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Affirmative Actions:

A Comparative Study of the Performance of the Supreme Courts in Brazil and in the United States of America, Especially in Higher Education

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Abstract

This paper deals with the issue of Affirmative Action policies, specifically their applicability, through the system of racial quotas used by higher education institutions in Brazil and the United States of America to guarantee rights denied to vulnerable groups accumulated throughout history. It emphasizes the appreciation of the principle of equality from the point of view of its materiality, as enshrined in the 1988 Political Charter. It analyzes the decisions handed down by the Supreme Courts of those two countries, focusing on the most recent decisions, such as the STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE. This work, therefore, allows us to understand the importance of adopting these special measures as an instrument capable of minimizing historical inequalities and also building a society founded on the dignity of the human person, more just for all.

Keywords: *Affirmative Action; Equality; Higher Education; Supreme Courts*

1. Introduction

One of the central premises of the 1776 Declaration of Independence of the United States of America, "All men are created free and equal," is in the 1988 Constitution of the Federative Republic of Brazil (CF/88) and in the constitutions of other democratic countries, and international treaties, also. However, despite the long time, the full effectiveness of "equality" is still somewhat distant. However, the constant search for norms to implement has led to the emergence of "affirmative action" as a policy to minimize social and economic injustices resulting from unequal access to life goods. This became the

object of significant debates in Brazil about whether, because they were extraordinary and temporary, they would help, or not, the fight against discrimination inherited from the past, by accelerating the process of equality, especially for vulnerable groups.

The tendency to link them exclusively to the policy of quotes in universities has not hindered their practice in other fields, such as reserving vacancies for people with disabilities in private companies, public service, and political activity. The right to differentiated legal treatment for groups considered vulnerable has received attention from the Brazilian State through rules and laws on the matter. Besides, the first joint measures organized at the international level counted on Brazilian participation and aimed at implementing affirmative action as a way to eliminate racial discrimination. (PIOVESAN, 2005).

The higher education system in Brazil, in the last decades, has undergone several transformations, mainly related to the creation of affirmative action policies and the extension of access to students from public schools, low-income students and self-declared blacks, browns (*pardos*), and indigenous students in undergraduate courses (VENTURINI, 2021). Therefore, we will deal with decisions of the Constitutional Courts of the United States[1] and Brazil to show their positions before affirmative actions, their genesis, and adoption as social policy of the State, with emphasis on higher education. We will also focus on important issues submitted to the jurisdiction of the Supreme Court in the United States and the Federal Supreme Court (STF) related to the objectives of affirmative action.

2. Chapter I – General Notions

Neutrality is susceptible to demonstration in various state forms. It produces relevant effects in the Law and in the attitude of the State, mainly because of its multicultural and for providing the interrelationship between this diversity to give rise to a perception of the importance of "equality" in the legal field. It is noted that in diverse nations, whose ethnic and religious diversity is comprehensive, the State is exempt from responsibility and believes that inclusion can be assured by simply inserting principles and rules aimed at formal equality in its Constitutions (GOMES, 2001).

It can be observed that state neutrality, when in absolute character, has proved to be a great failure in societies that have lived for a long time under the regime of slavery, subduing groups utilizing an inferiority validated by laws. And despite the countless legal devices, whose aim was to suppress this inferiority, the condition has not been modified. (GOMES, 2001). It refers to two important questions: "One is that simple legal devices are not enough to break a social framework that anchors the cultural tradition of each country, the collective imagination, the general perception that some should be reserved roles of free domination and others, roles indicative of the status of inferiority, of subordination. Two, the solution to this situation would be for the State to renounce its historical neutrality in social issues, and instead take an active, even radical, position in light of the guiding principles of liberal society (GOMES, 2001, p. 37).

The idea of affirmative action, arose in the United States, causing a change in the posture of the State - hiring of employees, and factors such as access to education, sex, race and color, previously despised, began to be considered, causing inadequate public policies to be abandoned, leading the State to take decisions that, without harming either party, benefited the less favored, due to the historical and cultural nature of discrimination. In Brazil, with its prejudiced culture and patriarchal tradition, affirmative action is still a little-discussed topic, especially at the academic level.

[1] In this country, the debate on the subject provoked great controversy.

Racial and socioeconomic inequality are closely linked in both the United States and Brazil. In recent decades, systemic racism has become a focal issue, partly due to the efforts of social movements. In the United States, the civil rights movement spurred governmental action to address the exclusion of African Americans from the “American dream”, culminating in landmark legislation like the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In Brazil, following the end of the military rule (1964-1985), Black social movements pushed for the recognition of racial exclusion as an injustice demanding urgent attention (FRENCH, 2021).

2.1 The Definition:

Since the late 90s, an emerging debate on diversity in access to graduate education has taken shape. The Universidade do Estado da Bahia (Uneb) was the first institution to implement an affirmative action policy in 2002, targeting the inclusion of Black and Indigenous students in both undergraduate and graduate programs. However, it wasn’t until after 2012 that more affirmative actions began to appear at the graduate level. As of January 2018, data shows that 737 academic graduate programs have adopted some form of affirmative action (VENTURINI, 2019).

Some policies originated from decision made by individual programs, while others were established to comply with state laws or University Council resolutions, applicable to all graduate programs at a given university. Analyzing how affirmative action policies are created is important, as it helps identify which institutions implemented these initiatives voluntarily and which were compiled to do so (VENTURINI, 2021).

It was in the early 1970s, in the United States, that actions imposed by rigid quotas that favored the access and permanence of minority representatives in the labor market and educational institutions prevailed, to guarantee equal opportunities and combat discrimination. This perspective, later on, led to a misinterpretation of affirmative action in Brazil, as it became confused with quota systems, when in fact these are a form of affirmative action practice (GOMES, 2001; PIOVESAN, 2005).

Brito Filho (2016, p. 11) states that "affirmative action should not be thought of as an end, nor as something isolated, much less as programs that can compensate, in some cases, hundreds of years of discrimination and oppression”.

For Gomes (2001, p. 40), "the projects aim to institute compensatory measures to promote the implementation of the constitutional principle of equality in favor of the Brazilian community.” This magnifies the discussion of this issue in Brazilian law by discussing "discrimination," - the most serious of the country's social problems - the exclusion of blacks from the productive process and dignified social life.

A fundamental aspect of comparing racial inequality in the United States and Brazil is recognizing that the middle and upper classes in Brazil have historically been and remains predominantly white. In contrast, the emergence of a Black middle class in the United States can largely be attributed to access historically Black colleges and affirmative action, which have provided opportunities for African Americans and other people of color to attend elite institutions that were once almost exclusively white (CROSS, ROBERTS, 1999).

In Brazil, the 2010 census reports the following representations of Black (*preto*) and Brown (*pardo*) individuals: 7.6 percent Black and 43.1 percent Brown. With the recent shift in racial discourse, it has become common to refer to Brazil’s population as being over half of African descent. Therefore, when this work mentions Black Students or Black Brazilian, it generally includes individuals from both the Black and Brown categories unless the context specifies otherwise (ANDREWS, 2014)

2.2 Objectives:

In recent decades Brazil's higher education system has undergone significant changes, particularly with the introduction of affirmative action policies and the expansion of access to undergraduate programs for public school students, low-income individuals, and self-identified Black, Brown (*pardo*), and Indigenous students (VENTURINI, 2021).

The justification for the adoption of affirmative action relates to the argument that social policies of this size would be conducive to the achievement of various objectives of combating discrimination and that they would be unreachable through simply prohibitive rules of discrimination: "In addition to the ideal of achieving equal opportunities, one of the objectives of alternative policies would be to induce cultural, pedagogical, and psychological transformations, capable of subtracting from the collective imagination the idea of supremacy and subordination of one race to another, of men to women" (GOMES, 2001, p. 44).

While often associated with reserved seats or quotes, affirmative action is broadly defined in the specialized literature as "any program or initiative, public or private, aimed at providing resources or special rights to members of a specific social group for the collective good" (FERES *et al.*, 2018). Therefore, affirmative action extends beyond ethnoracial policies and includes socially differentiated groups based on gender, sex, caste, place of residence, region of origin, religion, disability, socioeconomic status, and other living conditions (JENKINS & MOSES, 2014).

2.3 Classification:

Affirmative actions are classified according to those responsible for their creation, their objectives, and the conception of precepts that provide equality among individuals. For Gomes (2001), taking the United States as an example and considering its use in Brazil, there are three criteria for classifying affirmative actions: **1**. Those resulting from public policies conceived by the executive power; **2.** Those resulting from action by the judiciary; **3.** Those resulting from policies to combat discrimination are resulting from private initiatives.[2] A fourth classification used in Brazil is the quota system for access to certain goods.

Public policies to combat discrimination and its effects are of two types: **1)** classic governmental policies, usually translated into constitutional and infra-constitutional norms of prohibitive or inhibitory content of discrimination; **2)** norms that, instead of being limited to prohibiting discriminatory treatment, combat it through measures of promotion, affirmation or restoration, whose exemplary and pedagogical effects end up institutionalizing in society the feeling and understanding of the need and usefulness of the effective implementation of the universal principle of equality among human beings. The first category, can be subdivided into two types since the Public Power can use these actions for its administration, such as founding obligations for individuals - through its normative act. (BRITO FILHO, 2016).

2.4 Criteria for the validity of affirmative action programs:

Affirmative action measures are temporary, with no predetermined term. This is also the case in Brazil because they aim at equal access to the various sectors of society. They cannot persist until the reduction of existing social abysses is effectively achieved.

[2] In Brazil, an example of the second is the Program for the Promotion of Equal Opportunities for All, launched in 2005; of the third possibility, there is only one legal provision to ensure it, art. 337-A of the CLT, although it is possible for the employer to adopt temporary measures aimed at gender equality in the work environment - a faculty, whose final decision is the employer.

Ferreira Filho (2001) listed some legal conditions, the rule of validity of affirmative actions: **Objectivity** - aims at identifying the minority group and its field must be objectively ascertained; **measure or proportionality** - seeks to weigh up the inequality that must be remedied, requires care so that there is no advantage to the benefited group concerning other groups and society as a whole - **adequacy or rule of reasonableness** - the rules of advancement must be appropriate to correct the inequality; **purpose** - aims at correcting social inequalities; **temporariness** - the measures indicated by the International Convention on the Elimination of All Forms of Racial Discrimination must be temporary.[3]

The CF/1988 imposes the conditions for the correction of inequalities, which serves as justification for the adoption of affirmative actions (BRITO FILHO, 2016). It is, therefore, up to the State to implement public policies for the inclusion of vulnerable groups. This obligation extends to society as a task of correcting exclusion and inequalities. The CF/1988, for example, makes creating rules to combat discrimination possible[4]. Despite the abolition of slavery, this inequality is still present due to the lack of measures applied to the inclusion of blacks in society at the end of slavery. (GOMES, 2001).

These inclusion measures aim at achieving "material equality," besides being admitted into the Brazilian legal system, they impose that the state's actions follow the mentioned republican objectives. In other words, the use of these measures is not a matter of choice of the State, but an imposition - indispensable - for the society to grow in a fair way aiming for the good of all (BRITO FILHO, 2016). In the field of human rights, affirmative action aims to compensate for past mistakes, achieve equality, eliminate discrimination, and promote diversity. And they find motivation, in the public and private sectors, in provisions of the Brazilian Constitution of 1988, determining, for example, in subsection XX of art. 7, "protection of the labor market for women, through specific incentives, under the terms of the law", and in subsection VIII of art. 37, "the law will reserve a percentage of public positions and jobs for people with disabilities and will define the criteria for their admission".

Although they alone will not be enough to change these differences completely, they will be compatible to make changes, for certain periods or not, and if dependent on complex reforms, it would delay too much the desired effect on exclusion and inequality. In other words, it is not enough for the measure to be able to correct inequality, but it must also guarantee that the objectives will be achieved, with the lowest possible negative results (BRITO FILHO, 2016).

In the state of Rio de Janeiro, Law 3,254 of 28.12.2000, by allowing 50% of the state university vacancies to be for public school students, proved that without planning, affirmative action is less effective and increases the negativity of those who do not accept it.

Another aspect of the discussion surrounding affirmative action is the terminology used, specifically the term “quotas”. This type of policy, also referred to as a seat reservation system, involves allocating a certain number of seats to students from specific group (FERES et al., 2018). Among the 737 graduate programs with affirmative policies, 67.2% exclusively implement the quota system, while other have established additional reserved seats for candidates who meet the criteria. The primary beneficiaries of these policies include Black individuals (both Blacks and Browns), Indigenous people, individuals with

[3] Criteria accepted by the STF in the vote of Minister Ricardo Lewandowski, approved in ADPF 186: "... the State could resort to policies of a universalist nature - to cover an undetermined number of individuals - through actions of a structural nature; or affirmative actions - to reach determined social groups - through the attribution of certain advantages, for a limited time, to allow the supplanting of inequalities caused by particular historical situations".

[4] CF/88 – art. 3, section III; art. 5, caput and sections I, XLI, XLII, XLIII.

disabilities, quilombolas[5], transgender individuals, holders of humanitarian visas (refugees), and others (VENTURINI & FERES, 2020).

Studies have shown that although access to the university has been democratized, and there has been a significant increase in diversity in higher education, this varied significantly by careers: areas less valued by the labor market, such as the Humanities and Applied Social Sciences, became more diverse than the so-called "hard" areas (RIBEIRO & SCHLEGEL, 2015).

In Brazil, there was no consideration of the asymmetric distribution of opportunities within Brazilian society and the obstacles faced by certain groups to enter graduate education. There is consequently, a tendency for continuity and maintenance of the same criteria and process, which channeled to these programs (MAHONEY, 2000; PIERSON, 2004).

3. Chapter Ii - Affirmative Action Policy Practice

Here, with an emphasis on "equality", we will see the emergence of human rights declarations in the 18th century, the quota system for admission to higher education in the United States and Brazil aimed at reducing social inequalities and eliminating discrimination resulting from them, by race and sex *et cetera*.

3.1 Affirmative Action in the United States of America:

Only with James Madison's presentation of the Bill of Rights of the first 10 (ten) Amendments in 1789, approved and promulgated as the first 10 Constitutional Amendments, in force since 1791, did the American Constitution have a Declaration of Rights.

Declarations of law emerged in England[6]. The United States Constitution of 1787 did not originally contain a declaration of rights. Two years later, France, in the course of the 1789 revolution, would bequeath to the world the Declaration of the Rights of Man and of the Citizen, which in its articles 1 and 6 it declares:

> "Article 1 Men are born and are free and equal in rights. Social distinctions can only be based on common utility.
> "Article 6: The law is the expression of the general will. All citizens have the right to compete personally or through representatives for their education. It must be the same for everyone, whether to protect or to punish. All citizens are equal in their eyes and equally admissible to all public dignities, places, and jobs according to their ability and without distinction other than their virtues and talents".

The United States influenced the consolidation of constitutionalism in the 18th century. However, France, with the 1789 Declaration of the Rights of Man and the Citizen, exerted the most significant influence. Also, with the victory of the French Revolution, since the absolute state disappeared, the liberal state emerged, and the representative system, the democratic regime, and the written constitution were established, consecrating the separation of powers and the recognition of individual rights. Equality in the new state was, however, only a formal right. On the other hand, the liberal state, insensitive to man's exploitation by man, did not interfere in social relations. For it, the moral obligation of protection was not conceived among equals.

[5] A *quilombola* is an Afro-Brazilian resident of the quilombo settlements. The term "quilombo" has a "polysemic character, open, with great empirical variations of occurrence in time and space" (ARRUTI,2008).
[6] An example of this is the "Bill of Rights" of 1969.

In the second post-World War II, the General Assembly of the United Nations (UN) promulgated on December 10, 1948, the Universal Declaration of Human Rights, whose Preamble states the rights recognized as fundamental to all human beings in a just and equal society, in which all men have the right to participate in the government of their country, access to public service, economic, social and cultural rights indispensable to human dignity, free development, work *et cetera*.

For some, affirmative actions are typical of the social state, despite having emerged in the United States, which is undoubtedly the most liberal of all, but whose government validated actions aimed at helping poor people and reducing class inequality, promoting social equality between blacks and whites. In the United States, the quota system does not have a standard model for higher education, which is natural in American federalism[7].

For Sandel, one of the issues facing the courts "is whether employment and affirmative action policies violate the guarantee of the United States Constitution that the laws will protect everyone equally". Abstracting from the constitutional question, he focuses on the moral issue: "Is it unfair to consider race and ethnicity priority factors in the labor market and university admissions?" and analyzes three reasons why affirmative action advocates consider race and ethnicity: correcting distortions in standardized tests; compensating for past mistakes; and promoting diversity. At first, he states that:

> "The evaluation of tests in light of students racial, ethnic, and economic background does not call into question the idea that colleges and universities should admit students who demonstrate the best chance of academic success; it is simply an attempt to find the most accurate measure of the academic promise of each student"

Furthermore, that the real discussion of affirmative action lies in two other key arguments - compensatory and diversity. The first considers affirmative action as a solution to remedy the injustices of the past and treats admission to schools and jobs essentially as a benefit for those who receive them and seek to distribute them in a way that compensates for the injustices of the past, the consequences of which persist; the second emphasizes that "the principle of diversity is justified in the name of the common good - of the faculty itself and also of society in general". First, it holds that a student body with racial diversity allows students to learn more from each other than if everyone had a similar background. Second, the diversity argument considers that minorities should assume positions of leadership in public and professional life because this would meet the civic purpose of the university and contribute to the common good (SANDEL, 2016. p. 210-213).

The race quota system in U.S. universities and schools risked being abolished because of Supreme Court case law built on some of the major leading cases. In the "Bakke" case, the University of California School of Medicine practiced an affirmative action program that favored the admission of blacks and other minorities, reserving 16 of the 100 places in the course. Allan Bakke was white; he had achieved a higher grade than the candidates for the 16 vacancies but had not qualified him for one of the 84. He was not admitted. He then joined the California State Supreme Court with a lawsuit against the School of Medicine for violation of the XIV Amendment and Civil Rights Acts of 1964. She was admitted in 1978 and declared the program unconstitutional, considered discriminatory because it was white, and ordered its admission. The University appealed to the American Supreme Court and did not admit Bakke. It was the case of "Regents of the University of California v. Bakke", which stated that the special admission criteria for minorities aimed to remedy the effects of discrimination in society, with these arguments: **1.** Enable the diversity of students in the School of Medicine and the greater number of doctors from minority groups; **2.** Show young people from minority groups that they could study medicine and become doctors; **3**. Improve medical care in its traditionally needy communities.

[7] One the thesis of The Federalist is that the states acted as if they were rulers.

The appeal was heard in June 1978, and by five to four votes, the American Supreme Court declared the illegality of the system practiced and based on rigid quotas, but considered legitimate the criterion of race as long as it was combined with others, and that race could be used as a criterion for admission as long as it had the cause of promoting reparation for a situation of harm or disadvantage caused to a particular group by past or present racial discrimination. He concluded that the "criterion of race considered in affirmative action does not violate the Constitution if used appropriately" (PERRY, Barbara A. The Michigan Affirmative Action Cases. Ed. University Press of Kansas. 2007. Kansas. USA. p. 21 to 25).

More recently, the Supreme Court judged the case STUDENTS FOR FAIR ADMISSIONS, INC. *V.* PRESIDENT AND FELLOWS OF HARVARD COLLEGE. What happens is that both Harvard and the University of North Carolina (UNC) have a very selective admissions process. The admissions to each school can vary, depending on the student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. What was presented to the American Supreme Court was whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

According to the syllabus of the lawsuit:

> "At Harvard, each application for admission is initially screened by a 'first reader,' who assigns a numerical score in each of six categories:
>
> Academic, extracurricular, athletic, school support, personal, and overall. For the 'overall' category — a composite of the five other ratings —A first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's Race into account. When the 40 members of the full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions is ensuring there is no 'dramatic drop-off' in minority admissions from the prior class."

UNC has a similar admissions process in which the committee may consider the applicant's race by the end. Subsequently, the Supreme Court argued that after the Civil War, Congress proposed and the states ratified the Fourteenth Amendment, which prohibits any state from denying "equal protection of the laws" to anyone. Supporters of the Equal Protection Clause emphasized its core principle of forbidding distinctions in law based on race or color. They argued that laws affecting one person should apply equally to all. Early rulings by the Court interpreting the Equal Protection Clause affirmed that the Amendment ensured legal equality for Black and white citizens alike (U.S. SUPREME COURT, 2023).

However, despite this early recognition, the Court and the country quickly strayed from these commitments. For nearly a century after the Civil War, state-mandated segregation became the unfortunate norm in many parts of the nation. The Court contributed to this history by upholding the "separate but equal" doctrine in *Plessy v. Ferguson*, a ruling that cemented racial segregation across America. This "separate but equal" regime persisted for over 50 years as courts struggled with its implementation (U.S. SUPREME COURT, 2023).

Some decisions during this era attempted to mitigate the damage of segregation by insisting that states provide Black students with educational opportunities that, while separate, were theoretically equal to those available to white students, as seen in *Missouri ex rel. Gaines v. Canada*. However, it soon became apparent that separation could not achieve genuine equality. The Court later acknowledged that even seemingly minor racial distinctions worked to subordinate Black students, as in *McLaurin v. Oklahoma State Regents for Higher Education*.

By 1950, the inherent truth of the Fourteenth Amendment reemerged: separate can never be equal. This truth culminated in the landmark case *Brown v. Board of Education*, where the Court overturned the *Plessy* decision and began dismantling state-sponsored racial discrimination. In *Brown*, the Court decisively held that public education must be available equally for all students, regardless of race. The ruling emphasized that schools must admit students on a racially nondiscriminatory basis.

The principles established in *Brown* soon expanded beyond education, impacting laws on segregation in areas such as public transportation and marriage, as in cases like *Gayle v. Browder* and *Loving v. Virginia*. These decisions reflect the core objective of the Equal Protection Clause: eliminating all forms of state-imposed racial discrimination.

The Court has consistently held that eliminating racial discrimination means eliminating it. The Equal Protection Clause applies universally, regardless of race, color, or nationality, as established in *Yick Wo v. Hopkins*. The promise of equal protection cannot vary based on an individual's race, as reaffirmed in *Regents of the University of California v. Bakke*.

Exceptions to the Equal Protection Clause are subject to "strict scrutiny," a rigorous legal test. Under strict scrutiny, racial classifications must serve a compelling government interest and be narrowly tailored to achieve that goal, as noted in *Grutter v. Bollinger* and *Fisher v. University of Texas at Austin*. The use of race in state action is rare, as distinctions based solely on ancestry are considered inherently objectionable in a society based on equality, as *Rice v. Cayetano* highlights.

The Supreme Court also considered that the race-based admissions policies of Harvard and UNC do not meet the requirements of strict scrutiny under the Equal Protection Clause. The universities justify using race in admissions to achieve goals such as training future leaders, fostering diverse perspectives, and preparing engaged citizens. However, these goals are criticized as too vague and immeasurable, making it difficult for courts to determine when such policies should end. The policies also fail to show a clear connection between these broad goals and the specific methods used, such as grouping students into overly broad racial categories like "Asian" or "Hispanic" while excluding others, like Middle Eastern students. This lack of precision prevents proper judicial review.

Furthermore, the Court argues that race-based admissions inevitably create a zero-sum dynamic, where benefiting certain racial groups disadvantages others, contradicting claims that race is never used negatively. The Court also finds that these programs rely on racial stereotyping, assuming that students of a particular race share the same viewpoints, which goes against the purpose of the Equal Protection Clause. Finally, the policies are criticized for lacking a clear endpoint. While the universities argue that race-based preferences will end when diversity is sufficient, the Court points out that racial balancing is unconstitutional and that the periodic reviews of the policies do not justify their continued use. Therefore, the Court concludes that these admissions programs cannot be justified under the Constitution. However, it allows universities to consider how an applicant's race may have shaped their personal experiences if tied to individual qualities or achievements. (U.S. SUPREME COURT, 2023)

It could also be interesting to point out, as a way of illustration, Isabel Wilkerson's *Caste* in which she offers a personal narrative by a journalist who seeks to help readers understand the structural and personal dimensions of racism in the United States.

This book aims to provoke readers, mainly white individuals, to recognize their own society's unseen structures from a new perspective. Wilkerson achieves this by drawing parallels between the familiar and two extreme examples: India's caste system and Nazi Germany. She effectively uses Nazism to illustrate her point, noting that Jim Crow legislation served as a protype for the Nuremberg racial laws (87). After revealing that the one-drop rule was considered too extreme even by the Nazis (88), she

explicitly compares the indifference of European townspeople living near a concentration camp to the participation of white mobs in the lynching of African Americans in the United States.

Wilkerson's examination of the Indian caste system lacks depth in terms of personal experiences and though research. However, her approach makes for compelling storytelling as she encourages us to consider how our system might parallel one that feels distant from our reality. How does Wilkerson justify the shift in terminology from racism to casteism? She argues that racism can no longer effectively encapsule systemic, institutional, or structural racial hierarchies, as it has been "reduced to a feeling, a character flaw, conflated with prejudice, tied to whether one is a good person or not. It has come to mean overt and declared hatred" (68). She contends that this emphasis on individual feelings preserves the hierarchy, allowing the "worn grooves of comforting routines and unthinking expectations… to appear as the natural order of things" (70).

Some might refer to this phenomenon as white implicit bias, while African Americans may view it as evidence that they serve as the "shock absorbers of collective fears" (142). For Wilkerson, the term "caste" offers a more evident ranking system because racism has become too closely linked to individual behavior and is, therefore, too easily dismissed. However, it is questionable whether changing the terminology will effectively alter the underlying system.

Surprisingly, Wilkerson does not address affirmative action as a potential solution to systemic racism (or casteism) despite the well-documented increase in the number of Black students admitted to colleges in the United States due to affirmative action policies. This omission is striking, especially when considering India's quota system, which mandates opportunities for a much more significant percentage of the population (50 percent) compared to the United States, where African Americans make up 13 percent. Why are quotas in India deemed an acceptable approach to tackling extreme inequality? At the same time, even the mere suggestion of equal opportunity as a goal (the most basic form of affirmative action) is avoided mainly in the United States today. To explore this question, we can turn to historian Melvin Urofsky's *Affirmative Action Puzzle*, an engaging and thoroughly researched examination of the political and social context distinction between goal-based, numbers-driven quotas and the opportunity-driven model of affirmative action. The latter is characterized as "throwing open the gates of opportunity, actively recruiting… and ensuring that once hired or admitted to a school, individuals do not face discrimination" (xvii).

While Urofsky uses the term "puzzle" to refer to US affirmative actions, when we juxtapose the US and Brazilian approaches to affirmative action, we may find that the case of Brazil is also puzzling. This is where the class and ethnic history of Brazil provides a counterpoint to the United States; as noted earlier, whiteness is often regarded as the primary identity. In Brazil, there is a strong perceived alignment between class and race among the poor and working classes. This perception, combined with a century-long effort to encourage intermarriage in order to "whiten" the population—including formerly enslaved people from both rural and urban areas—aimed to "improve" the Brazilian nation. While this provides one piece of the puzzle, it is far from definitive. A deeper comparison between the United States and Brazil reveals a more fundamental distinction: how each country approaches the political nature of rights.

Urofsky affirms a deeply held belief in the United States that rights belong to individuals, not groups. As a result, he opposes "hard" affirmative action, such as quotas, favoring "soft" affirmative action, which focuses on outreach and opportunity. In his view, quotas violate the principle of equal protection: "By treating people as part of a group—African American, Hispanic, disabled, female—we contradict one of the core principles of American democracy and the constitutional order, namely, that rights are individual" (467). Yet Urofsky acknowledges that individuals continue to face discrimination based on group membership, which is why he supports decisions "from the Supreme Court on down" (468) that affirm the necessity of affirmative action, but only as a temporary measure. He does not lament

the brief period, from the Civil Rights Act of 1964 to the Bakke decision in 1978, when group rights were considered. Bakke marked a turning point, drawing the line that, in the United States, must not be crossed—the line where opportunities become quotas.

3.2 Affirmative Actions in Brazil:

Despite the abolition of slavery at the end of the 19th century, the level of social inequality in Brazil is still high due to the insensitivity of the public power concentrated in the hands of a conservative elite insensitive to the immense population contingent of blacks and poor kept away from access to education and decent work[8]. The Brazilian Republic and Federation did little to change the empire's landscape - in the first decades of the 20th century, struggles for social rights were repressed by a liberal state divorced from the problems of the less favored classes[9]. This, together with other factors of a political nature, provoked the revolution of 1930 that culminated in the deposition of President Washington Luiz on October 24, 1930 - the Social Question was one of the flags of the revolution.

Brazil was beginning to break with the liberal state, which was to be completed with the promulgation of the Brazilian Constitution of 1934, which dealt with the social question in a specific chapter, "Of the Economic and Social Order," which would be maintained in later Constitutions, realizing that formal equality leads to legal perspectives, while material equality leads to a substantial conception that takes into account, in its operationalization, specific conditions of a factual, economic and social nature that generate inequalities among men, to be considered for the effectiveness of the principle of equality of all before the law.

Brazil was re-democratized, and the 1988 Federal Constitution was promulgated, establishing a historical milestone in the evolution of human rights. This led the country to implement policies to materialize the programmatic norms it contained, aiming at reducing social inequalities and promoting greater opportunities for socially needy groups as attempts to achieve social justice, preserve human dignity, and affirm equality.

Under CF/1988, Brazil follows the North American model of racial quotas for admission to the University in the affirmative action policy. However, - while the Americans faced the racial problem, Brazil concealed it and camouflaged it. It thus reveals the colonized syndrome, considering it normal to solve the internal problem by adopting methods and mechanisms practiced in other countries. While in the United States, colonization was done by families who came from England to build a new country, and with temporary labor of white workers, without risk of miscegenation, in Brazil, colonization was done by the Portuguese who, besides being used to the presence of blacks since before the discovery of this country, came here to appropriate the wealth of the new colony, without their families. Moreover, slave labor became a standard practice with black contingents brought from Africa, giving rise to the miscegenation of races as a natural consequence[10].

The CF/1988 made it possible to implement affirmative action with norms aimed at affirming equality and eliminating inequalities, for example, in the first part of the caput of art. 5: "Everyone is equal before the law, without distinction of any kind."

[8] It is noted that even today, as reported by the press in the penultimate week of May, unemployment in the country reaches the rate of 13.5% of the national population - frightening, mainly, due to the fragility of the Brazilian economy, by several factors ranging from systemic corruption to incompetence or political interests of the rulers.

[9] In the 1920s, President Arthur Bernardes considered the social issue to be a police matter.

[10] In the United States the use of black slave labor began on the 18th century.

This is, however, a formal conception of equality, abstract in treatment, and does not consider the evident inequalities that exist - all that is required for the true meaning of this "Equality of all before the law." In other words, it is necessary to consider qualitative equality (all are equal by birth) and the quantitative inequality of each person (men are born equal, society makes them unequal) to not deny equality itself.

Men are formally equal but materially unequal. Therefore, the law must treat those who are equal and unequally those who are unequal insofar as they are unequal. That is, the law must treat those who are equal and unequal those who are unequal.

In the pursuit of equality, the CF/88 establishes norms of guarantee to citizens, as highlighted in art. 5. For example, in clauses I, “men and women are equal in rights and obligations under this Constitution,” and XLI, “the law will punish any discrimination that violates fundamental rights and freedoms.”

The enormous concentration of national wealth in the hands of less than ten percent of the Brazilian population, the difference in treatment and opportunities between whites and blacks, discrimination by sexual option, the difference in work opportunities, access to education and health, etc. leads us to the deduction that there is no material equality in Brazil because of the behavior of the State, which allows us to evaluate the degree of manifestation of material equality.

By 2003, public universities in Brazil had begun implementing racial quotas, and by 2012, seventy-three out of ninety-five universities had adopted such policies. This is partly due to the stark contrast in educational opportunities: Brazilians without financial resources attend underfunded public elementary and high schools. At the same time, wealthier families send their children to private schools. In higher education, the situation is reversed. Well-prepared students from private schools attend tuition-free public universities, which, due to this unequal social structure, are predominantly white. Additionally, class plays a significant structural role in Brazil at all levels of society. Following the 2012 Supreme Court decision that upheld racial quotas at the University of Brasília (UnB), the Law of Quotas was enacted. It mandates that 50 percent of seats in federal public universities be reserved for public school students, with further allocations for Afro-descendants and people of Indigenous ancestry based on the racial demographics of the state where the university is located. Additionally, 25 percent of these seats are reserved for students from low-income families (PERIA, BAILEY, 2014).

The system of quotas for entry into higher education implemented in Brazil was questioned as to its constitutionality and object of the Action for Non-compliance with the Basic Law, ADPF No. 186/DF, before the Federal Supreme Court (STF). However, on April 26, 2012, in a unanimous decision and the form of the vote of the Reporting Justice, Mr. Ricardo Lewandowski, the STF dismissed the action and declared the quota system constitutional. It made it clear that the affirmative action policy incorporated several institutional mechanisms to correct distortions arising from the application of the principle of equality under a merely formal conception and recognized that the racial quota system at the University aims to reduce the historical picture of inequality in ethnic-racial and social relations in the country, with emphasis on the impossibility of being analyzed only under the merely formal aspect of compatibility with constitutional precepts alone, "or from the eventual advantage of specific criteria over others.

The affirmative action policy in Brazil seeks to eliminate social discrimination due to various factors that still occur in society and has not been used only by the criteria of race and color. For example, it considers the discrimination suffered by people with physical disabilities. It seeks to enable them to enter the effective public service for which the CF/88 requires prior approval in a public contest through a quantum of vacancies reserved for members of the discriminated group.

The Federal Council of the Brazilian Bar Association filed a lawsuit for constitutionality - ADC 41/DF - on June 8, 2017, in which the matter was recognized as having **"general repercussion."** However, with the rapporteur, there was already ADPF n 186/DF, with the following decision:

> "Decision: Constitutional Law. Direct Action of Constitutionality. Reservation of vacancies for blacks in public tenders. Constitutionality of Law 12.990/2014. Origin of the request. 1) **Law 12.990/2014 is constitutional, which reserves 20% of the vacancies offered to black people in public contests to provide effective positions and public jobs in the scope of direct and indirect federal public administration by three foundations.** 1.1. First, **the disequipment promoted by the affirmative action policy aligns with the principle of isonomy.** It is based on the need to overcome the structural and institutional racism still existing in Brazilian society and to guarantee material equality among citizens by utilizing a more equitable distribution of social goods and promoting recognition of the Afro-descendant population….
> 1.2. (…)
> 2. (…)
> 3. (…)
> 4. Origin of the request to declare the full constitutionality of Law No. 12,990/2014. Thesis of judgment: "It is constitutional to reserve 20% of the vacancies offered in public tenders to provide effective positions and public jobs in direct and indirect public administration. In addition to self-declaration, it is legitimate to use subsidiary criteria of hetero-identification, provided that the dignity of the human person is respected and the contradictory and broad defense is guaranteed". (ADC 41, Rapporteur: Min. ROBERTO BARROSO, Full Court, judged on 06/08/2017, ELECTRONIC PROCEDURE DJe-180 DIVULG 16-08-2017 PUBLIC 17-08-2017)

In this ADC, the merit was linked to the controversy that arose soon after the publication of Law No. 12990/2014 - the reserve of 20% (twenty percent) of vacancies for blacks in public tenders for the provision of effective position and public employment in direct and indirect administration would be unconstitutional because this reserve violated one of the constitutional principles of the Public Administration - *efficiency* - enshrined in the caput of art. 37 of the Constitution, more evidently in its clause II – "the investiture in public office or employment depends on prior approval in a public contest of evidence or evidence and titles, according to the nature and complexity of the office or employment, as provided for by law, except for appointments to office in a commission declared by a law of free appointment and dismissal."

The Federal Council of the Brazilian Bar Association provoked the STF's manifestation to eliminate the controversy, accompanied by other entities such as *"Amicus Curiae."* And in deciding, the STF made it clear that the reservation of the quota for blacks is in line with the principle of isonomy, and is based on the need to overcome the structural and institutional racism still existing in Brazilian society, and ensure material equality among citizens, through the more equitable distribution of social goods and recognition of the afrodescendant population, there is no violation of the principles of public contest and efficiency because the reservation of vacancies for blacks does not exempt them from approval in the public contest, in which they must achieve the necessary grade to be considered suitable and efficient for the position determined; and that the incorporation of the *"race"* factor as a selection criterion, instead of affecting the principle of efficiency, contributes to its achievement to a greater extent by creating a "representative bureaucracy" capable of ensuring that the points of view and interest of the entire population are considered in state decision-making. Moreover, finally, it observes the principle of proportionality.

More recently, the National Council of Justice (CNJ) approved a resolution that reserves a minimum of 30% vacancies for black interns. According to its president, Minister Luiz Fux, whenever the number of vacancies offered in the selection process is equal or superior to three, and in case there are remaining vacancies after the application of the rule, they will be reverted to the universal system, and that the new rule will be in force until June 9, 2024, when the law 12.990/2014, that deals with the reserve

of vacancies offered to blacks in public contests for the provision of effective position and public jobs within the direct and indirect[11] Federal Public Administration, ceases to be in force.

Suppose the policy of affirmative action has been and continues to be the object of discussion, not always limited to the field of science. In that case, it cannot be denied that measures implemented by the public power or by private entities aimed at eliminating or reducing the differences between people resulting from economic and social factors, race, sex, color, and sexual preference, among others, has evolved making it possible to build a more just and equal society.

CASTRO (2010) informs that in the elaboration of the new Electoral Law of 1997 in our country, the reserve of at least 25% of the candidacies for female candidates[12] was consecrated. Regarding people with disabilities, the CF/1988 expressly adopted a policy of affirmative action regarding this small sector of the population, more than segregated, ignored by public policies. In this sense, both the guarantee of a minimum monthly benefit wage to the person with disability and to the elderly who prove not to have the means to provide for their maintenance, or to have it provided by their family, as the law provides (art. 230, inc. VI), and mainly, the express percentage reserve of public positions and jobs for people with disabilities, as provided for by law (art. 37, II), are considered measures adopted to promote a certain group of people who, due to physical or psychic disabilities, are naturally at a disadvantage concerning the other members of society.

Therefore, if there is still a discussion about affirmative action policy, which is not always limited to the field of science, it has evolved in its practice, fostering hope in constructing a more just and equal society.

5. Conclusion

Individual rights were recognized and declared as a result of the liberals' struggle in the 18th century to overthrow the absolute state, establish the representative system and democratic regime, and enshrine the system of written constitutions.

The new state, the Liberal, gave primacy to the freedom of all but maintained equality in its merely formal conception. This circumstance made possible for many years a regime of exploitation of man by man, which the state watched as inert and insensitive, under a false and convenient conception of "neutrality." What history would change?

Thus, at the end of the second decade of the 20th century, the State changed from liberal to social, recognized man's social rights, and intervened in economic and social relations to protect self-sufficiency.

How, despite the new state, social, interventionist, and leader, differences caused by prejudice of race, sex, etc., would allow abusive discrimination to generate a situation of inequality and discrimination. The civil rights movement was then gaining strength in the world, with greater prominence in the United States, where racial prejudice and even racial segregation were present in the 1960s.

Victorious in this movement, the policy of affirmative action aimed at reducing inequalities and eliminating discrimination would emerge more emphatically in that country. Today, it is a real fact, irreversible, and they improve every day.

[11] Legal Consultant Magazine, 23.09.2020. <www.conjur.com.br>

[12] In the world the percentage is 30%.

Although with different historical realities, Brazil and the United States of America were chosen for the development of this work. It focuses on the politics of affirmative action practiced through the system of racial quotas for entry into higher education by people potentially discriminated against and even in other sectors, including politics.

Before Brazil, the United States practiced a unique quota system at colleges and universities. Despite the challenge to its constitutionality, the U.S. Supreme Court, as demonstrated, recognizes the constitutionality of such a system, although it is under strict control as to its legality, given the requirements to preserve the dignity of the human person.

Recently, the United States Supreme Court ruled that race cannot be a determinant factor in whether a student will or will not be admitted to college, stating that utilizing race as a determinant factor in college admissions – or any admissions whatsoever – is a violation of one's constitutional rights, and therefore should not be a continuing practice in college admission processes, even more so because it violates past precedents that have already been established by the Supreme Court many years ago.

The 1988 Federal Constitution was concerned with social inequalities and discrimination, including several provisions that make affirmative action policy viable.

Affirmative actions are, therefore, an instrument of fundamental importance for achieving the Constituent's aspiration, expressed in the 1988 Constitution's Preamble, that is, the search and construction of a just society in solidarity and without any kind of discrimination.

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