantaged or vulnerable groups must be prioritized in actions related to enhancing accessibility.²⁰ This legitimized the use of positive discrimination, such as targeted support or preferential policies for marginalized groups,

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Committee on Economic, Social, and Cultural Rights, *General Comment No. 13*.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

in achieving the full realization of the right to education. Specifically, the CESCR stated that fellowship systems must “enhance the equality of educational access,” signaling that affirmative action measures may be necessary to correct structural disadvantages.²¹

The physical and economic dimensions of accessibility ensure students are not excluded due to material or financial constraints. The CESCR clarified in GC No. 13 (1999) that physical accessibility is not limited to the concerns of persons with disabilities; it also encompasses the distance between students and schools and whether students can travel to school safely.²² Additionally, GC No. 13 (1999) now required states to work toward providing free secondary and higher education, using the maximum of available resources, as part of their obligation to progressively realize the right to education.²³

Following GC No. 13 (1999), the CESCR further elaborated on states’ obligations to eliminate barriers to schooling by explicitly addressing means of overcoming structural barriers in GC No. 20 (2009). The CESCR acknowledges that one’s enjoyment of human rights “is often influenced by whether a person is a member” of a disadvantaged or vulnerable group.²⁴ As such, the committee states in Paragraph 8(b) that positive discrimination (also referred to as positive measures or special measures) is often necessary to repair the harms suffered by groups who have been historically, systemically, or persistently the subject of prejudice.²⁵ Affirmative action is a form of such positive discrimination. In Paragraph 39, the committee references the use of “special measures” to eliminate systematic discrimination across a range of social institutions, including education.²⁶ The CESCR argues that these measures are not only justifiable; they are often required.²⁷ This solidifies the ideas presented in Paragraph 8(b) and legitimizes the use of affirmative action policies as rights-affirming in the international context.²⁸

Brazilian Law and the Right to Education

²¹ Ibid.

²² Ibid.

²³ Committee on Economic, Social, and Cultural Rights, *General Comment No. 13*.

²⁴ Committee on Economic, Social, and Cultural Rights, *General Comment No. 20*.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

To fully understand the Brazilian Supreme Federal Court's ruling in *ADPF 186*, it is also essential to examine Brazil's constitutional provisions on education. Article 3 of the Constitution states that "social marginalization and inequality" must be "eradicated" and "a free, fair, and united society" must be established.²⁹ These fundamental values establish an affirmative constitutional duty to address structural inequalities.

Chapter III, Section I of the Constitution outlines the state's obligations in realizing the right to education.³⁰ Article 205 reads:

Education, which is the right of all and duty of the state and of the family, shall be promoted and fostered with the cooperation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work.³¹

This affirms that education is a universal right and acknowledges that the state has a positive duty to ensure that education is accessible to all. Having a positive duty to ensure the right to education obligates the state to take actions to ensure the enjoyment of the right. This could include providing resources to facilitate attendance for disadvantaged or vulnerable groups, progressively instituting free education, or implementing affirmative action policies. Additionally, Article 205 states that improving access to education is a collective and societal responsibility rather than an individual one. This implies that all sectors of society, including higher education institutions, must take active steps to address the systemic exclusion of minority students.

Article 206(I) further states that education must be provided based on the principle of "equal conditions of access and permanence in school."³² Providing education on equal conditions of access entails ensuring non-discriminatory access to education and the removal of barriers imposed on specific demographics of students. Ensuring students' permanence in school places another positive on the state, obligating the state to take measures to ensure that students can remain in school until their graduation.

²⁹ Equal Rights Trust, "Brazil's Supreme Court Upholds," para. 4.

³⁰ Biblioteca Digital, *Constitution of the Federative Republic of Brazil*.

³¹ Ibid.

³² Ibid.

Brazil's "Quota Law" Case: The Facts

In 2012, in recognition of the effects of slavery and historic racial discrimination, many Brazilian higher education institutions began adopting affirmative action policies.³³ Approximately 52 universities used racial criteria in their admissions policies, and 23 federal universities had a system in place for allotting spaces to Brazilian racial minorities.³⁴ The University of Brasília was one of these institutions, reserving a fixed number of seats for Black, Brown, and Indigenous Brazilian students.³⁵ At the time, this was not legally mandated.³⁶

The university and proponents of racial quotas held that racial admissions quotas met constitutional legitimacy tests for affirmative action policies, arguing that the measures were proportionate, reasonable, and necessary to correct admissions barriers imposed on minority students due to systemic racism.³⁷ As discussed, Black, Brown, and Indigenous students were disproportionately underrepresented in higher education student populations in 2012,³⁸ and this is indicative that special measures were needed to address persistent barriers to higher education for minority students.

Though many viewed the University of Brasília's policies as a necessary step toward improving the accessibility of education, political parties such as DEM and some members of the public opposed the use of racial quotas in higher education admission processes. In April 2012, the "Quota Law" case, or *ADPF 186*, was brought before the Brazilian Supreme Federal Court by Brazil's Democratas Party (DEM).³⁹ They alleged that the use of racial quotas was unconstitutional.⁴⁰ Specifically, they argued that it violated the Constitution's principles of human dignity, equality, and the elimination of racism.⁴¹ Detractors of affirmative action felt that

³³ Reis, Dyane Brito, and José Raimundo Santos. "Wins and Uncertainties after 10 Years of Affirmative Action." *NACLA Report on the Americas* 54, no. 2 (April 3, 2022): 203. <https://doi.org/10.1080/10714839.2022.2084992>.

³⁴ *Ibid.*, 205.

³⁵ Equal Rights Trust, "Brazil's Supreme Court Upholds," para. 3.

³⁶ Reis and Santos, "Wins and Uncertainties," 203.

³⁷ Equal Rights Trust, "Brazil's Supreme Court Upholds," para. 3.

³⁸ *Ibid.*, para. 1.

³⁹ *Ibid.*, para. 2.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

treating applicants differently based on race undermined the goal of eliminating racism, distorting the constitutional obligation to afford equal treatment to all citizens.

Brazil's "Quota Law" Case: The Findings

Ultimately, the Court came to a unanimous decision, voting 10-0 that the University of Brasília's use of racial quotas in its admission process was constitutional.⁴² The Court held that, because the racial quotas implemented by the University of Brasília were "designed to create a plural and diverse academic environment and overcome historical social disadvantage and racial inequality," they did not violate any principles of the Constitution and were, in fact, compatible with the Constitution.⁴³

Under Article 3 of the Constitution, the Court found that the use of racial quotas contributed to creating a free, fair, and united society.⁴⁴ It also held that, because the discrimination against Black, Brown, and Indigenous Brazilians is symmetrically built into many of Brazil's social institutions, the use of racial quotas in higher education admissions was necessary to eradicate social marginalization and inequality, which Article 3 of the Constitution obligates the state to do.⁴⁵ Furthermore, the racial quotas were deemed compatible with the state's obligation to "ensure access to higher education according to one's capabilities" under Article 208(V) of the Constitution.

In response to claims that the racial quotas violated the principles of equality and non-discrimination, the Court held that because the measures were proportional, reasonable, and necessary, they did not constitute a violation of these principles.⁴⁶ Additionally, the quotas did not violate the principle of universal access to education because they help minority students overcome systemic and historic roadblocks to accessing education.⁴⁷ Rather than limiting universal access to education, the Court held that the racial quotas increased it.⁴⁸ Affirmative action, then, is not an exception to the principle of equality; it is a tool to realize it. Treating

⁴² Ibid., para. 3

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

individuals in unequal conditions identically perpetuates existing disparities in educational accessibility. Acknowledging unequal conditions and implementing targeted measures to correct them increases equality for disadvantaged and vulnerable groups.

The Ministers of the Brazilian Supreme Federal Court also engaged with the concept of reparations in their ruling.⁴⁹ They argued that Brazil must provide reparations to Black, Brown, and Indigenous Brazilians who suffered losses due to slavery.⁵⁰ Providing increased accessibility to higher education is a necessary part of delivering these reparations as this will begin to bridge the economic inequality between the racial majorities and minorities in Brazil.

Critique of the Court's Opinion

Two key critiques emerge regarding the Court's ruling in *ADPF 186*. First, the Court made little reference to human rights instruments such as the ICESCR and GCs No. 13 (1999) and 20 (2009).⁵¹ The Court cited a universal right to education and discussed the principles of human dignity and equality, relying largely on Brazil's Constitution to bolster its findings.⁵² Referencing human rights instruments in greater detail would have provided global legitimacy to the ruling. It also would have established clearer domestic legal channels for upholding human rights standards, especially those related to the right to education. This might have encouraged other state parties to strengthen legal ties between their domestic legislation and international jurisprudence.

For example, GCs No. 13 (1999) and 20 (2009) support affirmative action, arguing that special measures and greater resources for traditionally marginalized groups are not only acceptable for eliminating systemic discrimination, but are often *required*. Moreover, these same standards—proportionality, reasonableness, and temporality—are discussed within the CESCR's GCs, as well.⁵³ Engaging with the CESCR's interpretation of these standards would have provided more credibility to the Court's opinion, reinforcing its argument and building stronger precedent for future cases related to the accessibility of education.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Committee on Economic, Social, and Cultural Rights, *General Comment No. 20*.

Brazil has not ratified the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights. Thus, this case could not have been taken to the CESCR if the domestic court had ruled against the admissions quotas, leaving the citizens of Brazil with few options for redress. Citing the ICESCR or CESCR in the Court's findings would have been an effective way for Brazil to acknowledge its obligations under the ICESCR and incorporate them into their domestic jurisprudence. This would introduce more options for redress in the event of a human rights violation, enhancing the ability to enforce the right to education. Although GCs are not legally binding, incorporating their interpretations could have strengthened Brazil's legal precedent and established a more robustly defined right to education. Brazil's Constitution already obligates the state to provide education on "equal conditions of access" under Article 206(1); discussing the ICESCR's obligations would have strengthened Brazil's existing legal norms and obligations. Thus, the right to education would have been better protected legally, safeguarding the realization of the right from retrogression.

The Court's ruling was also limited in its handling of relevant socioeconomic features. Emerging scholarship has indicated that low socioeconomic status is now a greater detriment to educational attainment than race is.⁵⁴ Sociologists have found that when socioeconomic status is controlled for, non-white individuals exhibit greater enrollment rates and academic attainment than white individuals.⁵⁵ While race remains a significant factor in determining one's access to education, it may be useful to conceptualize racial disparities in higher education as operating through and compounded by socioeconomic disparities. Affirmative action policies can then be designed accordingly. As pointed out by legal scholars Veriava and Paterson, "the major barrier to universal enrollment remains the prohibitive cost of public education."⁵⁶ Constructing affirmative action policies that address socioeconomic inequality would prevent the compounding of existing disparities.

Effectiveness and Case Impacts

⁵⁴ Mangino, "The Negative Effects of Privilege."

⁵⁵ Ibid.

⁵⁶ Veriava and Paterson, "The Right to Education," 114.

ADPF 186 is widely regarded as a major success in expanding access to higher education for disadvantaged and vulnerable students in Brazil.⁵⁷ Many legislative changes, including new laws, were implemented in the wake of the judgment on this case.⁵⁸ In August 2012, four months after the case was tried, Brazil's president enacted new Law 12.711/2012 (the "Quota Law"), mandating federal higher education and technical institutes to adhere to admissions quotas.⁵⁹ Additionally, these quotas now included public school graduates and low-income students.⁶⁰ This addressed the critique of the Court's ruling that socioeconomic factors were dismissed. Forms of vertical discrimination, such as those based on class or economic status, are less clearly addressed in international human rights law, which complicates legal remedies.⁶¹ This leaves a significant amount of domestic work to be done to address issues of economic inequality,⁶² and Brazil's efforts to increase the economic accessibility of education as encouraged by GC No. 13 (1999) are a promising step forward.

Additionally, Law 12.711/2012 required that at least 12.5 percent of admissions spots in federal higher education and technical institutions be allotted to public school graduates, low-income students, and racial minorities in 2013.⁶³ This percentage was required to progressively increase to fifty percent over no longer than four years.⁶⁴ As a result, between 2012-2014, there was a 225 percent increase in the portion of spots reserved for Black, Brown, and Indigenous students,⁶⁵ solidifying Brazil's commitment to increasing the accessibility of their education system and moving toward eliminating discrimination in school enrollment per the ICESCR and GCs No. 13 (1999) and 20 (2009). This was made even more impressive in 2016 when the percentage of spots reserved for minority students nearly reflected the proportions of the Brazilian population they made up.⁶⁶ Additionally, Brazil observed a 9 percent increase (from 55 percent before the enactment of Law 12.711/2012 to 64 percent after) in the number of public

⁵⁷ Reis and Santos, "Wins and Uncertainties," 206.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Oxford Human Rights Hub, "Outcomes from the Workshop," para. 10.

⁶² *Ibid.*

⁶³ Reis and Santos, "Wins and Uncertainties," 205.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para. 14.

⁶⁶ *Ibid.*

high school graduates enrolling in federal higher education institutions,⁶⁷ demonstrating the expanded economic access per GC No. 13 (1999).

These figures demonstrate how effective the Court's ruling in *ADPF 186* has been in increasing equitable access to education. The near-alignment of reserved spots for Black, Brown, and Indigenous students with Brazil's racial demographics reflects a significant shift toward proportional representation in Brazilian universities. It also refutes a key argument of critics of affirmative action: that it disadvantages members of dominant social groups. Rather than (dis)advantaging any particular group, affirmative action creates equal opportunities for all. Brazil's progress in establishing equitable access to higher education is an inspiration to the human rights movement and is a call to action for other states to begin implementing similar changes.

ADPF 186 has also set a precedent regarding how the courts have ruled on other cases involving affirmative action. In May 2012, shortly after the conclusion of *ADPF 186*, the Brazilian Supreme Federal Court heard another case related to affirmative action: ADI 3330 or the "ProUNi Case."⁶⁸ The University of All Program (ProUni) provides scholarships to students from low-income families at private universities.⁶⁹ ProUni utilizes quotas for Black and Indigenous students, as well as students with disabilities.⁷⁰ Once again, DEM alleged this use of quotas went against the Constitution, violating the principle of equality.⁷¹ The Court ruled 7-1 that there was no violation of the Constitution, finding the quotas were consistent with the Constitution on similar grounds as those discussed in *ADPF 186*.⁷² The Court held that these quotas reduced social inequity and played a significant role in social integration.⁷³ Brazil's continued upholding of the constitutionality of admissions quotas is indicative that this will create a powerful, long-standing precedent regarding the accessibility of education.

⁶⁷ Ibid, para. 15.

⁶⁸ Human Rights Trust, "Brazil's Supreme Court," para. 6.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

Moreover, as discussed by Veriava and Skelton (2019), domestic judgments on the right to education often play a significant role in shaping the normative development of the right.⁷⁴ They emphasize that international standards must be paired with rights-affirming domestic action to ensure the effective advancement of human rights. Depending on the national context, this can be beneficial or detrimental to the enforcement and public legitimacy of the right to education. States such as Brazil that value education as a right for all will establish more progressive norms surrounding the realization of the right, prioritizing goals such as expanding accessibility and introducing free or lowered tuition. Instituting such measures honors the ICESCR's obligation to progressively realize human rights. Conversely, states undervaluing education and the interdependence of human rights may neglect to enforce or institutionalize the right, failing to increase the accessibility of education and failing to establish rights-affirming societal and legal norms.

This is an important factor to consider as the implementation of domestic legal judgments and norms can be influenced by the (in)activity of local social movements and existing norms regarding human rights.⁷⁵ States that create a normative attitude of indifference toward the right to education may find that, even when they do attempt to introduce legislation increasing protections for a civil right, they are unable to implement this legislation effectively due to a lack of engagement with human rights standards and enforcement from local organizations and movements.⁷⁶ Texas, for example, engaged in litigation surrounding the right to education, attempting to increase educational equality by abandoning the school district's financing system, which was based on local property taxes.⁷⁷ In *San Antonio Independent School District v. Rodriguez*, the plaintiffs argued that the San Antonio Independent School District violated the Equal Protection Clause of the Fourteenth Amendment.⁷⁸ They stated that determining school funding based on property taxes resulted in wealth-based discrimination, diminishing equitable

⁷⁴ Veriava and Skelton, "The Right to Basic Education," 20.

⁷⁵ Langford and Rossi, "From Jurisprudence to Compliance."

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

access to education.⁷⁹ The United States Supreme Court held that there was no fundamental right to education in the United States and that the Equal Protection Clause had not been violated.⁸⁰

This demonstrates how a lack of engagement with human rights norms in domestic jurisprudence can constrain a country's ability to achieve the realization of human rights. The United States did not have the domestic legal framework in place to uphold the equal right to education. Brazil, being a state party to the ICESCR and recognizing the right to education in its Constitution, was able to effectively expand educational access. Brazil's ability to embed the right to education into both legal and cultural norms has been instrumental in translating human rights standards into enforceable, institutionalized policies.

Conclusion

This paper analyzed the international community's construction of the right to education and the Brazilian Supreme Federal Court's interpretation of the right in *ADPF 186*, exploring how domestic legal action can influence a human right's enforceability and social credibility. The right to education is established in the ICESCR and clarified across various human rights instruments, including reports from the Special Rapporteur on Education, and CESCR's GCs No. 13 (1999) and 20 (2009). These instruments define the right's essential elements—including accessibility—and legitimize the use of affirmative action as a means of achieving equitable access to education. Brazil's Constitution establishes similar standards.

While *ADPF 186* favored the right to education and significantly improved the accessibility of higher education in Brazil, the Court overlooked a valuable opportunity to demonstrate its commitment to upholding its international human rights obligations. While the Court's interpretation of the right to education was informed by domestic and international legislation, it heavily favored the former. Referencing human rights instruments could have afforded global legitimacy to the Court's ruling and strengthened Brazil's alignment with international human rights standards.

Nevertheless, Brazil's Constitution and domestic legislation closely correspond with international standards regarding the right to education. This alignment facilitates the integration

⁷⁹ Ibid.

⁸⁰ Ibid.

of human rights principles into domestic jurisprudence, enhancing the strength and enforceability of human rights. However, the effective realization of these rights relies on sustained local action. Landmark cases such as *ADPF 186* play a crucial role in reinforcing domestic legal frameworks that promote equal access to education and combat structural inequality.

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