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INDEX OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and People's Right
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADRDM	American Declaration of the Rights and Duties of Man
ANC	African National Congress
AU	African Union
AYC	African Youth Charter
Banjul Charter	African Charter on Human and People's Rights
CADE	Convention Against Discrimination in Education
CERD	Committee on the Elimination of Racial Discrimination
CHET	Center for Higher Education Trust
COAS	Charter of the Organization of American States
CommRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DHET	Department of Higher Education and Training
FIES	<i>Fundo de Financiamento ao Estudante do Ensino Superior</i> (Financing of Higher Education Students)
GDP	Gross Domestic Product
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IADC	Inter-American Democratic Charter
IBGE	<i>Instituto Brasileiro de Geografia e Estatística</i> (Brazilian Institute of Geography and Statistics)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

NSFAS	National Student Financial Aid Scheme
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
ProUni	<i>Programa Universidade para Todos</i> (University for All Programme)
REUNI	<i>Programa de Apoio a Planos de Reestruturação e Expansão das</i> <i>Universidades Federais</i> (Plan of Reorganization and Expansion of Federal Universities)
SACC	South African Constitutional Court
SAHRC	South African Human Rights Commission
SASO	South African Students' Organisation
STF	Supreme Federal Tribunal of Brazil
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization

1 INTRODUCTION

The 21st century has seen a significant increase in student protests taking place globally, particularly in response to neoliberal policy reform and tuition increases. South Africa saw a rise in protests at higher education institutions over the last few years, mainly regarding affordability, climaxing with the 2015/16 #FeesMustFall protests. Meanwhile, in Brazil, public universities are fee-free, and the conversation has instead revolved more around the limited availability of public universities and the privatisation of higher education.

Across the world, educational attainment is linked to an individual's life satisfaction. Particularly in South Africa, the difference between those educated at the tertiary level and those with upper secondary or post-secondary non-tertiary education reporting satisfaction is strikingly significant; 85% of individuals aged 25-26 who have completed tertiary education report to be satisfied with their life, while only 52% of individuals in the same age range, who have completed upper secondary or post-secondary non-tertiary education, report satisfaction.

Further, higher education is a key determinant to achieving sustainable development. As such, the United Nations Sustainable Development Goals (SDGs) include higher education in its Goal 4 Targets. Goal 4.3 aims to, 'by 2030, ensure equal access for all women and men to affordable and quality technical, vocational and tertiary education, including university.'¹ In that sense, Goal 4.b aims to, 'by 2020, substantially expand globally the number of scholarships available to developing countries ... for enrollment in higher education.'²

The importance and value of education are well acknowledged and as such, the right to education, including higher education, is extensively established in human rights law at the international, regional and national levels. The International Covenant on Economic, Social and Cultural Rights (ICESCR) states that 'higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means,

¹ United Nations, General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015, p. 17, <http://bit.ly/2gSm41o>, (accessed 21 June 2017).

² *ibid.*

and in particular by the progressive introduction of free education.’³ The reference therein to equality reflects the underlying fundamental principle of equality and non-discrimination that runs through all international Conventions like a red thread.

Although university enrolments are increasing across the spectrum, it is a global phenomenon that enrolment rates are vastly higher amongst the richest than amongst the poorest in each country.⁴ South Africa and Brazil are two countries where income and wealth remain highly correlated with race, impacting the participation rates in higher education disproportionately. This thesis explores the historical context in which inequality has developed and the way in which it manifests itself in higher education today. Further, the compatibility of the implementation of the right to higher education within international, regional and national human rights frameworks will be examined. Finally, comparisons and contrasts will be drawn between South Africa and Brazil, in relation to the right to equal and affordable higher education, and the States’ implementation thereof.

The idea for this thesis was inspired by the 2015/16 #FeesMustFall movement in South Africa which brought to light the financial barriers to accessing higher education, with which a vast share of students is faced. Comparative analyses and the reflection on similarities and differences can aid in a deeper understanding of the situations in both countries, and their relationship to each other.

Since Brazil and South Africa’s transitions to democracy in 1988 and 1994 respectively, both countries have shown commitment to policies of inclusion of those that were historically disadvantaged. As two emerging economies with similar trends in Gross Domestic Product (GDP) per capita⁵; human development indices⁶, high levels of inequality, and low university enrolment rates, South Africa and Brazil make for an interesting comparison on the extent of equal access to higher education ensured by the State. Particularly the distinct historical developments of racial ideology and inequality,

³ United Nations, General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, art. 13(2)(c) (ICESCR).

⁴ UNESCO, ‘Six ways to ensure higher education leaves no one behind’ *Global education monitoring report: policy paper*, 2017, p. 3, <http://bit.ly/2tPLzS5>, (accessed 1 July 2017).

⁵ World Bank, *GDP per capita (current US\$)*, [website] <http://bit.ly/2umbT8r>, (accessed 13 June 2017).

⁶ United Nations Development Programme, *Human Development Report 2013*, 2013, p. 124, <http://bit.ly/2gSD1J6>, (accessed 13 June 2017).

yet strikingly similar approaches to affirmative action in the 21st century, highlight some of the underlying issues in both contexts.

1.1 Research questions

The research questions that this thesis endeavours to answer are the following:

- a. How do South Africa and Brazil compare in ensuring affordable and equal access to higher education?*
- b. What are the implications of the current funding models for higher education in South Africa and Brazil?*
- c. To what extent are South Africa and Brazil's policies for the implementation of affordable and equal access to higher education compatible with international, regional and national human rights obligations?*

1.2 Methodology

The topic of this thesis is positioned in the contemporary context of the right to education and persistent inequality, yet taking into consideration the historical developments leading up to the present day in this regard. An interdisciplinary human rights-based approach is taken to examine the extent of equal access to higher education in South Africa.

Chapters 2 and 3 discuss higher education, its historical developments, structure and funding models in South Africa and Brazil respectively. Quantitative methods have been used to demonstrate trends in the funding policy towards higher education, supported by qualitative methods through the consultation of literature on the structure and development of higher education.

Chapters 4 and 5 present inequality, its historical context, as well as affirmative action policies implemented by the governments of South Africa and Brazil respectively. Qualitative methods are adopted through the discussion of national legislation and academic literature, supported by qualitative methods to analyse the correlation between race and income in both countries, using data from Brazil and South Africa's national statistics agencies.

Chapter 6 analyses the compatibility of South Africa and Brazil's implementation of the rights to education and non-discrimination with the international and respective regional and national human rights frameworks. Taking a legal perspective, international conventions; committee general comments; state reports; special rapporteur reports; regional charters and conventions; and national constitutions, legislation and jurisprudence were examined.

Taking a comparative approach, Chapter 7 draws parallels between Brazil and South Africa by looking at the situation of access to higher education in both countries in particularly in relation to the system of higher education, persistent inequality, the public reaction, and affirmative action policies, with the aim of, through scrutiny of similarities and differences, arriving at a point of more clarity on the distinct features of these two complex systems.

1.3 Clarification of recurring terminology and concepts

Higher education

Higher education and tertiary education are used interchangeably in this thesis, referring to levels 5 to 7, as defined by the 2011 International Standard Classification of Education (ISCED) maintained by the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁷ The sources of statistics used are not always clear as to whether students at level 7, 'masters or equivalent', are taken into consideration, which presents a certain margin of error. However, this does not affect the main conclusions drawn in this thesis.

Equality and non-discrimination

The principle of non-discrimination complements the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights (UDHR): 'all human beings are born free and equal in dignity and rights'.⁸ As the foundation for the enjoyment of all other human rights, the principles of non-discrimination and equality present two sides

⁷ UNESCO Institute for Statistics, *International Standard Classification of Education ISCED 2011*, 2012, p. 49, <http://bit.ly/2uLBvOh>, (accessed 13 June 2017).

⁸ United Nations, General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, art. 1 (UDHR).

of the same coin: the negative and positive statements referring to the same principle.⁹ Demanding non-discrimination requires equality, and, equality necessarily requires the absence of discrimination. As a fundamental, cross-cutting principle in international human rights law, this principle is present in all major human rights treaties¹⁰

Racial Discrimination

The concept of racial discrimination in this thesis is taken from the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which defines it to mean

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹¹

Race

The Brazilian government uses five official groups for categorisation: *preto* (black), *pardo* (brown or mixed race), *branco* (white), *amarela* (yellow) and *indígena* (indigenous). The first four are classified as ‘*cor*’ (skin colour) and *indígena* as ‘*raça*’ (race). Government statistics are calculated on the basis of self-identification with these five groups. In Brazil, race is considered a fluid concept which can change throughout a person’s lifetime.¹² In 2015, 53.9% of Brazil’s population self-declared as *preto* or

⁹ A.F. Bayefsky, ‘The principle of Equality or Non-discrimination in International Law’, 11 *Human Rights Quarterly*, 1990, cited in L. Weiwei, ‘Equality and Non-Discrimination Under International Human Rights Law’ *Research Notes 03/2004 The Norwegian Center for Human Rights*, 2004, p. 7, <http://bit.ly/2uLB0Ua>, (accessed 20 June 2017).

¹⁰ UDHR, art. 2; ICESCR, art. 2(2); United Nations, General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, art. 2 and 26, (ICCPR); United Nations, General Assembly, *Convention on the Rights of the Child*, 20 November 1989, art. 2, (CRC); United Nations, General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, art. 7, (ICMW); United Nations, General Assembly, *Convention on the Rights of Persons with Disabilities*, 24 January 2007, art. 5, (CRPD).

¹¹ United Nations, General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, art. 1(1), (ICERD).

¹² R. Rochetti, ‘Not as Easy as Black and White: The Implications of the University of Rio de Janeiro’s Quota-Based Admissions Policy on Affirmative Action Law in Brazil’, *Vanderbilt Journal of Transnational Law* 37, no. 1423, 2004, <http://bit.ly/2tq9Tuk>, (accessed 20 June 2017).

pardo, and 45.2% as *branco*.¹³ In fact, through the activism of black consciousness groups in Brazil, self-identification in non-white categories has grown.¹⁴

Relevant to this thesis are the categories *preto* (black), *pardo* (brown), *branco* (white), and their plural counterparts *pretos*, *pardos*, *brancos*. These terms are viewed with much scepticism and not used in everyday life. The term ‘*negro*’, which once had pejorative connotations, is seeing a rise in popularity, particularly but not only among activists, as to the promotion of a collective black identity, and the social disadvantages associated therewith, and it no longer carries racist connotations.¹⁵ Although I take issue with the five-fold terminology still adopted in the official census and government statistics of Brazil today, I have chosen to use these terms in original Portuguese language, to avoid ambiguity.

The South African government, both during and post-Apartheid uses four race categories: black, coloured, Indian/Asian, and white. This thesis will follow the official terminology accordingly.

Affirmative Action

International Conventions do not specifically mention the term ‘affirmative action’ but instead make reference to

special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human right and fundamental freedoms.¹⁶

The definition of affirmative action used in this thesis, is based on a United National Development Programme publication which defines affirmative action to include,

any measure that allocates goods – such as admission into universities, jobs, promotions, public contracts, business loans, and rights to buy and sell land – on the basis of membership in a designated group, for the purpose of increasing the proportion of members of that group in the

¹³ Instituto Brasileiro de Geografia e Estatística (IBGE), *Síntese de Indicadores Sociais: uma análise das condições de vida da população brasileira 2016*, Rio de Janeiro, IBGE, 2016, p. 17, <http://bit.ly/2tqaE6E>, (accessed 3 April 2017).

¹⁴ G. Mitchell-Walthour and W. Darity Jr, ‘Choosing Blackness in Brazil’s Racialized Democracy: The Endogeneity of Race in Salvador and São Paulo’, *Latin American and Caribbean Ethnic Studies*, vol. 9, no. 3, 2015, pp. 318-348, Available from Taylor & Francis Online, (accessed 18 May 2017).

¹⁵ *ibid.*

¹⁶ ICERD, art. 2(2).

relevant labour force, entrepreneurial class, or university student population, where they are currently underrepresented as a result of past or present discrimination.¹⁷

¹⁷ D. Sabbagh, 'Affirmative Action Policies: International Perspective' report prepared for the United National Development Programme, 2004, <http://bit.ly/2eE4rS7>, (accessed 19 May 2017).

2 HIGHER EDUCATION IN SOUTH AFRICA

To lay the groundwork for analysis and comparison, this chapter will explore the historical developments of the South African higher education system, traced back to colonial times. Secondly, the system as it exists today will be considered. Third, an extensive examination into how higher education in South Africa is funded will follow.

2.1 The development of higher education in South Africa

The historical development of higher education in South Africa is inseparable from the political and social developments at the time. Further, the development cannot be seen as one; historically black and historically white institutions developed separately, as a result of deliberate government policy. The development of higher education can be directly traced back to white domination in South Africa, during the colonial period and the Apartheid era.

Following the settlement of English colonisers in 1820, the first South African University, Rhodes University, was established. It was only nearly a century later, in 1916, that the first university for black South Africans, Fort Hare, was established. Until then, higher education was considered a privilege exclusive to white society, and very few black students were enrolled in university.¹⁸ In 1948, the share of black students was 4.8%.¹⁹

During the apartheid era, the State went on to create several new universities for blacks, divided from a majority into minorities by language, which would be referred to as 'bush colleges'.²⁰ This strategy of separate development was in line with the racial organisation prevailing in society. As such, the National Party, the ruling party at the time, created the Department of Bantu Education in 1953, which as Verwoerd put it, was designed for one particular purpose: 'the Bantu must be guided to serve his own

¹⁸ T. Reddy, 'Higher Education and Social Transformation: South Africa Case Study', 2004, p. 10, <http://bit.ly/2uLLS4u>, (accessed 18 May 2017).

¹⁹ S. Badat, 'Reformist strategies in black tertiary education since 1976', in E. Unterhalter, H. Wolpe, T. Botha et al (eds.), *Apartheid Education and Popular Struggles*, Johannesburg, Ravan Press, 1991, p. 48.

²⁰ Reddy, p. 10.

community in all respects. There is no place for him in the European community above the level of certain forms of labour',²¹ and 'when I have control of Native Education I will reform it so that the Natives will be taught from childhood to realise that equality with Europeans is not for them.'²²

Although black universities were established, circumstances at these universities could not be compared to those of white universities. Rules gazetted between 1959 and 1960 prohibited students from, *inter alia*, leaving the premises without permission, from forming student organisations, from holding meetings, and from distributing publications or pamphlets.²³

In 1969, a blacks-only student union, the South African Students' Organisation (SASO), was formed, with Steve Biko as its elected leader. SASO aimed to (1) mobilize black students by increasing contact nationally, (2) identify crucial issues and grievances that affected black students, (3) represent the interests of black students, (4) establish a solid and strong identity to boost black students' confidence in themselves, and (5) begin concrete programmes to respond to pertinent issues to get the majority of black students directly involved in SASO activities.²⁴ Closely linked to SASO, the Black Consciousness ideology developed.²⁵

In the 1970s, the situation intensified, starting with the 1972 boycotts and exploding with the 1976 Soweto Uprising. The 1972 boycotts symbolically, politically, and socially opened the doors for a boycotting culture to manifest itself.²⁶ When, in 1974, the Department of Bantu Education announced that from the following year onwards the language of instruction in half of school subjects would be Afrikaans, black students took to the streets in protest. The protests soon turned violent: police shot into the crowd of protesters and students burned buildings. Thousands of activists were detained, and Black Consciousness organisations were banned. Many students left the

²¹ A.L. Behr, *Education in South Africa: Origins, Issues and Trends 1652-1988*, Pretoria/Cape Town, Academica, 1988, p. 36.

²² B. Hirson, *Year of Fire, Year of Ash. The Soweto Revolt: Roots of a Revolution*, London, Zed Press, 1979, p. 45.

²³ Reddy, p. 18.

²⁴ A. Stubbs (ed.), *Steve Biko: I Write What I Like*, London, Penguin, 1988, pp. 4-5.

²⁵ Reddy, p. 24.

²⁶ *ibid.*, p. 25.

country to join the military wings of the African National Congress (ANC) and Pan Africanist Congress (PAC).²⁷ Strikes and boycotts continued until the fall of Apartheid when universities suddenly had to open their doors to students of all races. Higher education was restructured within a framework of policies and regulations including the 1996 National Commission on Higher Education, 1997 Higher Education Act, and the 2001 National Plan for Higher Education. Institutions were merged as to cut down from 26 to 23 universities, without actually closing down any campuses.²⁸

2.2 The structure of higher education in South Africa

The South African education system is comprised of three bands: General Education and Training, Further Education and Training and Higher Education and Training.²⁹ Since 2009, the national Department of Education has been split into the Department of Basic Education, and the Department of Higher Education and Training (DHET), of which the latter is headed by South African Communist Party Secretary-General, Minister Blade Nzimande. Higher education, also referred to as ‘tertiary education’, includes university education, technical and vocational training, as well as adult basic education and training.³⁰ South Africa has a vibrant higher education sector, with 20 universities and six universities of technology that, although autonomous, are subsidised by the government.³¹

Through mergers and restructuring of the sector, there are 26 public and 113 private higher education institutions in South Africa today. Under the apartheid regime, the sector was fragmented and far less regulated, with 36 public and over 300 private institutions.³² Private institutions are legally not allowed to call themselves ‘private

²⁷ Reddy, p. 26.

²⁸ International Education Association of South Africa, ‘South African Higher Education: Facts and Figures’, <http://bit.ly/2gT9xKT>, (accessed 23 May 2017).

²⁹ South African Schools Act No. 84, 1996.

³⁰ ‘Higher education’ and ‘tertiary education’ are used interchangeably in this paper.

³¹ L. Grant, ‘How much will it cost to go to a South African university in 2016?’, *AfricaCheck*, [website], 2015, <http://bit.ly/2uM3fC3>, (accessed 22 May 2016); Statistics South Africa, *Tuition fee trends over time: what do the data show?*, [website], 2016a, <http://bit.ly/2ulfPHT>, (accessed 1 June 2017).

³² Department of Higher Education and Training (DHET), *Statistics on Post-School Education and Training in South Africa: 2013*, Pretoria, DHET, 2015, p. 3, <http://bit.ly/2eEcvm2>, (accessed 6 April 2017).

universities', but they are increasingly becoming known as such since public and private institutions are subject to the same regulations. According to the latest available data from 2013, just over 1.1 million students were enrolled in public and private higher education institutions, of which 89% attended one of the 26 public institutions, down from 92% in 2009.³³ Notably, distance learning is a phenomenon of increasing popularity at public institutions. In 2013, 41% of those students enrolled in public universities were enrolled for the distance mode of learning as opposed to the contact mode of learning. In 2009, this figure was only at 38%.³⁴

While public higher education institutions are subsidised by the government, their private counterparts do not receive state funding. Nonetheless, the public institutions are only partially subsidised, and students are still required to pay university fees. In 1999 the government established the National Student Financial Aid Scheme (NSFAS), which enables poorer students to access higher education. The program is government-funded and provides bursaries and loans to disadvantaged students. Nonetheless, a concerning rate of drop-out students prevails, for which financial constraints are largely to blame. NSFAS funding does not sufficiently cover all the necessary costs, and 35% of students benefitting from this program terminate their studies prematurely.³⁵

2.3 Revenue streams of South African universities: (de)funding the future

The income of public South African higher education institutions can be divided into three main streams: government funds, student fees and private income. Figure 1 overleaf depicts the proportions of these income streams for the period 2000-2014. 'Government funds' refers to block grants to higher education institutions as well as earmarked grants or subsidies. 'Student fees' refers to the residence and tuition fees that students pay directly to the institutions. 'Private income' includes all other income,

³³ DHET, 2015, pp. 3-5.

³⁴ *ibid.*, p. 5.

³⁵ International Education Association of South Africa, p. 16.

obtained through donations, investments, etc.³⁶ The proportions shown in the figure are averaged out for all institutions across the country, and it is important to note that the figures amongst institutions may vary substantially. On the whole, it can be seen that the average proportion of government funds declined from 49% in 2000 to 38% in 2014. Notably, these figures do not take into account the number of enrolled students at these institutions per year. If the total funding were to be calculated per capita, one would find that government funds per student have in fact decreased significantly more than just nine percentage points, as the student participation rate has increased annually.³⁷

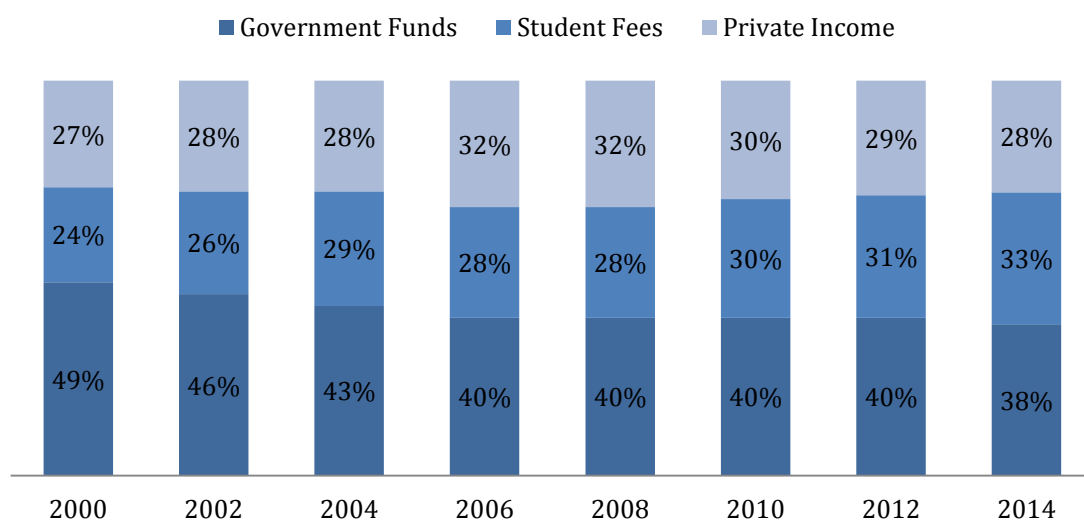


Figure 1: Income Sources of South African Universities, 2000-2014

*Graph showing the change in proportions of government funding, student fees, and private income, in the period from 2000 to 2014.*³⁸

In 2013, state expenditure on education as a percentage of GDP was 6% compared to 4.9% in 2008. The average for Organisation for Economic Co-operation and

³⁶ DHET, *Report of the Ministerial Committee for the Funding of Universities*, Pretoria, DHET, 2014, p. 144, <http://bit.ly/2uKZUUnc>, (accessed 3 May 2017); L. Nongxa and E. Carelse, 'Moving forward: Trends in annual reporting by South African public universities', 2014, p. 26, <http://pwc.to/2umG7bk>, (accessed 16 May 2017).

³⁷ Statistics South Africa, *2013 General Household Survey*, Pretoria, Stats SA, 2014, <http://bit.ly/2uTM6qZ>, (accessed 3 June 2017).

³⁸ Center for Higher Education Trust (CHET), *South African Higher Education Open Data*, [website], <http://bit.ly/2tQafd2>, (accessed 21 March 2017); DHET, 2014, p. 144.

Development (OECD) Member States was 5.2% and 5.1% in 2013 and 2008 respectively.³⁹ Another striking statistic is the percentage of total education expenditure that goes towards higher education. In 2013, the average recorded percentage across OECD Member States was 24.9%, up from 22.5% in 2008. South Africa lies well below this figure, with 12.4% of its total expenditure on education spent on tertiary education in 2013. This figure has decreased from 13% in 2008. These statistics confirm that the South African government does indeed appear to be underfunding its higher education institutions, compared to other OECD countries.

In its Report of the Ministerial Committee for the Review of the Funding of Universities of 2013, the DHET itself acknowledged that it had not met the transformation goals as articulated in the Education White Paper 3 and the National Plan for Higher Education.⁴⁰ These goals included improving entry opportunities to university, and increasing the participation of historically and presently disadvantaged students.⁴¹ Although university enrollments have increased, the student participation rates of historically disadvantaged population groups remain significantly low, as will be elaborated on in Chapter 4.2.

Since one of the biggest barriers to university entry is financial constraints, one way of effectively increasing enrolment rates, especially among historically and presently disadvantaged students, is a decrease in university fees; hence an increase in government funding of universities. Notably, the National Development Plan makes no mention of university funding in its vision for higher education and transformation.⁴² The DHET in its 2013 Report recommended that the South African government should ‘increase the funding for higher education, to be more in line with international levels of expenditures.’⁴³ It is clear that increased government funding for universities is not only necessary to ensure that South Africa is in line with global standards, but also to show

³⁹ World Bank, *Government expenditure on education, total (% of GDP)*, [website] <http://bit.ly/2uLXODd>, (accessed 23 May 2017).

⁴⁰ DHET, 2014, p. 12.

⁴¹ *ibid.*, pp. 12-13.

⁴² National Planning Commission, *National Development Plan: vision for 2030*, Pretoria, NPC, 2011, <http://bit.ly/2vMeqIr>, (accessed 21 March 2017).

⁴³ *ibid.*, p. 20.

that the government is in fact committed to achieving the transformation goals it has set in the Education White Paper 3 and the National Plan for Higher Education.

A multifaceted system of education is met with complex issues, caused largely by the legacies that were left by the apartheid regime and its discriminatory practices. However, it is undeniable that a lack of government funding has contributed to the issues that the higher education sector is facing. Consistent under-funding, coupled with increased tuition fees, continue to put pressure on poor and working class families and bar entry into higher education institutions.

Increases in the cost of education in South Africa exceed general inflation every year. When comparing March 2005 with March 2014, one sees that the increase in the cost of education is 5.3 percentage points higher than the headline Consumer Price Index (CPI) of 4%.⁴⁴ Over the five-year period between 2010 and 2015, the national cost of education increased by 53%.⁴⁵ These increases present one of the biggest barriers to entry for those seeking to enrol in a South African university.⁴⁶

For higher education in particular, it is undisputed that tuition fees are rising in real terms. Calitz and Fourie, two South African economics professors, undertook a study to determine the historical cost of tertiary education in South Africa, going as far back as 1911.⁴⁷ Using a Bachelor of Arts degree at one of the oldest universities in the country, Stellenbosch University, as the constant in their historical comparison, they determined the cost in 2005 South African Rand prices. Figure 2 overleaf indicates that between 2006 and 2015, the cost of tertiary education increased by 30%, after adjustments for inflation. This trend continues until 1961. In 2015, a BA degree cost 2.7 times as much as the same degree in 1961, in real terms.

However, since the per capita income in South Africa has increased over time, it is necessary to also consider tuition fees as a percentage of the average income of a

⁴⁴ Statistics South Africa, *Education costs continue to outstrip inflation*, [website], 2015, <http://bit.ly/2ultM8J>, (accessed 20 April 2017).

⁴⁵ *ibid.*

⁴⁶ Statistics South Africa, *2015 General Household Survey*, Pretoria, Stats SA, 2016b, <http://bit.ly/2ulpxtX>, (accessed 3 May 2017).

⁴⁷ E. Calitz and J. Fourie, 'The historically High Cost of Tertiary Education in South Africa', *Politikon*, vol. 43, iss. 1, 2016, pp. 149-154, Available from Taylor & Francis Online, (accessed 4 April 2017).

South African adult, and as a percentage the GDP per capita. These figures are listed in columns three and four. The trends in these columns can be explained by static or declining incomes and high inflation in the period after 1961 and before 1995. Although the fees in real terms have increased historically, up until 1995, these increases can be explained by the trends in income and inflation.⁴⁸

Figure 2: BA Tuition Fees at Stellenbosch University, South Africa, 1961-2015

	Real tuition fees (in 2005 Rand)	Tuition fee as a % of average income per adult	Tuition fee as a % of GDP per capita
1961	R6,652	22.0%	28.4%
1977	R9,823	26.2%	30.8%
1995	R11,261	35.4%	38.0%
2006	R13,753	36.9%	38.0%
2015	R17,915	44.0%	45.9%

*Table showing the cost of a BA degree at Stellenbosch University in real terms adjusted for inflation, as well as a percentage of the average income per South African adult and as a percentage of GDP per capita over the period from 1961 to 2015.*⁴⁹

Rising costs of tuition fees appear to be a post-1994 occurrence, as concluded by Calitz and Fourie, who claim that the increase seen in this particular period can be attributed almost entirely to increasing tuition fees, whereas the rise seen in the two decades before was largely a consequence of static or declining incomes and high inflation.⁵⁰ The vast increase of 22% between 1995 and 2006 was cushioned by a simultaneous,

⁴⁸ Calitz and Fourie, pp. 151-153.

⁴⁹ *ibid.*, pp. 152-153.

⁵⁰ *ibid.*, p. 153.

rapid increase in incomes. However, when the financial crisis hit in 2007, income increases came to a halt yet tuition fees continued to increase. The consequences on the affordability of higher education were and still are, felt firmly by students. In this latter period, the cost increased by 30% and now demands 44% of the average income of an adult.⁵¹

In light of the post-1994 fee increase phenomenon discussed above, it is necessary to understand the causes behind these fee increases, before going into their effects in the next chapter. Since only a few nonbiased studies on the tuition fee increases since 1994 have been conducted, there are some limitations to establishing the reasons behind the phenomenon. Nonetheless, by piecing together various fragments of information, some apparent reasons come to light. A large proportion of the rising costs can be attributed to rising maintenance costs and increasingly expensive municipal service costs. Further, as the South African Rand weakens in relation to other currencies, the costs of textbooks and other materials that are imported rise.⁵² Riana Geldenhuys, head of media liaison at the University of Cape Town confirms that ‘universities are very expensive to run’, and says that almost 65% of expenses at the University of Cape Town are associated with staff costs, while another large portion goes towards the upkeep of the university’s estate.⁵³ The universities themselves also make an effort to facilitate access to higher education, through cross-subsidisation of students, which means that a portion of the collected tuition fees is used to subsidise students who have been historically disadvantaged and could otherwise not afford to access higher education.

As a result of the simultaneous decrease in government funding of higher education institutions and an increase in costs associated with running a university, tuition fees have had to increase consistently, particularly since 1994, and even more so since the financial crisis. However, tuition fee increases cannot be explained away as being the result of purely logical increases in other costs. The Minister for Higher

⁵¹ Calitz and Fourie, . 153.

⁵² Statistics South Africa, 2015.

⁵³ M. Makoni, ‘Higher education is not cheap’, *University World News*, 24 October 2014, <http://bit.ly/2uLdMxX>, (accessed 4 May 2017).

Education and Training himself said that there is a ‘misuse of funds [in universities] due to mismanagement and corruption.’⁵⁴ Wangenge-Ouma, a renowned South African academic, is confident that the cost of higher education could be reduced, if universities were to cut unnecessary costs, reduce wastage of resources, and be more efficient in its operations.⁵⁵

⁵⁴ DHET, 2014, p. 1.

⁵⁵ G. Wangenge-Ouma and N. Cloete, ‘Financing higher education in South Africa: public funding, non-government revenue and tuition fees’, *South African Journal of Higher Education*, vol. 22, iss. 4, 2008, pp. 906-919, Available from AJOL, (accessed 14 May 2017).

3 HIGHER EDUCATION IN BRAZIL

As a basis for analysis of higher education in Brazil, and a comparison with South Africa, this chapter will first describe the relatively recent historical development of higher education in Brazil. Thereafter, the system and its structure as it exists today will be examined. Thirdly, and perhaps most importantly, this chapter will clarify how higher education institutions, both public and private, are funded in Brazil.

3.1 The development of higher education in Brazil

Brazil was one of the last countries in Latin America to establish higher education institutions, in the early nineteenth century. During the colonial period, children of the colonial elites would move to the metropolis to attend university. In the colony itself, the history of education dates back to the second half of the sixteenth century, where the Jesuits offered education that focused on the Christianization of indigenous people.⁵⁶ After 210 years of the colony's educational system being provided for solely by the Jesuits, it was transformed by King José I's minister, Marquis of Pombal, who expelled the Jesuits from the colony.⁵⁷ Brazil's education and culture took off again in 1808 when the Portuguese royal family moved to the colony to escape Napoleon's troops. King João VI went on to establish Brazil's first higher education programs for professional training in the fields of medicine and engineering, in schools referred to as *Faculdades*. Brazil's independence in 1822 did not have a significant impact on higher education.⁵⁸

In 1920, Brazil's first university was established in Rio de Janeiro. It was created by joining existing *Faculdades*. *De Facto* it was merely a structural change that took place.⁵⁹ Operations remained the same as under the *Faculdades*, without any

⁵⁶ A.C. Oliven, 'Higher Education in the United States and Brazil: How the Two Systems Origins Shaped Their Future Development', *Creative Education*, vol. 5, no. 18, 2014, pp. 1662-1672, <http://bit.ly/2uTYHuw>, (accessed 27 May 2017).

⁵⁷ E.R. Durham, 'Higher Education in Brazil: public and private', in C., Brock and S. Schwartzman, *The Challenges of Education in Brazil*, Didcot, Symposium Books, 2004, p. 149.

⁵⁸ M. Garcia, 'Higher Education Brazil: History, Policies and a Case Study', 2012, p. 2, <http://bit.ly/2vCMYNS>, (accessed 30 May 2017); Oliven, p. 1667.

⁵⁹ Oliven, p. 1668.

encouragement for development in science or technology.⁶⁰ In 1934, Brazil's third university was established in São Paulo. It was the first to institutionalise research.⁶¹ During the period between 1945 and 1964, higher education in Brazil was expanded, by building on previously existing *Faculdades*. These were located in the big cities and were attended by the elite.⁶²

When the military seized power in 1964, universities were directly influenced as the government removed many professors and created information units, in an attempt to control learning content as well as suppress any revolutionary ideas or actions. In 1968, a year of student protests around the world, Brazil saw a wave of protests against the limited number of vacancies in universities. Some students, although having passed the entrance exams in highly selective university courses, were not assigned a seat. Within a few weeks, the National Congress approved a law that would lead to university reform, and enrolment rates doubled between 1968 and 1970.⁶³ This reform however also made it easier for private institutions to be established, without strict regulations. The government put a stop to the boom of private institutions at the end of the 1970s. This stagnation lasted until 1996, when a law stipulating guidelines on education and giving more autonomy to institutions, *Lei de Diretrizes e Bases da Educação*, was passed. This law opened the doors for further expansion, and between 1996 and 2004, the number of private institutions increased by 151.6%.⁶⁴

3.2 The structure of higher education in Brazil

In Brazil, higher education at the federal level is regulated by the Ministry of Education (MEC). The system of education is separated into Basic Education, which includes kindergarten; primary education; and secondary education, and higher education which comprises both undergraduate and graduate studies. Undergraduate studies are either associate degrees, which last 2-3 years, or bachelor degrees with a duration of 3-6 years.

⁶⁰ M. de L. Fávero, *Universidade & poder*. Rio de Janeiro, Achimé, 1980, cited in Oliven, p. 1668.

⁶¹ Durham, p. 158.

⁶² Oliven, pp. 1668-1970.

⁶³ *ibid.*, p. 1669; D. de Melo Costa, 'A new era for higher education in Brazil', University World News, 11 July 2014, <http://bit.ly/2gToMng>, (accessed 1 June 2017).

⁶⁴ D. de Melo Costa.

To be eligible for undergraduate studies, an applicant must take an entrance test, called ‘*vestibular*’.⁶⁵

Higher education was initially funded by the government. However, over time as the system expanded, private institutions were established. Today, the higher education sector is comprised of 2.364 institutions, of which only 12.5% are public institutions maintained by the government, and the rest are private institutions maintained by associations, companies or families.⁶⁶ According to the 2015 Higher Education Census, there were just over 8 million students enrolled in undergraduate courses in higher education, up from 4.6 million in 2005. Of the 8 million students, 24.3% are enrolled in public higher education institutions.⁶⁷

Higher Education institutions are comprised of Universities (*Universidades*), University Centers (*Centros Universitários*), Faculties (*Faculdades*), Federal Institutes of Education (*Institutos Federais de Educação*), and Federal Centers for Technological Education (*Centros Federais de Educação Tecnológica*). Of the total number of higher education institutions, Universities make up only 8.2%. However, 53.2% of students are enrolled in universities. Faculties make up 83.8% of all higher education institutions, and 28% of students are enrolled in such an institution.⁶⁸

Public institutions are fully funded by the government and fee-free for students. They are known to have a high standard and admission is highly competitive. The *vestibular* is difficult to pass and those that are admitted usually attended private secondary schools. Garcia calls this ‘the X theory’: on the one hand, students from wealthy families with the financial resources to attend private secondary schools which provide them with the skills to fare well in the *vestibular* are accepted into the prestigious public universities and can complete higher education without having to pay for it. On the other hand, students from less privileged backgrounds, who attended public schooling which is considered to be of a lower standard, cannot attain high scores

⁶⁵ Garcia, pp. 6-8.

⁶⁶ Ministério da Educação, *Censo da Educação Superior 2015*, [PowerPoint], 2016, p. 13, <http://bit.ly/2tA8Yf1>, (accessed 15 April 2017); Garcia, pp. 4-7.

⁶⁷ Ministério da Educação, p. 13.

⁶⁸ *ibid.*, p. 57.

in the *vestibular* and are consequently left with the option of paid private higher education, for which they cannot afford to pay.⁶⁹

As will be elaborated on at a later point, income in Brazil is still highly correlated with race. Consequently, students in public universities are disproportionately white, wealthy and come from a private school background.⁷⁰ Private higher education institutions in Brazil do not have the same level of resources or the prestige of the public institutions.⁷¹ Although private institutions have a higher capacity for enrollment, most Brazilian families cannot afford to pay the fees at these institutions. Higher education is perceived as a means to social mobility in Brazil, and thus there have been demands for the government to take action and increase affordable access to higher education.⁷²

The government has since implemented several policies in an effort to meet the demand for increased access to higher education. Further policies were adopted for the public and private sector, which were laid out in the 2007 Education Development Plan (*Plano de Desenvolvimento da Educação*). The government aimed to expand access to public universities by investing approximately US \$900 million in the sector, as outlined in the Plan of Reorganization and Expansion of Federal Universities (REUNI) (*Programa de Apoio a Planos de Reestruturação e Expansão das Universidades Federais*).⁷³ In order to facilitate access to private higher education institutions, the government invested in two programs: Financing of Higher Education Students (FIES) (*Fundo de Financiamento ao Estudante do Ensino Superior*) and University for All Programme (ProUni) (*Programa Universidade para Todos*). FIES essentially provides student loans at a very favourable interest rate. ProUni provides partial and full scholarships to students from disadvantaged backgrounds. In 2012, the government of Brazil adopted a law which would implement very comprehensive

⁶⁹ Garcia, pp. 5.

⁷⁰ 'The mortarboard boom', *The Economist*, 15 September 2012, <http://econ.st/2gTGRkS>, (accessed 2 May 2017).

⁷¹ *ibid.*

⁷² D. de Melo Costa.

⁷³ *ibid.*

affirmative action policies.⁷⁴ The law requires all federal universities in Brazil to adopt a specific quota system, taking into account income, race, and schooling background. These measures will be elaborated on in Chapter 5.

3.3 Battle of the sectors: funding for higher education institutions in Brazil

Brazil adopts a mixed system of public and private universities. Public universities can be federally funded or financed by state governments. Private schools can be for-profit or, as many religious institutions, not-for-profit. The State, however, does not only fund public universities. To support the expansion of higher education, the State invests public funds in two programs, which affect the private sector: FIES and ProUni. FIES essentially provides student loans at a very favourable interest rate. ProUni provides partial and full scholarships to students from disadvantaged backgrounds.

In 2013, Brazil's state expenditure on education made up 6% of its GDP, a slight increase from 5.3% in 2008. Comparatively, The average for OECD Member States was 5.2% and 5.1% in 2013 and 2008 respectively.⁷⁵ Although government spending per student in higher education is significantly higher than that per student in primary or secondary education, the number of students in higher education is relatively low.⁷⁶ State spending on education as a share of total state expenditure totalled 16.1% in Brazil in 2013, well above the OECD average of 11.2%. Of the total state expenditure on education, 18.1% went towards higher education in 2013, and 15.9% in 2008. This figure lies well below the OECD average of 24.9% and 22.5% in 2013 and 2008 respectively.⁷⁷ Public expenditure on education in Brazil is increasing, both as a percentage of GDP and total government expenditure. However, it is increasing at a faster rate in primary and secondary education, compared to higher education.⁷⁸

Brazil has followed a recent global trend of privatisation. Only around 25% of

⁷⁴ Lei No. 12.711, 2012 (*Lei de Cotas*).

⁷⁵ World Bank, *Government expenditure on education, total (% of GDP)*.

⁷⁶ Organisation for Economic Co-operation and Development (OECD), 'Brazil Country Note' *Education at a Glance 2016: OECD Indicators*, 2016, pp. 3-4, <http://bit.ly/2tzIUkn>, (accessed 15 June 2017).

⁷⁷ World Bank, *Government expenditure on education, total (% of GDP)*.

⁷⁸ OECD, pp. 3-4.

students are enrolled in public higher education institutions, with the rest being absorbed by the private sector.⁷⁹ Although private institutions by nature do not typically receive funding from the State, government spending on private higher education as a percentage of total government spending on education is increasing at a faster rate than spending on public higher education. Figure 3 below, shows the increase in government spending on FIES and ProUni, as a share of total government expenditure on education, between 2008 and 2015.

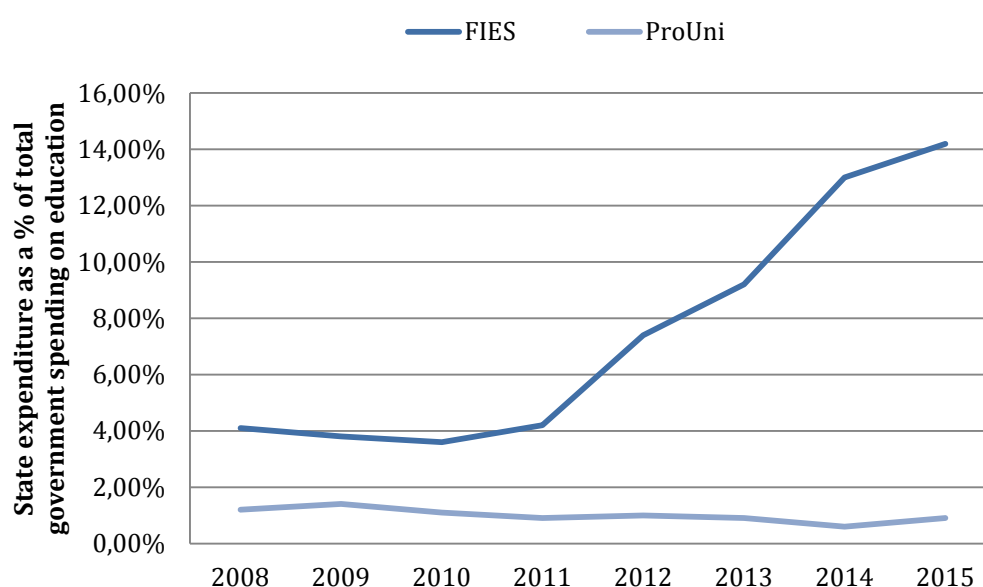


Figure 3: Increase in Government Funding for Private Higher Education Institutions in Brazil, 2008-2015

*Graph showing the change in government funding for FIES and ProUni as a percentage of total government spending on education, between 2008 and 2015.*⁸⁰

The above graph shows that state funding for private higher education institutions comprises an increasing share of total government spending on education. It is important to note that funding associated with ProUni is in fact not a direct payment

⁷⁹ Ministério da Educação, p. 13.

⁸⁰ V.L.J. Chaves and N.C. Amaral, 'Política de Expansão da Educação Superior no Brasil', *Educação em Revista*, vol. 32, no. 4, 2016, pp. 49-72, Available from SciELO, (accessed 30 June 2017).

from the State to institutions, but a loss in revenue as a result of tax breaks granted to private institutions that award scholarships to students. The funding in the form of FIES is in the form of student loans, which the State expects to see recovered.

4 INEQUALITY IN SOUTH AFRICA

In addition to the historical development and present structure of higher education in South Africa, a relevant factor for a comparative analysis and deeper understanding of disparity in access to higher education is the persistent level of inequality. This chapter will look at the roots of inequality in South Africa, how it manifests itself today, and what measures the State has taken in recent years to combat this.

4.1 Historical context

In a speech in Parliament in 1998, Thabo Mbeki, then-Deputy President of the Republic, spoke to the state of inequality in South Africa:

Material conditions ...have divided our country into two nations, the one black, and the other white. ...[the latter] is relatively prosperous and has ready access to a developed economic, physical, educational, communication and other infrastructure...The second, and larger, nation of South Africa is black and poor, [and] lives under conditions of a grossly underdeveloped infrastructure...⁸¹

In tracing the development of inequality in South Africa back to its roots, and these ‘material conditions’ that Mbeki spoke of, they will be considered in relation to land, labour and capital, the three factors of production.

Land ownership as it is today can be traced back to the second half of the 17th century, which saw the start of a 200 year battle period of appropriation of most of the land by European colonisers.⁸² Further, as part of the English common law system, riparian law allocated water rights to the owner of the land through which it flows. For the following 200 years, land and water formed the basis of wealth accumulation.⁸³ At the beginning of the 20th century, legislation was enacted which limited land ownership for blacks to certain areas which amounted to only 8% of South Africa’s land.⁸⁴ This

⁸¹ T. Mbeki, ‘Reconciliation and Nation-Building’, speech at opening of debate in National Assembly, Cape Town, South Africa, 29 May 1998, <http://bit.ly/2tqh3Ps>, (accessed 2 June 2017).

⁸² F. Wilson, ‘Historical Roots of Inequality in South Africa’, *Economic History of Developing Regions*, vol. 26, iss. 1, 2011, p. 1-15, Available from Taylor & Francis Online, (accessed 3 June 2017).

⁸³ *ibid.*

⁸⁴ Natives Land Act No. 27, 1913.

figure was increased to 13% in 1936.⁸⁵ Property ownership remained restricted and was reinforced using the Group Areas Act of 1950.⁸⁶ The unavailability, or rather prohibition of use, of land by blacks for agricultural purposes, allowed whites, in the absence of competition, to produce 90% of agricultural value-added.⁸⁷

With the boom of mineral mining and the process of industrialisation, arose the need for a migrant labour system which entailed the forced migration of black men to the mines, where they would work under short-term labour contracts with very little employment security and accommodated in repressive on-site compounds. There were no opportunities for labour organisations, and an occupational hierarchy was enforced by a strict colour-bar.⁸⁸ While the migrant labour system remained a central feature of employment into the 1980s, whites were able to advance themselves into skilled positions or positions of superiority. Wages increased steadily, mainly made possible by a favourable system of labour organisations.⁸⁹ The migrant labour system simultaneously created wealth and poverty, for the two ‘nations’ that Mbeki referred to in his 1998 speech.⁹⁰ The world has not seen a comparable labour system in another industrialising country, which operated for a full 100 years.⁹¹

Apart from the factors of land and labour, the most pertinent factor remains that of the racist manipulation of human capital.⁹² Two ways in which human capital accumulation was restricted for blacks include by means of education and through the limitation of business ownership. Until the mid-20th century, the only form of education provided to black children by the State was low-quality ‘Bantu education’, as elaborated on previously. Compulsory primary schooling existed only for white children, until 1994. In 1976, the per capita state expenditure on black students was just 7.5% of the

⁸⁵ Development Trust and Land Act No. 18, 1936.

⁸⁶ Group Areas Act No. 41, 1950.

⁸⁷ Gelb, S., *Inequality in South Africa: Nature, causes and responses*, Johannesburg, The EDGE Institute, 2013, <http://bit.ly/2tQxfc9>, (accessed 27 May 2017).

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ Mbeki, ‘Reconciliation and Nation-Building’.

⁹¹ Wilson, p. 7-8.

⁹² *ibid.*, p. 8.

per capita state expenditure on their white counterparts.⁹³ Black firm ownership was explicitly restricted and limited to certain areas in the cities through legislation.⁹⁴ Over time, black entrepreneurs were prohibited from owning multiple businesses, from entering certain markets, and restrictions became harsher, preventing black-owned companies from being established.⁹⁵ Without ownership, blacks were unable to provide loan security for asset acquisition.⁹⁶

4.2 On continuity and change: inequality in numbers

The post-1994 government inherited an education system corrupted with inequalities, which it has not been able to tackle.⁹⁷ The system was separated along racial lines and characterised by a grossly disproportionate distribution of resources in favour of white students.⁹⁸ While white South African children received virtually free, quality education, their black counterparts received only what was known as ‘Bantu education’; this education system expressly aimed to ‘prevent Africans [from] receiving an education that would lead them to aspire to positions they wouldn’t be allowed to hold in society.’⁹⁹ Higher education was mostly restricted to those who could afford it, which, as a result of the system, were overwhelmingly white families, leaving the vast majority of South Africans without access to university. The huge backlog left by 40 years of apartheid education has been one of the major challenges for the South African government, for which it received a constitutional mandate.

The change in proportions of students from the four main race groups in South Africa enrolled in university, over the period from 1970 to 2015, is depicted in Figure 4 overleaf. The change in proportions over time can be accredited mainly to changes in legislation. The introduction of the Universities Amendment Act of 1983, gave

⁹³ P.N. Pillay, *The development and underdevelopment of education in South Africa*, 1990, p. 2, <http://bit.ly/2vwN2yX>, (accessed 1 May 2017).

⁹⁴ Group Areas Act No. 41, 1950.

⁹⁵ Gelb, p. 21.

⁹⁶ *ibid.*

⁹⁷ Wilson, p. 3.

⁹⁸ South African Human Rights Commission (SAHRC), ‘Chapter Three: The Right to Education’ in *3rd Economic and Social Rights Report*, 2001, p. 79, <http://bit.ly/2untixk>, (accessed 30 May 2017).

⁹⁹ Bantu Education Act No. 47, 1953.

discretion to the Minister of Education to set quotas for the number of black students allowed at ‘white universities’.¹⁰⁰ Subsequently, the 1959 Extension of University Education Act was abolished, which had prohibited black, coloured and Indian/Asian students from studying at white universities without a permit from the minister of education, and rather limited their access to newly established universities specifically envisaged for black, coloured and Indian/Asian students.¹⁰¹ In 1991, the last remaining provisions in the law allowing for restrictions on university admission on the grounds of race were abolished.

Figure 4: Proportion of Students Enrolled in Univesity in South Africa, 1970-2015

	WHITE	COLOURED	INDIAN/ASIAN	BLACK
1970	90.9%	1.2%	2.3%	5.7%
1983	68.9%	5.3%	7.7%	18.1%
1994	41.4%	5.1%	6.9%	46.7%
2015	18.2%	6.2%	7.2%	68.5%

*Table showing the proportion of white, coloured, Indian/Asian, and black students, as a share of total students enrolled in university between 1970 and 2015.*¹⁰²

Although a large increase in the proportion of black students enrolled in university from 1970 to 1983 can be seen, it is important to note that until 1994, those black students that were granted access to higher education, predominantly attended universities established exclusively for them, such as those in the Transkei, Medunsa, Venda, and Bophuthatswana. Afrikaans universities such as those in the Orange Free State, Pretoria,

¹⁰⁰ Universities’ Amendment Act No. 83, 1983.

¹⁰¹ Extension of University Education Act No. 45, 1959.

¹⁰² Statistics South Africa, 2016b, pp. 15-16; Council on Higher Education South Africa, *2011 Higher Education Data: Participation*, [website], <http://bit.ly/2vy1x5s>, (accessed 31 May 2017).

Stellenbosch, and Cape Town remained restricted to white students, with only a handful of exceptions.¹⁰³ Segregation was in no way reduced during this time but rather reinforced.

Albeit the recorded proportion of 68.5% black students enrolled in South African universities in 2015 appears to be high, it is essential to consider this number in the context of the racial population demographics. As per Figure 5 below, the student participation rates of black individuals, recorded in 2015, remains proportionally low in comparison with particularly the Indian/Asian and white population group. While only 3.1% of black individuals aged 18-29 were enrolled at higher education institutions, 15.7% of white individuals aged 18-29 were enrolled and 14.3% of Indian/Asian individuals. This shows that although the number of black students enrolled at university has increased over the past decades, the participation rate of young black individuals in higher education remains disproportionately small.

Figure 5: Student Participation Rate in South Africa, 2015

	STUDENT PARTICIPATION RATE
WHITE	15.7%
COLOURED	3.7%
INDIAN/ASIAN	14.3%
BLACK	3.1%
TOTAL	4.2%

*Table showing the student participation rate of white, coloured, Indian/Asian, and black individuals aged 18 to 29 years, in 2015.*¹⁰⁴

¹⁰³ Statistics South Africa, 2016b, pp. 15-16; Council on Higher Education South Africa, 2012.

¹⁰⁴ Statistics South Africa, 2016b, p. 16.

South Africa's state of inequality between rich and poor, which manifests itself in the Gini coefficient, is one of the highest in the world and seems to be deteriorating.¹⁰⁵ The Gini coefficient is an economic indicator for inequality, which is presented either as a decimal from 0 to 1 or as a percentage. 0 indicates total equality, and 1, or 100%, total inequality. The last available data, from 2011, shows South Africa's Gini coefficient to be 63.38%.¹⁰⁶ According to the 2011 census, the average income of white households was six times as high as the average income of black households.¹⁰⁷ This shows how income and race are still highly correlated in South Africa. Moreover, when considering inequality in a country as unequal as South Africa, the median can be more telling than the mean, as high earners positive skew the average income: the median income of a black South African household was not even half of the mean income.¹⁰⁸

4.3 Affirmative action in higher education

Since the end of statutory apartheid,¹⁰⁹ the government has taken steps to address the extreme backlog left by 40 years of apartheid education and to transform the higher education system. Two concrete examples of this are the race-based admission policy and the National Student Financial Aid Scheme (NSFAS). South African universities apply a race-based admission policy, meaning that when applying to university, students are given a certain degree of preference according to their race. The rationale behind this is to minimise the educational disadvantages that remain as a result of the legacy of apartheid, for which race is the best available proxy at this time.¹¹⁰

¹⁰⁵ Wilson, p. 2.

¹⁰⁶ World Bank, *GINI index (World Bank estimate)*, [website], <http://bit.ly/2tzvbtI>, (accessed 25 May 2017).

¹⁰⁷ Statistics South Africa, *Census 2011*, Pretoria, Stats SA, 2012, <http://bit.ly/2eFphRf>, (accessed 25 May 2017).

¹⁰⁸ K. Wilkinson, 'Race, poverty and inequality: Black First Land First claims fact-checked', *AfricaCheck*, [website], 2015, <http://bit.ly/2eFu2tZ>, (accessed 16 June 2017).

¹⁰⁹ The term 'statutory apartheid' is used with intention, to indicate that although racial segregation is no longer pursued by means of legislation, South Africa does indeed continue to struggle against systematic and societal discrimination and segregation, which can be seen in many sectors, including but not limited to, higher education.

¹¹⁰ M. Price, 'Affirmative Action in South African Universities: What does Race Represent?', *Oxford Human Rights Hub*, 1 July 2013, <http://bit.ly/2vN1f9Z>, [accessed 4 June 2017].

Another way in which the government has tried to achieve its goal of facilitating university access for historically disadvantaged students, and tried to overcome the rising costs of a university degree, is through NSFAS, which is a government initiative that gives loans to historically disadvantaged and financially needy students, established in 1999. These loans remain interest-free for a period of 12 months after graduation. Approximately 40% of these loans end up being converted to bursaries annually, for students who successfully pass all of their courses.¹¹¹

In 2014/15, NSFAS disbursed R7 billion among 186,150 university students.¹¹² To put this figure into context, at the University of Cape Town, NSFAS assisted 3,650 students, making up 14% of the student body.¹¹³ Nonetheless, too few students are accessing these funds, and for those who do, the funds do not suffice to cover all of their university-related expenses. The government claims that the annual budget for this initiative is steadily expanding, however when these figures are compared to the number of enrolled students annually, we again see that an increasing annual budget does not mean that more students annually are accessing NSFAS funds. This means that many students who are deserving of NSFAS support do not receive it. Adequate levels of NSFAS funding are vital to ensuring that no student is excluded from higher education on financial grounds.

¹¹¹ National Student Financial Aid Scheme (NSFAS), '2014/15 Annual Report: NSFAS Toward a student-centred approach,' 2015, p. 4, <http://bit.ly/2uMAA0n>, (accessed 3 June 2017).

¹¹² *ibid.*, p. 9.

¹¹³ *ibid.*, p. 10.

5 INEQUALITY IN BRAZIL

Brazil, like South Africa, has seen persistent inequality levels. This chapter will consider the historical roots of inequality in Brazil and study how this manifests itself today, by looking at key statistics. Moreover, various measures taken by the government in recent years to counteract social disparities will be illustrated.

5.1 Historical context

Since the end of slavery in 1888, racism in Brazil has been more subtle than that in South Africa, and racial segregation was not enforced by law. Until the early 90s, miscegenation or ‘whitening’ and the concept of a ‘racial democracy’ formed the two main pillars of Brazil’s racial ideology.¹¹⁴ Miscegenation was promoted to eliminate the large black population through immigration from Europe and intermarriages. From the 1930s onwards, Brazil saw a period of biological and cultural hybridization, which was explicitly celebrated and encouraged.¹¹⁵ Even in 1987, in response to questions from the CERD on the situation of ‘Afro-Brazilians’ in Brazil, the country’s representative stated that Brazil attached ‘great importance to the number of mixed marriages registered, which were producing a new race and a new culture.’¹¹⁶

Racial democracy was an ideology of non-racialism, which entailed the denial of racism and the existence thereof, in Brazil. As a basis for national identity, this ideology was used to promote nationalism in Brazil. It was not only an ideology held within the country, but Brazil had built up an international reputation for its non-racialism by the 1950s.¹¹⁷ In seeking to understand Brazil’s secret for ‘racial harmony’ in a time where the world was plagued by racism and genocide, UNESCO commissioned a series of studies. However, the results brought forward by researchers such as Florestan Fernandes, Marvin Harris, Roger Bastide, and Thales de Azevedo did not yield the

¹¹⁴ E.E. Telles, *Race in another America – The significance of skin color in Brazil*, Princeton and Oxford, Princeton University Press, 2004, p. 45.

¹¹⁵ *ibid.*

¹¹⁶ United Nations, Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Brazil*, 1987, A/42/18, para. 563, <http://bit.ly/2uNiivk>, (accessed 15 May 2017).

¹¹⁷ Telles, p. 42.

expected outcome.¹¹⁸ For the first time, Brazil's non-racialist identity was stained with accusations of widespread racism and racial domination over 'blacks' by 'whites'.¹¹⁹ These studies saw the persisting racial inequalities and prejudices as a direct consequence of the slavery period, which could be overcome in an open and democratic society.¹²⁰

Regardless of the revelation of these studies in the 1950s, the ideology of racial democracy managed to stay entrenched, even through the dark days of authoritarian rule from 1967 to 1974. Mentioning race or racism was strictly forbidden, and would be punished with social sanctions.¹²¹ The CERD'S concluding observations for Brazil between 1971 and 1987 generally gave positive feedback, except for requests for missing or more information. The issue of the situation of black Brazilians was only touched on superficially. Brazil's 1972 country report to the CERD stated:

Taking into consideration the position of Brazil in terms of racial integration, the Brazilian Government fails to understand the insistence of the Committee on the Elimination of Racial Discrimination in reiterating its demands for additional information on a country where, in spite of the multiplicity of races living within its boundaries, racial problems are simply non-existent.¹²²

Responding to this statement, the Committee elaborated that such requests to Brazil were made 'in light of the situation of racial harmony which prevailed in Brazil...as an opportunity to help other countries'.¹²³

In the 1990s, Brazil finally transitioned from racial democracy to affirmative action, through the process of democratisation and the acknowledgement of racism by

¹¹⁸ Key works in this series of studies include: T. de Azevedo, *Cultura e Situaçao Racial no Brasil*, Rio de Janeiro, 1966; R. Bastide, 'A Imprensa Negra do Estado de Sao Paulo', *Estudos Afro-Brasileiros*, Sao Paulo, 1973; R. Bastide, *The African Religions of Brazil: Toward a Sociology of the Interpenetration of Civilisations*, Baltimore, 1978; F. Fernandes, *A Integração do Negro na Sociedade de Classes*, 2 vols., 3rd edn., Sao Paulo, 1978; R. Bastide and F. Fernandes, *Branços e Negros em Sao Paulo*, Sao Paulo, 1959; M. Harris, *Patterns of Race in the Americas*, New York, 1964.

¹¹⁹ *ibid.*

¹²⁰ A. Hofbauer, 'Before Multiculturalism: Hintergründe zur aktuellen Rassismuskussion in Brasilien', in B. Gomes, W. Schicho, and A. Sonderegger (Hrsg.), *Rassismus. Beiträge zu einem vielgesichtigen Phänomen*, Wien, Mandelbaum, 2008, p. 73-94.

¹²¹ Telles, p. 42.

¹²² United Nations, Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation IV Concerning Reporting by States Parties (Art. 1 of the Convention)*, 1973, A/90/18, para. 124.

¹²³ *ibid.*

the Brazilian government and society at large. With the expansion of civil society and a rise in black-movement organisations, simultaneously with a rejection of the military rule, the groundwork was laid for democratisation, which would hold near to its core the implementation of race-based affirmative action.¹²⁴ The 2001 Third World Conference on Racism in Durban and the media attention given to it, granted legitimacy to the fight against racism in Brazil.¹²⁵

Today the Brazilian population is categorised into five groups: *preto* (black), *pardo* (brown), *branco* (white), *amarela* (yellow) and *indígena* (indigenous). The first four are classified as ‘*cor*’ (skin colour) and Indígena as ‘*raça*’ (race). Government statistics are calculated on the basis of self-identification with these five groups. In Brazil, race is considered a fluid concept which can change throughout a person’s lifetime.¹²⁶ In 2015, 53.9% of Brazil’s population self-declared as *preto* or *pardo* and 45.2% as *branco*.¹²⁷ In fact, through the activism of black consciousness groups in Brazil, self-identification in non-white categories has grown.¹²⁸ Studies have shown a considerable degree of convergence between how a person self-identifies, and how they are identified by third parties.¹²⁹

5.2 Inequality in numbers

Brazil remains one of the more unequal countries in the world, and a large percentage of Brazilians blame discrimination for the lower economic standing of *pretos* and *pardos*.¹³⁰ A study on the sources of perceived discrimination in Brazil from 2017, found that people with darker skin tones were more likely to perceive discrimination on

¹²⁴ Telles, p. 47.

¹²⁵ *ibid.*, p. 75.

¹²⁶ Rochetti, p. 1461.

¹²⁷ IBGE, p. 17.

¹²⁸ G. Mitchell-Walthour and W. Darity Jr, p. 321.

¹²⁹ T.W. Davis, ‘Affirmative Action in Brazil: Its Recent Developments And The Argument For A Narrow Federalism Doctrine’, *Miami Race & Social Justice Law Review*, vol. 4, iss. 1, 2014, pp. 73-97, <http://bit.ly/2uMeg7a>, (accessed 3 May 2017).

¹³⁰ E. Telles and S. Bailey, ‘Understanding Latin American Beliefs about Racial Inequality’, *American Journal of Sociology*, vol. 118, no. 6, 2013, pp. 1559-1595, Available from JSTOR, (accessed 4 May 2017).

the basis of skin colour.¹³¹ In 1996, the CERD drew attention to, and raised particular concern regarding, the fact that black communities in Brazil suffered from deep structural inequalities and that government action to combat this had not sufficed.¹³² Discriminatory attitudes in society prevailed, and the Committee called on the State to take adequate measures in ensuring the fundamental rights of the most vulnerable groups of its population.¹³³

One of the ways in which inequality manifests itself in Brazil is access to higher education. The higher education participation rate for 18 to 24-year-olds has improved significantly in the past decade. In 2015, the total student participation rate was 18.4%, an increase of seven percentage points from 2005. However, when broken down by race, it becomes evident that *brancos* have gained much more ground, and that the inequality gap has failed to close. The participation rate in higher education of *branco* students aged 18 to 24, increased from 17.8% to 26.5% in 2005 and 2015 respectively. For *preto* and *pardo*, this figure increased from 5.5% to 7.3% over the period from 2005 to 2015.¹³⁴ The participation rate of *pretos* or *pardos* students aged 18-24 in higher education, therefore, remains at less than half of their *branco* counterparts.

When looking at Figure 6 overleaf and the representation of income brackets in public and private universities, it becomes apparent that poorer students are underrepresented in both public and private universities. However, students from the lowest quintile income bracket have increased their relative participation in private universities from 0.8% to 4% between 2005 and 2015, and in public universities the poorest quintile represented 8.3% of the student body in 2015, up from 1.9% in 2005. These increases were primarily driven by policy changes.¹³⁵

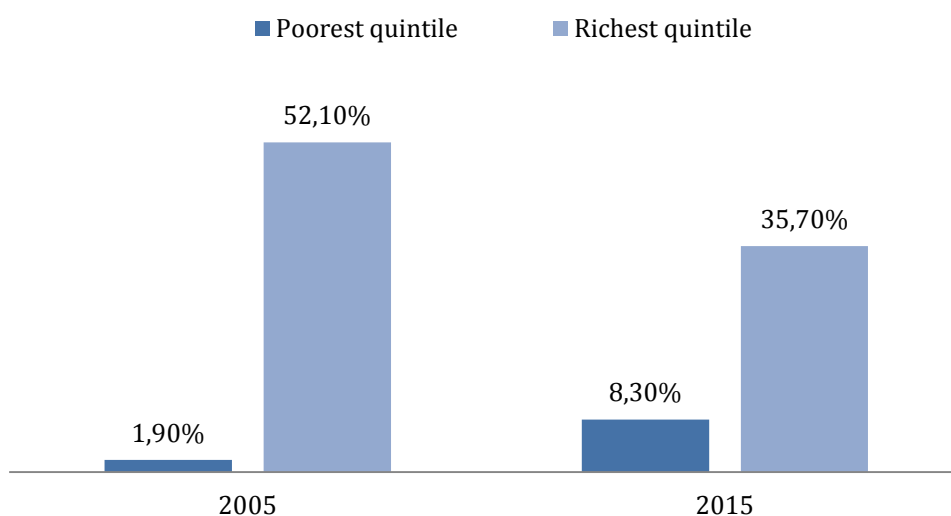
¹³¹ M.L. Layton and A.E. Smith, 'Is It Race, Class, or Gender? The Sources of Perceived Discrimination in Brazil', *Latin American Politics and Society*, 2017, pp. 52-73, Available from: Wiley, (accessed 12 May 2017).

¹³² United Nations, Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Brazil*, 1996, A/51/18, paras. 8-10.

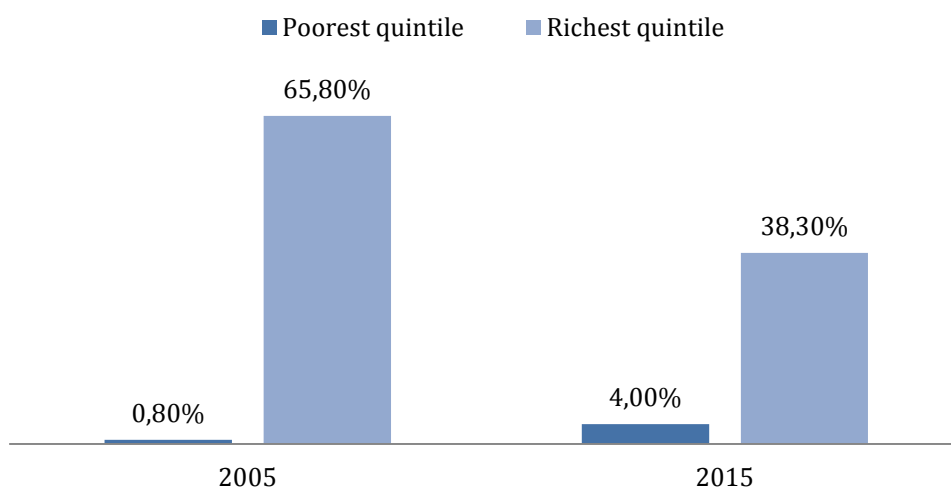
¹³³ *ibid.*

¹³⁴ IBGE, p. 62.

¹³⁵ *ibid.*, p. 63.



(a) Public Higher Education Institutions



(b) Private Higher Education Institutions

Figure 6: Distribution of Students Enrolled in Higher Education relative to Family Income, 2005-2015

*Two graphs, showing the distribution of students in (a) public higher education institutions and (b) private higher education institutions, representing families from the lowest and highest quintile income brackets, in 2005 and 2015.*¹³⁶

¹³⁶ IBGE, p. 63.

It remains particularly problematic to see the underrepresentation of students from a low-income background when considering that income and race remain highly correlated in Brazil. Over the past decade, income inequality has persisted in Brazil. The population remains segmented by colour and race. 2015 statistics show that the lowest 10% income bracket is made up of 75.5% *pretos* and *pardos*, and 23.4% *brancos*. In comparison with 2005 data, the situation has in fact deteriorated, with more *pretos* and *pardos* falling into this bracket and fewer *brancos*.¹³⁷ Amongst the richest 1%, are 79.7% *brancos*, and only 17.8% *preto* and *pardo*. These figures have improved, from 85% and 11.4% in 2005 respectively.¹³⁸

5.3 Affirmative action in higher education

Since the 1990s, the government of Brazil has taken increasing action to eliminate the social inequality rooted in racism, in the form of affirmative action in several sectors. One of these targeted sectors has been higher education. Since 1999, a student loan system has been in place in Brazil, which allows students in public higher education with a positive academic record to apply for funding, to cover either the full or partial costs, repayable at a very low interest rate of 3.4% per annum.¹³⁹

In 2000 and 2001, affirmative action policies were gradually introduced in the State of Rio de Janeiro, requiring state-run universities to reserve a certain number of seats for students from public school backgrounds and/or *preto* and *pardo* youth.¹⁴⁰ These quotas in public universities were first applied in 2003, and in 2005 then-President Luiz Inácio Lula da Silva created an affirmative action program for the private higher education sector: ProUni.¹⁴¹ This program grants tax breaks to private higher education institutions, in exchange for full or partial scholarships granted by these

¹³⁷ IBGE, p. 96.

¹³⁸ *ibid.*

¹³⁹ Garcia, p. 16.

¹⁴⁰ M. Lloyd, 'A decade of affirmative action in Brazil: Lessons for the global debate', in C. Camp-Yeaky, *Advances in Education in Diverse Communities: Research, Policy and Praxis*, vol. 11, 2015, p. 170.

¹⁴¹ Lloyd, p. 172-3.

institutions to a proportion of their students.¹⁴² To be eligible for such a scholarship, a student must have completed their prior education in public schools, or by means of a scholarship in private schools; their per family income must be below 1.5 times the minimum wage for a full scholarship, and up to three times the minimum wage for a partial scholarship.¹⁴³

In response to critical remarks towards ProUni, then-President Luiz Inácio Lula da Silva and his first education minister highlighted the importance of incorporating the private sector, to attain higher education expansion particularly for persons from disadvantaged groups.¹⁴⁴ During the inauguration of ProUni, Lula said that this program does not amount to favours, but rather pays a debt going back 500 years.¹⁴⁵

In 2007, the government launched a Restructuring and Expansion of Federal Universities program (REUNI) which conditions funding for federal universities national-wide, on their adoption of affirmative action policies, to promote the participation of students from disadvantaged groups.¹⁴⁶

In April 2012, the Supreme Federal Tribunal of Brazil (STF) ruled on the constitutionality of race quotas in public universities.¹⁴⁷ Brazil's *Democratas* Party (DEM) claimed that racial quotas violate Article 5 of the Brazilian Constitution, which ensures equality for all citizens regardless of race. However, the STF rejected this argument and reemphasized its constitutional obligation to correct the wrongs of the past, and to close the inequality gap, precisely in line with Article 5.¹⁴⁸

In May 2012, the STF ruled on a similar case, regarding the constitutionality of the public policy for private universities, ProUni.¹⁴⁹ Along the same reasoning, the STF concluded that the program is constitutional, and in line with constitutional provisions requiring the eradication of barriers to equality. Further, the STF reasoned

¹⁴² Garcia, p. 15.

¹⁴³ Lloyd, p. 178-9.

¹⁴⁴ *ibid.*

¹⁴⁵ R.A. Silveira, 'Presidente Lula sanciona Lei do ProUni', *Folha de Sao Paulo*, 13 January 2005, <http://bit.ly/2unyG5h>, (accessed 27 May 2017).

¹⁴⁶ Lloyd, p. 177.

¹⁴⁷ Supremo Tribunal Federal, APDF 186, 12 April 2012, Relator: Rep. Ricardo Lewandowski.

¹⁴⁸ E. Alvaro, 'Race to the Top: Brazil's Racial Quotas for Higher Education', *Human Rights Brief*, 2 November 2012, <http://bit.ly/2tCbMsd>, (accessed 11 May 2017); Davis, p77.

¹⁴⁹ Supremo Tribunal Federal, ADI 3330, 3 May 2012, Relator: Rep. Ayres Britto.

that according to Article 207 of the Federal Constitution of 1988,¹⁵⁰ and the Law Guidelines and Bases of Education (Law 9.394/96), universities could independently decide the criteria for student admissions, as the program is subject to voluntary participation from private universities.¹⁵¹

With this ruling in place and the constitutionality of racial quotas confirmed, Brazilian legislators went on to enact affirmative action legislation to this end. On 29 August 2012, then-President Dilma Rousseff signed the *Lei de Cotas*¹⁵² (Law of Social Quotas), which requires all federal public universities to reserve 50% of their admission seats for students from a public school background. In turn, half of these reserved seats must go to applicants from families with a per capita income of less than 1.5 times the minimum wage. The proportion of these seats reserved for *preto*, *pardo*, or *indígena* will depend on the racial makeup of the federal state. Disabilities are also taken into account, as per Figure 7 overleaf.

¹⁵⁰ Hereinafter referred to as the ‘Brazilian Constitution’.

¹⁵¹ Supremo Tribunal Federal, ADI 3330, 3 May 2012, Relator: Rep. Ayres Britto.

¹⁵² *Lei de Cotas*.

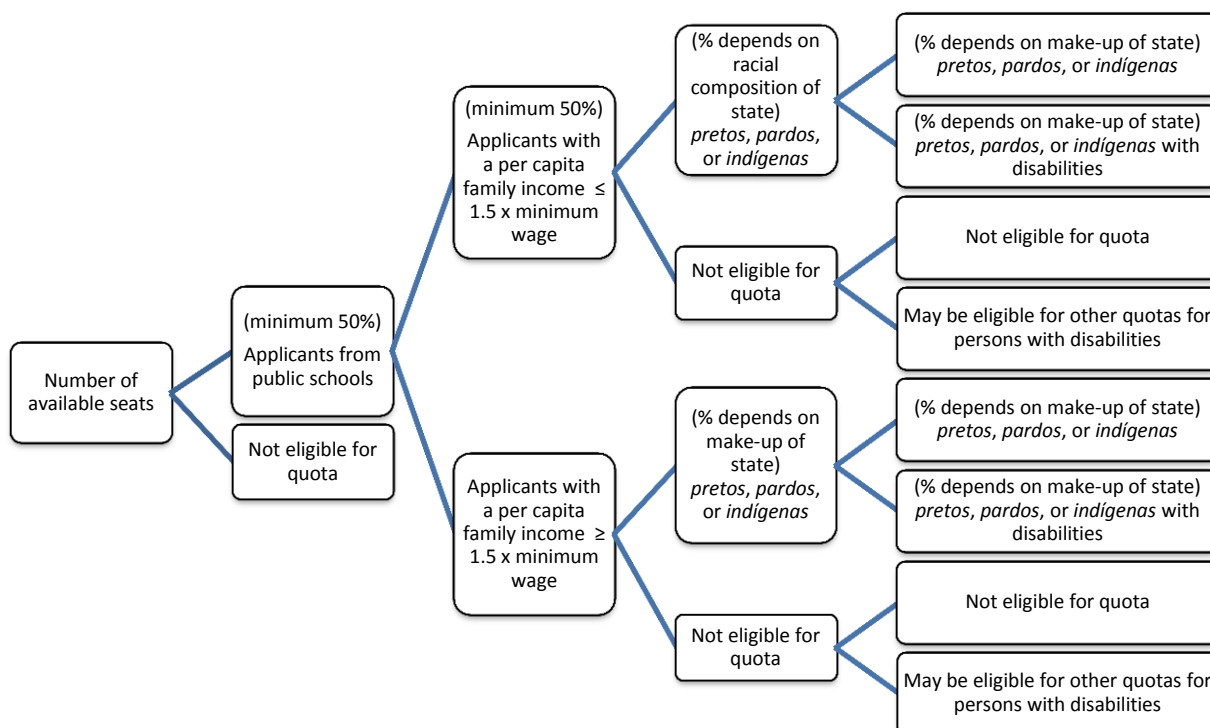


Figure 7: Distribution of Quotas as Foreseen by the Lei de Cotas

*Diagram showing the selection criteria for university admission quotas, as legally prescribed by the Lei de Cotas.*¹⁵³

Universities were given until 2016 to implement this policy. Today, these minimum quotas are mandatory for all 59 federal state universities in Brazil. The law itself does not prescribe a termination date or a requirement of review.¹⁵⁴

The number of enrolled students in both public and private higher education institutions is increasing. The implementation of quotas by universities, for face-to-face bachelor degrees, ensure that spaces for persons with disabilities, students from a public school background or for persons from specific race or ethnic groups were reserved. Student loan increases through FIES in public institutions or ProUni in private institutions also enabled higher participation in higher education from poor students. In public institutions, reserved seats more than doubled from 5.6% in 2009 to 14% in 2014.

¹⁵³ *Lei de Cotas.*

¹⁵⁴ *ibid.*

In 2015, 44.4% of students enrolled at private universities benefited from some form of financial aid. This number has almost doubled since 2009.¹⁵⁵ The distribution of financial aid between FIES, ProUni and Other, is displayed in Figure 8 below.

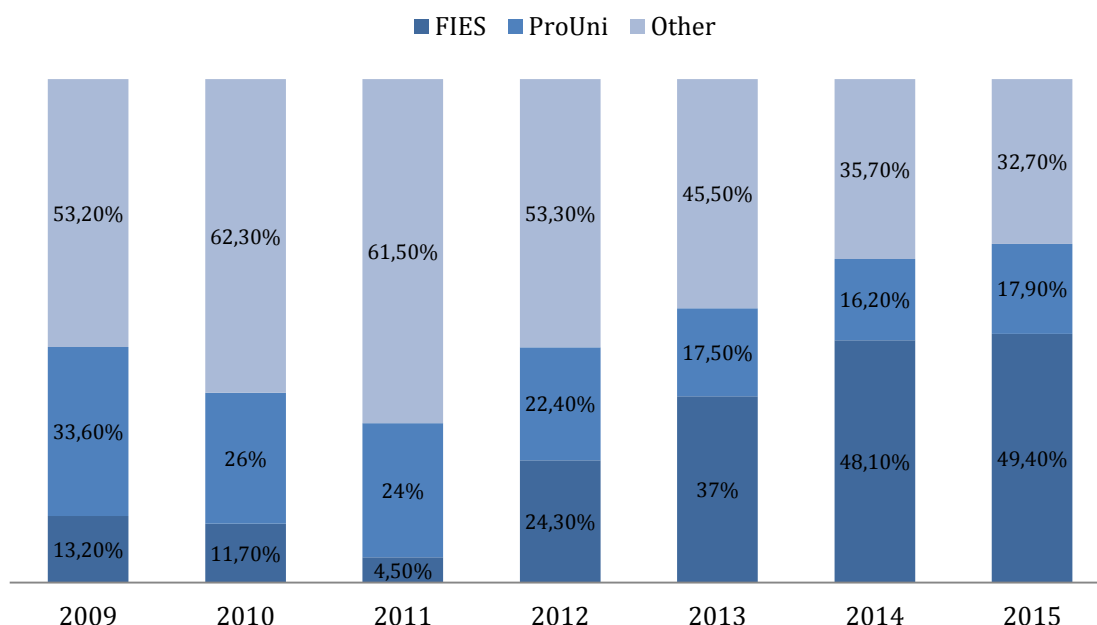


Figure 8: Distribution of Enrolment in Private Higher Education by Type of Funding or Scholarships in Brazil, 2009-2015

*Graph showing how Brazil's private universities are funded, in the categories of FIES funding, ProUni scholarships, and Other, between 2009 and 2015.*¹⁵⁶

In the period from 2009 to 2015, the share of financial aid students in private institutions on the ProUni non-repayable scholarship system has decreased from 33.6% to 17.9%. This decrease has been absorbed by the student loan system, FIES. This shows that there is a trend towards repayable loans, rather than non-repayable bursaries.¹⁵⁷

¹⁵⁵ Ministério da Educação p. 57.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

6 A LEGAL ANALYSIS

In consideration of equal access to higher education, two rights are implicated: the right to education, which includes higher education, and the right to non-discrimination. These are among the human rights that are inalienable and fundamental to all human beings. They empower us to shape our lives in accordance with liberty, equality, and dignity.

While human rights can be conceptualised in a myriad of ways, they are often classified into the categories of civil, political, economic, social, and cultural rights. Most of these rights have become entrenched in international and regional human rights instruments, customary law and the constitutions of States. Individuals – in this case, students and prospective applicants – are the right-holders of human rights, while states are the respective duty-bearers obligated to respect and ensure these rights.

The duty to respect is a negative duty, with the corresponding right being the right to non-interference. It requires the State to acknowledge the right and not infringe on it.¹⁵⁸ In the case of the right to education, this would mean that the State shall not take away or make more difficult the existing access to, or enjoyment of, education. Respecting the right to non-discrimination requires the State to refrain from implementing policies or laws which would amount or lead to discrimination.

On the other hand, a State has the positive obligation to ensure rights, which demands positive actions being taken to protect and fulfil human rights. The obligation to protect human rights refers to the protection of the horizontal relationship between individuals,¹⁵⁹ thereby piercing the public vs. private divide in that the State involves itself in private affairs. The State must protect the beneficiaries of the right to education and non-discrimination from violations by third parties, which in this case would be independent university institutions. *Inter alia*, the State has a duty to enact legislation and to provide remedies to protect individuals against violation of their rights to education and non-discrimination.

¹⁵⁸ M. Nowak, 'Introduction to Human Rights Theory', in M. Nowak, K.M. Januszewski and T. Hofstätter, *All Human Rights For All*, Wien, Neuer Wissenschaftlicher Verlag, 2012, p. 270.

¹⁵⁹ *ibid.*, p. 270-271.

Finally, to ensure these rights, the state has an obligation to fulfil them meaning that the State is obliged to take actions such as building schools and infrastructures, setting an appropriate curriculum, and providing adequate funding.

All positive state obligations, particularly regarding economic, social and cultural rights, must be undertaken in light of the principle of progressive realisation.¹⁶⁰ This means that the State may take into account economic capabilities as well as social and cultural traditions.¹⁶¹ To ensure the right to non-discrimination, the State is obligated to adopt appropriate measures towards the full realisation of the right to non-discrimination, such as quotas in admission procedures. In this sense, the State is required to exercise “due diligence” in protecting individuals against violations of their human rights by other individuals and in fulfilling their rights. To take due diligence means that in cases where the State knew, or should reasonably have known, of imminent danger to a human right from a third party, it has to take protective measures that are within its power and can be reasonably expected.¹⁶²

At this point, it is important to note that an interference with a right does not necessarily amount to a violation since interferences can also be justified. For an interference to be established, the victim must necessarily have suffered personal harm and must be protected by the scope of the right.¹⁶³ For an interference to be justified, it is first necessary to determine whether the right in question is absolute. In international human rights law, only few rights are absolute: the prohibition of torture; the prohibition of slavery; the right to be recognised as a person before the law; and the right to freedom of conscience.¹⁶⁴ If the given right falls into the category of an absolute right, an interference automatically amounts to a violation. If the right is not absolute, the justifications for interference require that it (1) is provided for by law, (2) serves a specific purpose, and (3) meets the principle of proportionality.¹⁶⁵

The principle of proportionality has three further requirements: the measure

¹⁶⁰ ICESCR, art. 2(1).

¹⁶¹ Nowak, 2012, p. 271.

¹⁶² *ibid.*, p. 271-272.

¹⁶³ *ibid.*, p. 275.

¹⁶⁴ *ibid.*, p. 274.

¹⁶⁵ *ibid.*, p. 275.

taken must be necessary and suitable; it must be the most lenient means; and it must balance the interests of the public and the individual.¹⁶⁶ To be necessary, the aim must be unachievable without the measure, and the measure must necessarily lead to an achievement of the aim. To be the most lenient means, there must be no other available means with less severe consequences that the State could have taken. Lastly, to be considered proportional, the means must have taken into consideration both the interest of the public as well as the interest of the individual and balanced them accordingly.¹⁶⁷ If any of these requirements are not met, an interference amounts to a violation. Since neither the right to education nor the right to non-discrimination is absolute, justified interferences are possible.¹⁶⁸

Further limitations may apply if a State enters into reservations about specific clauses in international law at the time of signature.¹⁶⁹ States can also derogate from certain rights in States of emergency meaning that they are not bound by certain rights during such a time.¹⁷⁰ Furthermore, national limitations clauses can limit certain rights.

This chapter will analyse the legal compliance of South Africa and Brazil, in respecting, protecting, and fulfilling the right to education and the right to non-discrimination. In turn, obligations under the international, regional and national legal framework will be considered.

6.1 The right to education

As a key economic and social right, the human right to education is widely recognised. This section will examine the right enshrined in international, African, Inter-American, South African, and Brazilian law. Subsequently, the law will be applied to the factual situation in each country, to determine to what extent the respective governments realise the right to education.

¹⁶⁶ Nowak, 2012, p. 275-276.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*, p. 276.

¹⁶⁹ *ibid.*, p. 276.

¹⁷⁰ *ibid.*, p. 276.

6.1.1 International Legal Framework

The right to education is entrenched in various international human rights documents.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to education and that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education’.¹⁷¹ Article 2(1) of the ICESCR makes each entailed right subject to the State parties’ ‘available resources, with a view to achieving progressively the full realization of the rights.’¹⁷² ‘Progressive realization’ means that State parties have an obligation ‘to move as expeditiously and effectively as possible’ towards the full realisation of Article 13.¹⁷³ Still, the ICESCR goes a step further, by explicitly envisaging the progressive introduction of free higher education. Additionally, the CESCR has clarified that the ICESCR’s limitations clause is primarily intended to protect the rights of individuals rather than permit the imposition of limitations by the State.¹⁷⁴

There is a strong presumption articulated in the ICESCR that retrogressive measures are impermissible and,

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.¹⁷⁵

The United Nations Convention on the Rights of the Child (CRC) requires State parties to progressively achieve the right to education on the basis of equal opportunity and to make higher education accessible to all on the basis of capacity by every appropriate means.¹⁷⁶ Although this Convention applies, according to its definition of ‘child,’ only

¹⁷¹ ICESCR, art. 13(2)(c).

¹⁷² *ibid.*, art. 2(1).

¹⁷³ United Nations, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para. 9.

¹⁷⁴ United Nations, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, para. 42.

¹⁷⁵ CESCR, 1990, para. 45.

¹⁷⁶ CRC, art. 28(1)(c).

to persons under the age of 18, it makes specific reference to higher education.¹⁷⁷ The Committee on the Rights of the Child (CommRC) has specified this to mean that States shall use the maximum available resources to implement measures, which will achieve this right.¹⁷⁸ In order to do this, State parties shall demonstrate that they have in fact ‘made every effort to mobilize, allocate and spend budget resources to fulfil the economic, social and cultural rights of all children.’¹⁷⁹

According to the UNESCO Convention against Discrimination in Education (CADE), State parties shall develop national policies to promote equal opportunities to higher education.¹⁸⁰

The binding international law conventions which entrench the right to education collectively require State parties to provide all persons with equal access to higher education by every appropriate means and using the maximum available resources, with the vision of achieving progressively free higher education. To this end, State parties must develop and implement national policies.

6.1.2 African Human Rights Framework

Under the African human rights system the right to education is protected by the African Charter on Human and Peoples’ Rights (‘Banjul Charter’), the African Charter on the Rights and Welfare of the Child (ACRWC), and the African Youth Charter (AYC), which enshrine the right to education for individuals, children (under the age of 18), and young persons (ages 15 to 35).¹⁸¹

The ACRWC and the AYC oblige State parties to ensure equal access to higher education for all, by every appropriate means.¹⁸² Further, the AYC requires State parties

¹⁷⁷ CRC, art. 1.

¹⁷⁸ United Nations, Committee on the Rights of the Child (CommRC), *General Comment No. 19 on public budgeting for the realization of children’s rights (art. 4)*, 20 July 2016, para. 29.

¹⁷⁹ *ibid.*, para. 30.

¹⁸⁰ UNESCO, *Convention Against Discrimination in Education*, 14 December 1960, art. 4(a), (CADE).

¹⁸¹ Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights*, 27 June 1981, art. 17(1), (Banjul Charter); OAU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990 art. 11(1), (ACRWC); and African Union (AU), *African Youth Charter*, 2 July 2006, art. 13(1), (AYC); respectively.

¹⁸² ACRWC, art. 11(3)(c); AYC art. 13(4)(f).

to introduce scholarships and bursaries, to encourage and enable participation in higher education.¹⁸³

In the Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and People's Rights, The African Commission on Human and Peoples' Rights (ACHPR) has further elaborated on the obligations associated with the right to education that Article 17(1) imposes on State parties, highlighting the importance of education as a fundamental right for the 'growth, development and welfare of human beings'.¹⁸⁴ The right to education as it is enshrined in the Banjul Charter encompasses all forms of education, including higher education.¹⁸⁵ State parties must ensure that education is economically accessible and affordable to everyone.¹⁸⁶ This provision already formed part of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, of 2004.¹⁸⁷ Using similar language to that in other international documents, the ACHPR too emphasises the obligation to 'ensure that higher education is made generally available and accessible to all, on the basis of capacity, by all appropriate means, and in particular by the progressive introduction of free education.'¹⁸⁸

While the CESCR has clarified that the 'progressive realisation' of rights obliges states 'to move as expeditiously and effectively as possible' towards the full realization of that right, the Banjul Charter does not make obligations subject to the availability of resources.¹⁸⁹ Article 60 of the Banjul Charter also explicitly states that in its application, African States must draw inspiration from other international legal documents, including the ICESCR. Some consideration for available resources, then, does appear to be implied. Furthermore, in the infamous *Ogoni* case, the ACHPR was required to determine to what extent a State has an obligation to act immediately to

¹⁸³ AYC art. 13(4)(l).

¹⁸⁴ African Commission on Human and Peoples' Rights (ACHPR), *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 2010, para. 69, <http://bit.ly/2gXzw3N>, (accessed 2 April 2017).

¹⁸⁵ *ibid.*, para. 70.

¹⁸⁶ *ibid.*, paras. 71(c) and (m).

¹⁸⁷ ACHPR, *Pretoria Declaration on Economic, Social and Cultural Rights in Africa*, 2004, art. 8, <http://bit.ly/2tvhIz6>, (accessed 2 April 2017).

¹⁸⁸ ACHPR, 2010, para. 71(e).

¹⁸⁹ CESCR, 1990, para. 9.

ensure the positive realisation of a right, and it concluded that the State is required to act reasonably.¹⁹⁰

6.1.3 Inter-American Human Rights Framework

The Inter-American system for the protection of human rights provides for the right to education in the American Declaration of the Rights and Duties of Man (ADRDM), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the Charter of the Organization of American States (COAS), and the Inter-American Democratic Charter (IADC).¹⁹¹

The IADC, which was adopted in Lima in 2011, recognises that ‘education is a key to ... alleviating poverty and fostering greater understanding. To achieve these ends, it is essential that a quality education is available to all’.¹⁹² The ADRDM provides for the right to equal opportunity to education.¹⁹³ Although at the time of its adoption in 1948, it was originally not considered to be legally binding, it has attained legal authority through state practice of 70 years. In an Advisory Opinion, the Inter-American Court of Human Rights (IACtHR) has indicated that the ADRDM contains and defines the rights contained in the COAS and that Member States are legally bound by the ADRDM.¹⁹⁴

The COAS obliges Member States to ‘exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education’ on the basis that ‘higher education shall be available to all, provided that, in

¹⁹⁰ ACHPR, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 2002.

¹⁹¹ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, art. 12, (ADRDM); Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 16 November 1999, art. 13, (Protocol of San Salvador); OAS, *Charter of the Organization of American States*, 30 April 1948, art. 39, (COAS); OAS, *Inter-American Democratic Charter*, 11 September 2001, art. 16, (IADC).

¹⁹² IADC, art. 16.

¹⁹³ ADRDM, art. 12.

¹⁹⁴ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-10/89, 14 July 1989, <http://bit.ly/2tUpsKp>, (accessed 22 May, 2017).

order to maintain its high level, the corresponding regulatory or academic standards are met.¹⁹⁵

The American Convention on Human Rights (ACHR) does not explicitly mention the right to education or other socio economic rights, although Article 26 establishes the principle of progressivity and refers to the COAS.¹⁹⁶ However, the most comprehensive protection for the right to education in the Inter-American System can be found in the Protocol of San Salvador, which is overseen by the IACtHR, whose decisions are legally binding. The Protocol of San Salvador guarantees the right to education to everyone in Article 13(1), using wording almost identical to that of Article 13 of the ICESCR. The right to education is also mentioned Article 16, under rights of the child. States are obliged to provide equal access to higher education for everyone on the basis of individual capacity, by every appropriate means. This particularly includes the progressive introduction of free education.¹⁹⁷

The right to education is qualified in the Protocol of San Salvador, in that States are required to ensure the rights in the Protocol and adopt necessary measures to do so only ‘to the extent allowed by available resources’.¹⁹⁸ The ADRDM also only requires State parties to ensure rights to the extent that they are ‘in a position to provide’.¹⁹⁹ This could be interpreted as the right to education, and the equality of opportunity thereto, being conditioned by the economic capacity of the State party.

6.1.4 National Legal Frameworks

6.1.4.1 South African Legal Framework

Education is an essential right for a developing country; particularly for one that is still in the process of a complex transition, such as South Africa. The Freedom Charter adopted by the ANC in 1955, promises that:

¹⁹⁵ COAS, art. 49(c).

¹⁹⁶ OAS, *American Convention on Human Rights*, 22 November 1969, art. 26, (ACHR).

¹⁹⁷ Protocol of San Salvador, art. 13(3)(c).

¹⁹⁸ *ibid.*, art. 1.

¹⁹⁹ ADRDM, art. 12.

...education shall be free, compulsory, universal and equal for all children; higher education and technical training shall be opened to all by means of state allowances and scholarships awarded on the basis of merit²⁰⁰.

Congruently, the 1996 Constitution of the Republic of South Africa guarantees to everyone not only 'the right to basic education, including basic adult education'²⁰¹ but also 'the right to further education which the state, through reasonable measures, must make progressively available and accessible'.²⁰² The right to education as per section 29 must be considered in light of the broader aim of education. As stated by the South African Human Rights Commission (SAHRC) in the 3rd Economic and Social Rights Report, education is a means to the full development of an individual's personality, and instils a sense of dignity in that individual, which enables her to participate effectively in society.²⁰³

When considering whether the government has upheld its constitutional obligation, the first consideration must be what exactly these obligations entail. The CESCR has clarified that the implementation of the right to education at all levels, shall exhibit, available, accessible, acceptable and adaptable.²⁰⁴

Availability refers to the quantity of institutions and availability of necessary services such as clean drinking water, adequate sanitary facilities, well-trained teaching staff and sufficient learning materials at all facilities.²⁰⁵ This element of the right could be questioned, as students moving to the cities from rural areas are faced with limited availability of student housing although, However, it does not appear further relevant in the context of fee increases.

Accessibility refers to the removal of barriers, which can be further divided into three categories: (1) non-discrimination, (2) physical accessibility, and (3) economic accessibility. Non-discrimination requires the elimination of differential treatment,

²⁰⁰ Congress of the People, *The Freedom Charter*, 1955, p. 2, <http://bit.ly/2tBRzCI>, (accessed 20 April 2017).

²⁰¹ Constitution of the Republic of South Africa, 1996, s. 29(1)(a); Hereinafter referred to as the 'South African Constitution'.

²⁰² *ibid.*, s. 29(1)(b).

²⁰³ SAHRC, 2001, p. 80.

²⁰⁴ CESCR, 1999, para. 6.

²⁰⁵ *ibid.*, para. 6(a).

where this does not serve a public interest or purpose.²⁰⁶ Physical accessibility may include both the physical access to schools, such as transportation from rural to urban areas, as well as barriers within the school, that may prevent access to persons with physical disabilities.²⁰⁷ Economic accessibility particularly requires that education is affordable to all and State parties are required to progressively introduce free higher education.²⁰⁸ The most relevant barrier in the context of this thesis is the financial barrier faced by the majority of young South Africans seeking access to higher education.

Acceptability refers to the form and substance of the education, taking into consideration its relevance, cultural appropriateness and quality.²⁰⁹ In the broader context of the #FeesMustFall movement, there have been calls for the decolonisation of the university curriculum, claiming that it is Eurocentric and neither culturally relevant nor appropriate. However, for the purposes of the question posed in this thesis, a lack of funding does not breach the acceptability element of higher education.

Adaptability requires education to be flexible and able to change according to changes in society or needs of learners.²¹⁰ Again, this element is not relevant in the context of rising student fees and decreasing government funding.

When considering the meaning of making a right ‘progressively available’, the international interpretation has already been discussed. Similarly to the standard adopted in the *Ogoni* case by the ACHPR, the South African Constitutional Court (SACC) has argued that steps towards the realisation of a right can be considered to be reasonable when they are based on clear policies that have a reasonable concept and are reasonably implemented. The SACC has also held, in the groundbreaking judgment in the case of *Government of the Republic of South Africa v Grootboom*, that the provision of a right depends on the availability of resources and that the State is not required to do more than its resources permit. However, the State is required to prioritise and shift

²⁰⁶ CESCR, 1999, para. 6(a)(i).

²⁰⁷ *ibid.*, para. 6(a)(ii).

²⁰⁸ *ibid.*, para. 6(a)(iii).

²⁰⁹ *ibid.*, para. 6(c).

²¹⁰ *ibid.*, para. 6(d).

resources to be able to progressively realise the rights in the South African Bill of Rights.²¹¹

The *Grootboom* judgment concerned the right to housing. Unlike this right²¹² as well as the right to healthcare, food, water, and social security,²¹³ the right to education²¹⁴ is phrased distinctly differently. Notably, it is the only right that does not contain the phrase ‘within its available resources’. The drafters of the South African Constitution must have envisaged a different interpretation of the right to education, in comparison to other social and economic rights; one requiring a stronger government commitment.²¹⁵

6.1.4.2 Brazilian Legal Framework

In Brazil, the federal government is the primary duty bearer for the right to higher education. The two primary legal sources governing the right to higher education are the Brazilian Constitution, and the National Education Act (NEA), which is the federal law applicable to all education systems countrywide.²¹⁶ The right to higher education, although primarily governed by the federal government, is not entirely exhausted at this level and some legislating powers are left to the States.²¹⁷

The Brazilian Constitution provides for higher education as a fundamental right, on the grounds that it forms the basis of human capital and resources for national development.²¹⁸ In an attempt to ensure universal access to university education, the Brazilian Constitution allows for the establishment of private higher education institutions.²¹⁹ Besides the right to education, students in higher education in Brazil are

²¹¹ South African Constitutional Court, *Government of the Republic of South Africa and Others v Grootboom and Others*, (1) SA 46, 2001, p. 25.

²¹² Constitution of the Republic of South Africa, s. 26.

²¹³ *ibid.*, s. 27.

²¹⁴ *ibid.*, s. 29.

²¹⁵ P. de Vos, ‘Pious wishes or directly enforceable human rights?: social and economic rights in South Africa’s 1996 Constitution’, *South African Journal on Human Rights*, vol. 13, iss. 1, 1997, pp. 67-101, Available from HeinOnline, (accessed 28 April, 2017).

²¹⁶ Constitution of the Federative Republic of Brazil, 1988, art. 23(XXIV).

²¹⁷ *ibid.*, art. 24 (IX).

²¹⁸ *ibid.*, art. 205.

²¹⁹ *ibid.*, art. 209.

entitled to various other rights enshrined in the Constitution: fair access to school and the right to stay in school;²²⁰ freedom to learn, research, and share knowledge;²²¹ free access to public education;²²² and guarantee to quality standards in education.²²³ Moreover, students are protected by civil, economic, social and cultural rights enshrined in the Constitution, by the general norms of the NEA, State norms on education; and federal laws addressing student-funding programs.

6.1.6 Application: South Africa

In 1995, South Africa ratified the CRC, and in 2000 the CADE. South Africa signed the ICESCR in 1994, but only ratified it almost 20 years later, in 2015. Notably, upon ratification, one reservation was made on the right to education. The declaration under Article 13(2)(a) commits South Africa to giving ‘progressive effect to the right to education...within the framework of its National Education Policy and available resources’.²²⁴ South Africa is therefore under obligation to give effect to equal access to higher education by every appropriate means, within the national framework and subject to available resources, with the vision of achieving progressively free higher education, and to implement policies to this end.²²⁵

As a State party to all the African regional mechanisms mentioned,²²⁶ South Africa is obliged to ensure equal access, also in economic terms,²²⁷ to higher education that is accessible for all, by every appropriate means,²²⁸ and to introduce scholarships and bursaries to this end.²²⁹ Particularly, South Africa is obliged to progressively

²²⁰ Constitution of the Federative Republic of Brazil, 1988, art. 206 (I).

²²¹ *ibid.*, art. 206 (II).

²²² *ibid.*, art. 206 (IV).

²²³ *ibid.*, art. 206 (VII).

²²⁴ For the full text of South Africa’s Declaration to the ICESCR, see <http://bit.ly/2v1knF9>.

²²⁵ For a complete list of South Africa’s signature and ratification status of United Nations human rights treaties, see: <http://bit.ly/2tBygcP>.

²²⁶ For a complete list of South Africa’s signature and ratification status of African Union treaties, conventions, protocols and charters, see: <http://bit.ly/2tS2ljD>.

²²⁷ ACHPR, 2010, para. 71(c) and (m).

²²⁸ ACRWC art. 11(3)(c); AYC art. 13(4)(f).

²²⁹ AYC art. 13(4)(l).

introduce free higher education,²³⁰ and is required to act reasonably in this regard.²³¹

When considering the right to education as a constitutional right in the national context, it can be seen that the required element of accessibility, in particular the removal of financial barriers, has not been fulfilled by the South African government. The nature of the phrasing of the right, in contrast to other social and economic rights, indicates that the drafters of the South African Constitution envisaged a stronger commitment to its fulfilment, regardless of the available resources.

Although limitations on the right to education are permissible, they need not only be provided for by law but also serve a specific purpose and be proportional. The curbing of funding for higher education institutions may well serve a specific purpose - preventing a fiscal deficit in the country - but it is unlikely to meet the proportionality test: although it could be considered necessary and suitable, it cannot qualify as the most lenient means when the Auditor General has pointed out that in 2014/15, R28.3 billion were logged as irregular, unauthorized and fruitless and wasteful expenditure by the government.²³² To put this number into perspective, it is more than three times the amount government disbursed through NSFAS in 2014/15.²³³ Clearly, a more lenient and appropriate means to take, and one that would have been in the public *and* individual interest, would have been to reduce wasteful spending and curb corruption.

Limiting funding makes it more difficult for many students to gain access to higher education, which is a retrogressive measure and not in line with providing equal access on the basis of merit, but rather access on the basis of financial means. Rather than creating equal opportunities and access, existing barriers are reinforced. Such retrogressive measures also do not correspond with achieving progressively free higher education. Since retrogressive measures have been taken, South Africa would have to prove that there were only introduced after careful consideration of all alternative measures, and that they are in line with achieving the totality of rights in the ICESCR,

²³⁰ ACHPR, 2010, para. 71(e).

²³¹ ACHPR, *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 2002.

²³² 'Audit reports improve, but old problems remain', *Corruption Watch*, 26 November 2015, <http://bit.ly/2tELTaZ>, (accessed 2 May 2017).

²³³ NSFAS, p. 9.

having used the maximum available resources.²³⁴

The South African government cannot justify its shortcomings in adequately funding higher education on the basis that it does not have the necessary resources. The drafters of the South African Constitution decided to treat education differently from the right to housing, health care, food and water, which the State has a duty to make accessible progressively but only within its available resources.²³⁵ As a result of this notable difference, it is reasonable to assume that the SACC would have come to a different conclusion in a case concerning the right to education, rather than the right to housing. Nonetheless, it is important to understand that the SACC has also held that even the right to higher education contains an internal limitation, in that it is to be ‘progressively realised’ meaning that there is no immediate requirement for full realisation, but an immediate requirement to take steps.²³⁶

To conclude, South Africa’s current actions and funding policy for higher education do not allow equal access to universities; every appropriate means to this end is not adopted; and increases in university fees remove the situation further and further away from one that envisions progressively achieving free higher education. At this point in time, South Africa fails to meet its international, regional and national legal obligations to respect, protect and fulfil the right to higher education. By taking retrogressive measures in its higher education funding policy, the government has also failed to meet its obligation to make access to higher education progressively available, in a reasonable manner.

6.1.7 Application: Brazil

Brazil was one of the original signatories of the UDHR in 1948. In 1968 it ratified the CADE, in 1990 the CRC, and in 1992 it acceded to the ICESCR. All of these treaties were entered into without reservations. International law, therefore, obliges Brazil to

²³⁴ CESCR, 1999, para. 45.

²³⁵ P. de Vos, ‘Excluding students from university because of a lack of funds may be unconstitutional’, *Constitutionally Speaking*, [web blog], 19 October 2015, <http://bit.ly/2uVXrHa>, (accessed 12 May 2017).

²³⁶ South African Constitutional Court, *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*, (8) BCLR 761, 2011, p. 19.

give effect to equal access to higher education that is progressively free, by every appropriate means, using the maximum available resources, and to implement policies to this end.²³⁷ The Protocol of San Salvador, binds Brazil to these same standards on the regional level, with identical wording to the ICESCR.²³⁸ The Protocol and the ADRDM could be interpreted to qualify the right to education to the available resources of the State.

By having a public university system that is fee-free, Brazil has achieved free higher education. However, the country has followed a recent global trend of privatisation, and as a result, public spending is used to strengthen the already dominant private sector, rather than to expand the smaller public sector. Private higher education institutions in Brazil absorb 75.7% of enrolled university students.²³⁹ Government spending for private higher education as a percentage of total government expenditure on education is increasing at a faster rate than spending on public higher education. Between 2008 and 2013, spending on public higher education as a percentage of total government spending increased by 2.1 percentage points, from 15.9% to 18.1%. Comparatively, the amount that the government spends on FIES as a percentage of total government spending more than doubled in this period, increasing from 4.1% to 9.2%. Funding for scholarships in the form of ProUni saw a slight decrease as a percentage of total government spending on education, from 1.2% to 0.9% between 2008 and 2013.

Privatisation means that States no longer themselves provide education, and instead allow this role to be filled by non-State actors. Nonetheless, under international law States remain the duty bearers and are ultimately responsible regardless of the provider. States are therefore obliged to regulate private education, ensure that it meets minimum standards, and does not lead to extreme disparities of opportunities to education for certain groups of society.²⁴⁰ Even though private actors have the liberty to establish educational institutions, this does not exempt States from their obligations to

²³⁷ For a complete list of Brazil's signature and ratification status of United Nations human rights treaties, see: <http://bit.ly/2tBTRli>.

²³⁸ For a complete list of Brazil's signature and ratification status of Inter-American Treaties, see: <http://bit.ly/2eGbM3A>

²³⁹ Ministério da Educação, p. 13.

²⁴⁰ ICESCR, art. 13; CDESCR, 1999, para. 30.

respect, protect and fulfil the right to education.

Since States are obliged to make higher education ‘available and accessible to all by every appropriate means’, both in physical and economic terms, Brazil is required to offer a sufficient number of free public universities.²⁴¹ It is clear that the drafters of the CRC did not envision education to be a commodity bought and sold, but rather a fundamental right which states are obliged to provide in order to develop ‘personality, talents, and mental and physical abilities to their fullest potential’.²⁴² In the words of Nowak, ‘it is difficult to imagine how states could delegate their obligations to the corporate sector if they are at the same time required to progressively introduce free education’.²⁴³

Kishore Singh, the Special Rapporteur on the right to education, has made several cautioning comments on the privatisation of education. Both during the presentation of his report to the UN General Assembly in September 2014²⁴⁴ and to the Human Rights Council (HRC) in June 2015,²⁴⁵ he warned of the negative effects that privatisation has on the right to education and its fundamental principle of equal opportunity. Further, privatisation leads to disinvestment in public education. While the World Bank and International Finance Corporation consider the private sector to play a key role in education, Singh claims these strategies to be ‘blatantly disrespectful of the human rights obligations of international bodies’.²⁴⁶

In a landmark resolution, the HRC comments on the growing phenomenon of privatisation of education and reaffirms the status of education as a public good.²⁴⁷

In its Concluding Observations, the CRC urged Brazil to ‘phase-out the transfer of public funds to the private education sector and review its policies with regard to fiscal and tax incentives for enrollment in private education institutions in order to

²⁴¹ ICESCR, art. 13(2)(b).

²⁴² CRC, art. 29(1)(a).

²⁴³ M. Nowak, *Human Rights of Global Capitalism: The Limits of Privatization*, Philadelphia, University of Pennsylvania Press, 2016, p. 65.

²⁴⁴ United Nations, General Assembly, *Report of the Special Rapporteur on the right to education*, A/69/402, 2014, <http://bit.ly/2tUy9o1>, (accessed 27 June 2017).

²⁴⁵ United Nations, Human Rights Council (HRC), *HRC Resolution A/HRC/29/30*, 1 July 2015, para. 11, <http://bit.ly/2vtBF1>, (accessed 27 June 2017).

²⁴⁶ *ibid.*, para. 38.

²⁴⁷ HRC, 2015, para. 2(b).

ensure access to free quality education ... by strictly prioritizing the public education sector in the distribution of public funds'.²⁴⁸

If a court or commission were to decide whether Brazil is implementing appropriate policies to give effect to the right to education, it is doubtful whether they would find the current policies that strengthen the *private* sector to be sufficient.

6.2 Right to equality and non-discrimination

Equality and non-discrimination are fundamental principles of human rights, and as such given paramount importance. This section will consider the right enshrined in international, African, Inter-American, South African, and Brazilian law. Subsequently, the law will be applied to the factual situation in each country, to determine to what extent the respective governments are respecting and ensuring equality and non-discrimination.

6.2.1 International Legal Framework

The principle of non-discrimination complements the principle of equality, as stated in Article 1 of the UDHR: 'all human beings are born free and equal in dignity and rights'.²⁴⁹ As the foundation for the enjoyment of all other human rights, the principles of non-discrimination and equality present two sides of the same coin: the negative and positive statements referring to the same principle.²⁵⁰ Demanding non-discrimination requires equality, and likewise, equality essentially requires the absence of discrimination. As a fundamental, cross-cutting principle in international human rights law, this right is included in all major human rights treaties²⁵¹ and is even the central theme of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as well as the Convention on the Elimination of Discrimination against Women (CEDAW). Of primary importance, is Article 26 of the

²⁴⁸ United Nations, Committee on the Rights of the Child (CommRC), *Concluding Observations of the Committee on the Rights of the Child: Brazil*, 2015, CRC/C/OPAC/BRA/CO/1, paras. 75-76.

²⁴⁹ UDHR, art. 1.

²⁵⁰ Bayefsky, cited in Weiwei, p. 7.

²⁵¹ UDHR, art. 2; ICCPR, art. 2 and 26; ICESCR, art. 2(2); CRC, art. 2; ICMW, art. 7; CRPD, art. 5.

International Covenant on Civil and Political Rights (ICCPR), which prohibits:

any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁵²

Non-discrimination first became recognised as a part of international law with the adoption of the UN Charter in 1945.²⁵³ Some even claim that the ‘United Nations Organization had been founded principally to combat discrimination in the world.’²⁵⁴ The UN Charter did not establish immediate State obligations regarding human rights, and it remained vague on what ‘human rights and fundamental freedoms’ were and how they were to be ensured. The only unambiguous provision in the UN Charter is the prohibition of discrimination.²⁵⁵

Various monitoring bodies have come up with definitions of ‘discrimination’. The HRC has defined:

“discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁵⁶

These ten grounds on which discrimination is prohibited are also listed in the UDHR, ICCPR, ICESCR and CRC. The UNESCO Convention against Discrimination in Education includes ‘economic condition’ as a further ground on which discrimination is prohibited.²⁵⁷ However, these ten grounds are not exhaustive. The term ‘other status’ leaves the prohibited grounds for discrimination open-ended. The ICCPR provides that the right to non-discrimination may never be derogated from, even in a state of emergency, solely on the basis of race, colour, sex, language, religious or social

²⁵² ICCPR, art. 26.

²⁵³ United Nations, *Charter of the United Nations*, 24 October 1945, (UN Charter).

²⁵⁴ United Nations General Assembly, A/C.3/SR.100, 1948, p. 129.

²⁵⁵ Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’, 19 *Human Right Quarterly*, 1997, p. 707 cited in Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, 2004, p. 5-6, <http://bit.ly/2tUW7zc>, (accessed 15 May, 2017).

²⁵⁶ HRC, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para. 7, emphasis added.

²⁵⁷ CADE, art. 1(1).

origin.²⁵⁸

The general non-discrimination clauses, which prohibit discrimination on the basis of ten grounds for the enjoyment of all rights in the respective Covenant or Convention, are complemented by specific provisions for individual rights. As already discussed in Chapter 5.2.1, international law requires States to make education equally accessible to all. The Human Rights Committee has explicitly stated that to truly make a right *equally* accessible to all, a State may be obliged to implement affirmative action measures.²⁵⁹ The ICERD provides for ‘proactive measures’ against racism.²⁶⁰ It obliges States to:

[w]hen the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.²⁶¹

6.2.2 African Human Rights Framework

The principle of non-discrimination is enshrined in the Banjul Charter, the ACRWC and the AYC in the African human rights system, which guarantee the right to non-discrimination and equality for individuals, children, and young persons respectively. The Banjul Charter provides that:

[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.²⁶²

The ACRWC uses similar wording to guarantee that the rights therein are to be enjoyed by all children, regardless of their, or their parents’ position in regard to the listed criteria.²⁶³ The AYC too ensures this same right for all young persons but goes a step

²⁵⁸ ICCPR, art. 4(1).

²⁵⁹ HRC, 1989, para. 10.

²⁶⁰ ICERD, art. 1(4) and 2(2).

²⁶¹ *ibid.*, art. 2(2).

²⁶² Banjul Charter, art. 2

²⁶³ ACRWC, art. 3.

further to guarantee the right to non-discrimination to young persons in *every* regard, and not only in regard to the rights and freedoms in the AYC, obliging States to take appropriate measures to ensure this.²⁶⁴

Contrasting international law, African human rights law lists ‘fortune’ instead of ‘property’ as one of the prohibited grounds for discrimination. However, as is the case for international law, the lists are not exhaustive, and the term ‘other status’ allows for a broader interpretation to include a multitude of other discriminatory grounds.

Unlike the right to education, the African Charters do not subject the right to be free from discrimination to progressive realisation, nor the availability of resources. The importance attached to this right is further illustrated by its position as the very first right listed in each of the Charters. The ACHPR has held, in a case against Mauritania, that racial discrimination against black Mauritians violated ‘the very spirit of the African Charter and of the letter of its Article 2’.²⁶⁵

Moreover, there is no derogation provision in the Banjul Charter. The ACHPR has held that the Charter ‘does not allow for State parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war ... cannot be used as an excuse by the State [for] violating or permitting violations of rights in the African Charter.’²⁶⁶ Consequently, the non-discrimination provisions must at all times be fully implemented.

6.2.3 Inter-American Human Rights Framework

The regional human rights law documents on non-discrimination applicable to Brazil are the ADRDM, the ACHR, and the Protocol of San Salvador. The ADRDM guarantees to all individuals the rights and freedoms therein equally, without distinction

²⁶⁴ AYC art. 2(1) and 2(2).

²⁶⁵ ACHPR, *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l’Homme v. Mauritania*, Communications 54/91, 61/91, 164/97-196/97 and 210/98, 11 May 2000, para. 131.

²⁶⁶ ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Communication No. 74/92, 11 October 1995, para. 21.

based on race, sex, language, creed, or any other factor.²⁶⁷ Although this list is not as long as those in other conventions, its open-ended nature by the inclusion of ‘other factors’, allows for a broader interpretation.

Article 1 of the ACHR obliges State parties to:

undertake to respect the rights and freedoms recognized [in the treaty] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.²⁶⁸

However, since the right to education is not explicitly listed in this Convention, and non-discrimination is only guaranteed in relation to listed rights, it does not apply in this case. Nonetheless, the Protocol of San Salvador adds a number of rights to the original Convention, including the right to education. The right to non-discrimination and equality is guaranteed in Article 3, which requires State parties to ensure the rights set out in the Protocol ‘without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition’.²⁶⁹

Interestingly, contrary to international and African human rights laws, the list of prohibited grounds for discrimination does not include ‘property’ or ‘fortune’ respectively, but instead uses the term ‘economic status’ which would seem to cover a wider range of circumstances. The open-ended nature of the ADRDM, the COAS and the Protocol of San Salvador allows for a wider interpretation, to include a range of grounds on which discrimination is prohibited.

In reaffirming the importance of equality, and following the general principles of international law, the IACtHR has held that ‘no discrimination exists if the difference in treatment has a legitimate purpose and it does not lead to situations which are contrary to justice, to reason or to the nature of things’.²⁷⁰ As such, ‘States are obliged

²⁶⁷ ADRDM, art. 2.

²⁶⁸ ACHR, art. 1.

²⁶⁹ Protocol of San Salvador, art. 3.

²⁷⁰ IACtHR, *Advisory Opinion OC-18/03*, 2003, para. 91.

to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons.²⁷¹

In 2013 the General Assembly of the Organization of American States (OAS) approved two new regional legal instruments: the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (Anti-Racism Convention) and the Inter-American Convention against all Forms of Discrimination and Intolerance (Anti-Discrimination Convention). The Conventions will come into force after two States have ratified it. As of June 2017, the Anti-Racism Convention and Anti-Discrimination Convention had been signed by ten States, including Brazil, but ratified by none.

These two Conventions, both in Article 1, provide the most inclusive notion of the definition and scope of discrimination that international law has seen:

Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States parties.

Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; **socioeconomic status**; educational level; *migrant, refugee, repatriate, stateless or internally displaced status*; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.²⁷² [emphasis added]

With the new additions to regional American legal instruments governing the right to non-discrimination and equality, the system will see further strengthening. The regional commitment to ensuring this right has been reaffirmed.

²⁷¹ IACtHR, *Advisory Opinion OC-18/03*, 2003, para. 104.

²⁷² OAS, *Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance*, 6 May 2013, art. 1, (Anti-Racism Convention); OAS, *Inter-American Convention against all Forms of Discrimination and Intolerance*, 6 May 2013, art. 1, (Anti-Discrimination Convention).

6.2.4 National Legal Frameworks

6.2.4.1 South African Legal Framework

The South African Constitution recognises the injustices of South Africa's past, and the need to heal the consequent divisions and establish a society based on 'democratic values, social justice and fundamental human rights'.²⁷³ Equality and non-racialism are among the founding values of the Republic of South Africa.²⁷⁴ Further, the Promotion of Equality Prevention of Unfair Discrimination Act prohibits unfair discrimination by the government and by private organisations and individuals on the grounds of race, gender, sex, pregnancy, family responsibility or status, marital status, ethnic or social origin, HIV/AIDS status, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.²⁷⁵

Section 9 of the South African Constitution prohibits anyone, both the State and non-state actors such as universities, from unfairly discriminating against an individual *inter alia* on the basis of race, gender, sex, ethnic or social origin, sexual orientation, age, disability, religion, or language.²⁷⁶ The non-exhaustive list allows for a broad interpretation to include economic status-related grounds. For listed grounds, all discrimination is assumed to be unfair.²⁷⁷ This presumption does not apply to unlisted grounds. For the latter, the discrimination must be proven to be unfair, for which the SACC has specified relevant factors: the position of the complainant in society; the purpose of the discrimination; the extent of the effects of the discrimination on the complainant and his/her human dignity; and any other relevant factors.²⁷⁸ In terms of section 36 of the South African Constitution, limitations on the right to equality can still be considered justified, provided they are reasonable and justifiable in a democratic society based on dignity and equality.²⁷⁹

²⁷³ Constitution of the Republic of South Africa, preamble.

²⁷⁴ *ibid.*, s. 1.

²⁷⁵ Promotion of Equality Prevention of Unfair Discrimination Act No. 4, 2000, s. 1

²⁷⁶ Constitution of the Republic of South Africa, s. 9(3) and 9(4).

²⁷⁷ *ibid.*, s. 9(5).

²⁷⁸ South African Constitutional Court, *Harksen v Lane NO*, (11) BCLR 1489 (C), 1997, 323H-324E.

²⁷⁹ Constitution of the Republic of South Africa, s. 36(1)(a)-(e).

The South African Constitution embraces a substantive notion of equality and does not require identical treatment of individuals, in acknowledging the fact that differential treatment, such as affirmative action, may be necessary to ensure equal dignity.²⁸⁰ Section 9(2) allows for legislative and other measures, to advance persons or groups of persons previously disadvantaged by unfair discrimination, to be taken. In other words, affirmative action is ‘supported as an acceptable “tool” in the struggle to eliminate discrimination and as a “remedial measure” to ensure that equality can, in fact, be reached.’²⁸¹

6.2.4.2 Brazilian Legal Framework

The fundamental objectives of the rather elaborate and detailed Brazilian Constitution include reducing social inequalities and promoting the well-being of all without prejudice regarding origin, race, sex, colour, age or any other forms of discrimination.²⁸² The principle of equality is further enshrined in Article 5, which ensures equality to all and prohibits any distinction whatsoever.²⁸³

The Brazilian Constitution came into force in 1988, during a time when self-proclaimed ‘racial harmony’ prevailed. As such, specific reference to race can be found only once in the Constitution. Instead, the Brazilian Constitution places a lot of weight on the equality and non-discrimination of persons with disabilities. Since the acknowledgement of persisting racial inequalities in Brazil in the 1990s, Brazil has entered a phase of affirmative action, with several policies implemented to eliminate the social inequality rooted in racism.

Particularly in the sector of higher education, affirmative action laws and policies have been introduced, to ensure equal participation of particularly *preto* and *pardo* students. Brazilian federal universities are therefore obliged not only to ensure

²⁸⁰ P. de Vos, 2015.

²⁸¹ M. McGregor, ‘Affirmative action and non-discrimination: South African law evaluated against international law’, *The Comparative and International Law Journal of Southern Africa*, vol. 39, no. 3, 2006, pp. 385-404, Available from JSTOR, (accessed 15 May 2017).

²⁸² Constitution of the Federative Republic of Brazil, 1988, art. 3(III) and (IV).

²⁸³ *ibid.*, art. 5.

equality but also to meet very specific quotas in admissions. These quotas not only consider race but also where the student completed their secondary education and how low the family income is.

The STF has confirmed the constitutionality of race quotas and found it to be in line with the State's constitutional obligation to close the inequality gap, according to Article 5 of the Constitution.²⁸⁴

6.2.6 Application: South Africa

South Africa is bound by the obligations placed on State parties of the ICCPR, ICESCR, CRC, CADE, Banjul Charter, ACRWC, AYC, and as such its actions must respect, protect and fulfil the fundamental rights enshrined in these legal instruments.²⁸⁵ As complementary principles on the international, regional and national levels, non-discrimination and equality require South Africa to ensure equality of its subject and prevent distinction, exclusion, restriction or preference on several protected grounds, of which race and property or fortune apply to this case. However, the open-ended nature of the list of prohibited grounds for discrimination could further be interpreted to prohibit discrimination on property-related grounds like the economic status of a person.

The right to equality and non-discrimination is not subject to progressive realisation or available resources available to the State. Discrimination on the ground of race, *inter alia*, may never be derogated from. As a fundamental principle in international law, non-discrimination carries a substantial weight and importance in relation to the realisation of all other rights. Not only is South Africa required to prevent discrimination, but also to take measures that will fulfil the notion of substantive equality. Although there are measures in place, such as NSFAS, it is questionable whether this meets the required standard, since the reality remains far-removed from equality.

²⁸⁴ Supremo Tribunal Federal, APDF 186, 12 April 2012, Relator: Rep. Ricardo Lewandowski.

²⁸⁵ For a complete list of South Africa's signature and ratification status of United Nations human rights treaties, see: <http://bit.ly/2tBygcP>; For a complete list of South Africa's signature and ratification status of African Union treaties, conventions, protocols and charters, see: <http://bit.ly/2uNS2B5>.

Access to higher education depends to a large extent on an applicant's ability to pay the high (and increasing) university fees that persist in South Africa. Given the legacy of apartheid and due to the structural racism that persists in South Africa, not all students are affected by financial barriers to higher education access in equal parts. According to the 2011 census, the average income of white households was six times as high as the average income of black households.²⁸⁶ Therefore, those that are adversely affected by the consistent underfunding of universities are predominantly black students. We consequently see not only direct exclusion on the basis of financial capacity but also indirect exclusion on the basis of race. Since race is a protected ground on which discrimination is prohibited in the relevant international, regional and national legal instruments, it is easier to prove that this exclusion amounts to unfair discrimination. In the case of financial capabilities, it is included as a listed ground only in international documents as 'property' and in regional documents as 'fortune'. Even though national legislation does not explicitly state it as a prohibited ground for discrimination, the open-ended nature of the list allows for a broader interpretation, and a good case can be made in arguing that the current funding model for higher education in South Africa violates the right to equality and non-discrimination.

6.2.7 Application: Brazil

As a State party to all mentioned international and regional legal instruments, Brazil has an obligation to prevent distinction, exclusion, restriction or preference of individuals based on a list of prohibited grounds which include race and economic status, or property, in regional and international law respectively.²⁸⁷ However, this list is not exhaustive and its open-ended nature can be interpreted to include a range of other prohibited grounds for discrimination. It is notable that Inter-American documents include 'economic status' on the list, which seems to cover a wider range of circumstances than 'property' in international conventions. Notably, the right to non-

²⁸⁶ Statistics South Africa, 2012, p. 42.

²⁸⁷ For a complete list of Brazil's signature and ratification status of United Nations human rights treaties, see: <http://bit.ly/2tBTRli>; For a complete list of Brazil's signature and ratification status of Inter-American Treaties, see: <http://bit.ly/2eGbM3A>.

discrimination is not subject to progressive realisation or the availability of State resources.

Not only is Brazil obliged to prevent discrimination, but it is also required to take measures, which will achieve substantive equality. Brazil has adopted the most sweeping affirmative action policies in the Western hemisphere, supported and confirmed by the Brazilian Supreme Tribunal. Particularly in higher education, quotas now ensure equal participation of students from families with various economic statuses and of different races. Brazil has made significant strides in implementing affirmative action policies that work towards equality and non-discrimination in access to higher education, in line with the requirements set out in the CADE.

6.3 Summary of findings

In taking retrogressive measures to ensuring equal access to the right to education, the South African government's actions are incompatible with international, regional and national human rights frameworks. On 7 June 2017, South Africa submitted its periodic report to the CESCR, in which it mentions the grievances expressed by the #FeesMustFall movement.²⁸⁸ It will be interesting to see whether the CESCR's comments on this state report will address these issues and the retrogressive government measures from which they stem.

Brazil's strategy of funding the private sector, which is subject to tuition fees, does not amount to progressively introducing free higher education, as envisioned by the ICESCR. As such, it is doubtful whether this policy is compatible with international, regional and national human rights frameworks

South Africa's funding policy for higher education directly inhibits access for students of lower economic standing. As a result of the persistent high correlation between income and race, a good case can be made in arguing that the current funding model for higher education in South Africa violates the right to equality and non-discrimination.

²⁸⁸ United Nations, Committee on Economic, Social and Cultural Rights (CESCR), *State party's report: South Africa*, E/C.12/ZAF/1, 2017, pp. 57-58, <http://bit.ly/2uSAnII>, (accessed 21 June 2017).

Brazil's adoption of quotas in higher education amounts to the kind of affirmative action policies envisioned in the ICCPR and CERD. Newer data on the enrolment and participation rates of *pardos* and *pretos* will show the implications of these policies. In theory, however, it appears that Brazil has made significant strides in implementing affirmative action policies that work towards equality and non-discrimination in access to higher education, in line with the requirements set out in the CADE.

7 DRAWING PARALLELS

As two countries with very distinct historical developments, it is astounding to see the number of similarities in challenges that Brazil and South Africa face today with regards to unequal access to higher education, and inequality as a whole. So far, this thesis has highlighted the historical development, current structure, and funding model of the system of higher education in each country, as well as the historical context of inequality, the ways in which this manifests itself today, and measures taken by the government to combat these issues in South Africa and Brazil. This chapter will analyse these aspects using a comparative approach with the aim of, through the scrutiny of similarities and differences, arrive at a point of more clarity on the distinct features of these two complex systems.

This thesis has further highlighted access to education as a challenge in both countries. Exponential increases in student enrolments are a global phenomenon, and according to a UNESCO Policy Paper published in 2017, countries around the world have tackled this confrontation in one of two ways: while some countries have implemented a shift a portion of the cost burden onto students by increasing tuition fees, other countries have gone with the second option of encouraging the private sector to supply to this excess demand by absorbing more students into their systems or establishing more private institutions.²⁸⁹ South Africa and Brazil have adopted these strategies respectively. Whereas in South Africa these measures have caused an eruption of protests, reactions on such a grand scale in Brazil have not transpired.

Moreover, both countries are marked by high levels of inequality, which result in the barriers to accessing higher education not affecting all persons equally. South Africa and Brazil have arrived at a relatively similar point where inequality persists, and the government continues to take affirmative action measures to combat it. All this, in spite of the varied political and social, historical backgrounds in which these inequalities have developed.

²⁸⁹ UNESCO, 2017, p. 7.

7.1 Two distinctive systems of higher education

Although the first South African university was established 100 years before the first Brazilian university, higher education in South Africa was initially legally restricted to white students. In 1916, the first South African university for black students was established, shortly before the first university in Brazil, in 1920. While in Brazil universities were technically accessible to everyone, South African universities restricted access in line with the racial segregation prevailing in society during colonial and Apartheid times. Even once ‘black’ universities had been established, the share of enrolled students remained minimal for decades, and black students’ rights and freedoms remained restricted until the end of Apartheid when higher education was restructured.²⁹⁰

South Africa’s higher education sector is dominated by public universities. Of the 1.1 million students enrolled in higher education in 2013, 89% attended one of the 26 public universities.²⁹¹ Notably, the number of private higher education institutions in South Africa has decreased significantly from 300 under the apartheid regime, to 113 in 2013, as a result of increased regulation.²⁹² In Brazil, as regulations were reduced, the private higher education expanded and in 2015 only 12.5% of the 2.364 institutions were public.²⁹³ In fact, only 24.3% of the 8 million students enrolled in 2015 were enrolled in public higher education institutions.²⁹⁴ Private institutions play a much more significant role in Brazil than they do in South Africa.

With regards to state expenditure on education as a percentage of GDP, South Africa and Brazil fare equally and are even slightly ahead of the OECD average.²⁹⁵ Both countries saw an increase in how much the State spent on education between 2008 and 2013. However, when looking at how much of this total expenditure on education went towards higher education, both South Africa and Brazil lie well below the OECD average.²⁹⁶ Yet, at 18.1% Brazil spends a larger share of its total expenditure on

²⁹⁰ Reddy, p. 18.

²⁹¹ DHET, 2015, pp. 3-5.

²⁹² *ibid.*, p. 3.

²⁹³ Ministério da Educação, p. 13; Garcia, pp. 4-7.

²⁹⁴ Ministério da Educação, p. 13.

²⁹⁵ World Bank, *Government expenditure on education, total (% of GDP)*.

²⁹⁶ *ibid.*

education on higher education than South Africa at 12.4%. Between 2008 and 2013, this figure increased for Brazil, while South Africa saw a slight decrease.²⁹⁷

An increase in demand for higher education and subsequent increases in student enrolments are a worldwide occurrence that present a challenge to governments, and which have essentially been tackled in one of two ways: shifting some of the cost burden onto students through higher tuition fees or encouraging the private sector to establish more institutions of higher education, in order to absorb some of the excess demand. South Africa has adopted the first of these strategies.²⁹⁸ While in Brazil, public universities are fully funded by the government and fee-free for students, in South Africa this is not the case; public universities receive their funding from the government, student fees, and private income streams. However, government funds have been steadily declining, while student fees have seen an increase, particularly in the past decade.²⁹⁹ Even though Brazilian public universities are fully funded by the State and do not charge tuition fees, there are relatively few public universities, and almost 75% of students are absorbed by the private sector, which is not funded by the State and largely relies on tuition fees.³⁰⁰ As a result, places at public universities are very competitive, and the entrance exams are difficult to pass. This leaves the majority of students with the residual option of paying for their higher education at private higher education institutions.

The question logically follows – what are the barriers to accessing higher education in Brazil and South Africa? This thesis has shown how in the case of South Africa, increasing tuition fees make higher education less accessible. In fact, according to the South African General Household Survey of 2013, 25.3% of individuals aged between five and twenty-four that were not enrolled in an educational institution cited a lack of financial means as the reason.³⁰¹ In Brazil, although public universities are fee-free, the issue appears to come down to privatisation and the tuition fees that are then associated with these private higher education institutions. According to data from 2015

²⁹⁷ World Bank, *Government expenditure on education, total (% of GDP)*.

²⁹⁸ UNESCO, 2017, p. 7.

²⁹⁹ CHET, *South African Higher Education Open Data*; DHET, 2014, p. 144.

³⁰⁰ Ministério da Educação, p. 13.

³⁰¹ Statistics South Africa, 2014, p. 19.

which was presented in Chapter 5.4, the poorest Brazilians, or rather those from families with the lowest income are underrepresented in both public and private higher education institutions, yet the proportion of the poorest quintile in public universities is double that in private universities. In both countries, poverty and low income do not affect all fractions of the population equally. The next section will elaborate on the close correlations between income and race that persist in both South Africa and Brazil.

7.2 Mind the gap: inequality in South Africa and Brazil

Brazil and South Africa are two of the more unequal countries in the world. This inequality manifests itself largely along racial lines, still today. In South Africa, the average income of a white household is six times that of the average income of a black household.³⁰² In Brazil's lowest 10% income bracket, three in four persons are *preto* or *pardo*.³⁰³ Among the richest 1% of the Brazilian population, only 17.8% are *preto* or *pardo*.³⁰⁴

These figures show that those with the lowest income in Brazil are predominantly *preto* or *pardo* and in South Africa they are black. Given then that in South Africa, financial means present a barrier to accessing higher education, it follows that the student participation rates of black South Africans remain proportionally low, at 3.1% compared to the 15.7% for white South Africans.³⁰⁵ Similarly, in Brazil, the student participation rates of *pretos* and *pardos* remain low compared to that of *brancos*, at 7.3% and 26.5% respectively.³⁰⁶

In South Africa, black land ownership was restricted by law for decades, and the accumulation of human capital was prevented by a corrupt education system and the limitation on business ownership. Moreover, the labour system was rigged to suppress the black worker and disable him from accumulating skills or wealth. Although Brazil saw no legal segregation or restrictive laws on *pardos* and *pretos*, racism was disguised as 'racial democracy' and methods of miscegenation were promoted to 'whiten' the

³⁰² Statistics South Africa, 2012, p. 42.

³⁰³ IBGE, p. 96.

³⁰⁴ *ibid.*

³⁰⁵ Statistics South Africa, 2016b, p. 16.

³⁰⁶ IBGE, p. 62.

population post-abolition. In fact, Brazil was internationally considered a beacon of ‘racial harmony’ in a time when the rest of the world was beset by racism and genocide, until acknowledgements of persistent racism were finally made by the Brazilian government in the 1990s.³⁰⁷

7.3 The voice of the people

As a result of the increasing tuition fees in South Africa and the social pressure with which black students are consequently faced, a wave of student protests erupted in 2015, which continued through 2016.

In October 2015, the University of Witwatersrand in Johannesburg announced that it would increase tuition fees by more than 10% for 2016, despite an inflation rate of only 6%. As a response, South African students set in motion a mass movement, bringing to light the need for deep and enduring policy and social changes. The 2015 student rising was lead under the umbrella name #FeesMustFall. The hashtag originated from a protest in March 2015 at the University of Cape Town, #RhodesMustFall, which campaigned for the removal of an oppressive statue of Cecil John Rhodes – representative of institutional racism and a lack of transformation at universities – and a wider call for the ‘decolonisation’ of education across South Africa. Although the #FeesMustFall movement will be analysed in its role concerning tuition fees in this thesis, it is important to note that a second and equally important objective was to abolish outsourcing of workers at universities.

No student movement in the post-1994 South Africa has received as much attention, on both a national and global scale, as the #FeesMustFall movement. The protests were actively documented, often ‘live’, and shared on social media, which allowed the public to gain immediate access to information. Starting at the University of Witwatersrand, the protests moved to the University of Cape Town and Rhodes University as well the remaining traditional universities and technical colleges across the country in a matter of days. The financial pressures applying to South Africa’s youths across all higher education institutions united students behind one cause: to

³⁰⁷ Telles, p. 47.

prevent higher education hikes and to demand the progressive realisation of free higher education. Calling upon the ruling party, the ANC, to fulfil Nelson Mandela's promise that 'the doors of learning and culture shall be opened'³⁰⁸, tens of thousands of students protested against the fees that present a financial barrier to their constitutional right to education.

Within ten days, South African students made history by forcing the government to freeze tuition hikes: on the 23rd of October 2015, President Jacob Zuma announced that there would be no increases for the following year. The announcement was made with no indication of how the shortfalls would be funded, and it was not seen as a victory for the students as no commitments beyond 2016 were made. Although the student protests have been praised for their achievement in the short space of ten days, it is important to understand that concerns regarding increased tuition fees have been raised by student leadership with university management and with government on an annual basis. The 2015 protests were an escalation of the frustrations of numerous fruitless conversations, as a representative of the student movement said in response to a suggestion that the student protests should have taken place in a more bureaucratic way:

The protests escalated in a certain context because [we] were forced to take certain kinds of measures in order to be heard. Any time young people are trying to speak, we're told that we must engage with structures that have been ignoring us for a long time. We are trying to determine creative ways of engaging, but instead people are being thrown with court interdicts and are being thrown into jail. There is a tone-deafness to which this conversation takes place that makes it really difficult to understand what people are saying. It's important to understand that there was an escalation. Why is it that student power must manifest in this way? We need to start taking student voices seriously.³⁰⁹

In mid-August 2016, in anticipation of Minister Nzimande's announcement of a fee increase capped at 8% for 2017, the #FeesMustFall protests were revived nation-wide. Student leaders called on students to mobilise campus shut-downs. Indeed, at the University of Cape Town, students forced a shutdown that lasted for six weeks and which resulted in a postponement of the academic year. Through various negotiation

³⁰⁸ Congress of the People, p. 2.

³⁰⁹ *South African Students find their voice*, [online video], Al Jazeera, 2015, <http://bit.ly/2twi6gs>, (accessed 3 April 2017).

sessions between leaders of the protests and university management, which were all live-streamed on social media, an agreement was reached in early November 2016. Amongst many other pledges, the University here with committed itself to examining the possibility and implications of fee-free higher education, to include the facilitating of debate and active lobbying at the national level.³¹⁰

In response to the protests, then-Finance Minister Pravin Gordhan in his medium-term budget policy statement announced to Parliament in late October that funding higher education is a priority. As such, university subsidies are to grow by 10.9% annually and funding for NSFAS by 18.5%.³¹¹ In August of the same year, Gordhan had claimed that by curbing corruption, the government would indeed be able to cover the cost of higher education for poor students.³¹² Gordhan has since been dismissed from office, in March 2017.

Meanwhile, a Commission of Inquiry into Higher Education and Training was established by President Zuma in January 2016 to investigate the feasibility of free higher education in South Africa. The Commission completed its work on 30 June 2017 and will submit its report to the President in August 2017.

The legacies left by the education system of apartheid remain tangible, and the promises made, and manifested in the Constitution, are unfulfilled. Universities are chronically underfunded by the State, leaving students to pay the price. Without concrete government action to reduce tuition fees and increase support to students in the form of bursaries and loans, South African universities cannot return to the low levels of tuition fees that it saw around 1960. South African university campuses are therefore likely to remain a volatile source for social protests in the foreseeable future, until fees actually *fall*, rather than remain unchanged.

In Brazil, no such wave of student protests has erupted in higher education in recent times. However, Brazilian students are responsive to changes in policies that

³¹⁰ University of Cape Town, 'Agreement with the SRC Candidates / Shackville TRC and other student formations', 2016, pp. 3-4, <http://bit.ly/2tvGAa1>, (accessed 14 June 2017).

³¹¹ N. Goba, 'Wits #FeesMustFall leader says Gordhan's doesn't "respond to question at hand"', *Times Live*, 27 October 2016 <http://bit.ly/2uxS2D0>, (accessed 2 May 2017).

³¹² *Stop corruption to help pay university fees, says Gordhan*, [online video], 2016, <http://bit.ly/2eJx0O9>, (accessed 1 June 2017).

affect education, as became clear in October 2016, when students occupied hundreds of schools across the country to protest President Temer's Education Reform Model.³¹³ The reforms would entail a change in curriculum and adopt austerity policies which students considered a threat to the already poor level of public schools.³¹⁴ Through these protests, education has been shifted towards the centre of national debate. Therefore, depending on how the situation regarding privatisation and disinvestment in public education continues in Brazil, and how the quotas are implemented by federal universities, student protests may too rise in Brazil.

7.4 Affirmative action: steps towards substantive equality

Regardless of the different paths that have lead South Africa and Brazil to their transitions in ideologies in the 21st century, both countries have taken strikingly similar turns towards their views on affirmative action policies, particularly in higher education. In both countries, affirmative action has judicial legitimacy, lent to it by the South African Constitution and the Brazilian STF. Expressed succinctly by then-President Lula: 'we're not doing any favours. We are merely paying a debt going back 500 years'.³¹⁵ Both countries have on numerous occasions re-emphasises the importance and validity of affirmative action. However, with regard to affirmative action in higher education, Brazil has taken a stronger stance and implemented far more comprehensive policies.

Since the end of Apartheid, South Africa has been adopting affirmative action measures to combat the vast inequalities as a result of centuries of domination and suppression of black South Africans. However, race quotas in universities are not a requirement and race is merely a factor taken into consideration in enrollment. During

³¹³ P. Prengaman and S. Diloranzo, 'Brazilian students occupy high schools nationwide to protest budget cuts' INDEPENDENT, 25 November 2016, <http://ind.pn/2gXNwuI>, (accessed 22 June 2017).

³¹⁴ *ibid.*

³¹⁵ Silveira, [translated from Portuguese].

the enrollment process, certain applicants are given a ‘preferential boost’ according to their race.³¹⁶ This treatment is not always explicit.

Brazil, on the other hand, has made quotas in federal universities legally enforceable.³¹⁷ As such, a certain number of slots are allocated to members of the target group of these quotas. Government policies to this end were first implemented in 2007 when the government launched REUNI, which conditioned funding for federal universities national-wide on their adoption of affirmative action policies, to promote the participation of students from disadvantaged groups.³¹⁸ Further, Brazil has implemented ProUni which grants tax breaks to private higher education institutions in exchange for full or partial scholarships granted by these institutions to a proportion of their students.³¹⁹ Requirements for these scholarships are that the student has completed their prior education in public schools and that the family income is below a certain target.³²⁰ After the Supreme Tribunal of Brazil had confirmed the constitutionality of race quotas in public universities as well as the constitutionality of ProUni, in April and May of 2012 respectively, Brazilian legislators went on to enact the *Lei de Cotas* in August of the same year, which prescribes a complex quota system to all federal universities.

A closer look at the difference in approaches taken by South Africa and Brazil, shows not only that Brazil has taken more sweeping measures, but also that Brazil seems to have taken an approach that is more based on class than race: the quotas primarily require that seats are reserved for students from public schools and students from families with low incomes. The proportion of seats reserved for *pretos* and *pardos* must represent the racial makeup of the federal state in which the university is located. South Africa’s methods of ‘preferential boosts’ in enrollment do not take school background or family income into consideration and only look at race.

³¹⁶ B.T. Long and L. Kavazanjian, ‘Affirmative Action in Tertiary Education: A Meta-Analysis of Global Policies and Practices’, 2012, p. 16, <http://bit.ly/2uSLfGp>, (accessed 5 June 2017).

³¹⁷ *Lei de Cotas*.

³¹⁸ Lloyd, p. 177.

³¹⁹ Garcia, p. 15.

³²⁰ Lloyd, p. 178-9.

Naturally, the question follows: are Brazil and South Africa doing enough to ensure equal access to higher education? In the case of South Africa, it is dubious whether the state has in fact taken enough affirmative action measures to ensure equal access to higher education. South Africa's race-based admission policy is vaguer and less explicit than that of Brazil. Further, NSFAS has not been as effective in increasing access to education for historically disadvantaged groups, as Brazil's ProUni and FIES. The effects of Brazil's *Lei de Cotas* are yet to be seen, as quotas have to be implemented by 2016. However, this applies only to public universities, which enrol a mere quarter of students in higher education. Nevertheless, policies are also in place to improve the accessibility to private higher education in Brazil, and FIES and ProUni have been effective in this regard. The number of students enrolled at private institutions benefitting from some form of financial aid has almost doubled between 2009 and 2015.

8 CONCLUSION

Throughout the 20th century, South Africa and Brazil have adopted very different, in fact opposing, ideologies on race. While South Africa saw strict racial classification and boundaries adopted under Apartheid, race was considered a fluid concept in Brazil. South Africa adopted a strict racial segregation regime, while Brazil avoided the establishment of any and all racial classification post-abolition and was hailed the beacon of ‘racial harmony’ internationally.

This thesis has shown how two countries with such disparate historical developments have since the 21st century adopted similar approaches to affirmative action in higher education. In both countries, affirmative action has judicial legitimacy. In South Africa, ‘fair discrimination’ is guaranteed by the Constitution, and in Brazil it was ruled constitutional by the highest court. Similarly, the Human Rights Committee has affirmed that to make education equally accessible to all, a state may be obliged to implement affirmative action measures. However, Brazil has adopted much more comprehensive affirmative action policies in higher education in South Africa. While in Brazil federal public universities are, since 2012, obliged to implement quotas, in South Africa students’ applications are merely assessed differently, but no quotas exist. Taking a closer look at these policies has shown how Brazil’s affirmative action policies for higher education admission are more class- than race-based, as the quotas require consideration for family income and schooling background, in addition to race.

Particularly in ensuring the right to non-discrimination in higher education, Brazil has taken great strides in implementing affirmative action through quotas. In this sense South Africa lags behind and current policies, or rather the lack thereof, are incompatible with international law which requires states to ensure equality of all its subjects and prevent distinction, exclusion, restriction or preference on several protected ground, of which race and property - or fortune or economic status in the African system and Inter-American system respectively - apply to this case. The open-ended nature of the list of protected grounds can be interpreted to have an even wider scope. Black South Africans, as a result of the correlation between race and income, remain disproportionately underrepresented in higher education, to a significant extent as a result

of increasing tuition fees and decreases in government funding for universities. NSFAS, the National Student Financial Aid Scheme, has not succeeded in alleviating these financial barriers for enough students to a satisfactory degree. However, it remains notable that Brazil's quotas are applicable only to public federal universities, which do not even enrol a quarter of university students.

The right to higher education requires states to give effect to equal access to higher education by every appropriate means, within the national framework and subject to available resources, with the vision of achieving progressively free higher education, and to implement policies to this end. In consideration of whether South Africa has met this standard, financing is at the centre of the debate. This thesis has shown how in South Africa access to education is not ensured on the basis of merit, but rather on the basis of financial means. Existing barriers are reinforced by increasing university fees, and these retrogressive measures are incompatible with international human rights standards on the right to education. In Brazil on the other hand, where public universities are fee-free, the discussion centres on privatisation. The State has dealt with the increasing demand for higher education by encouraging the private sector to absorb the majority of that demand. Three out of four university students in Brazil attend private higher education institutions. It is thus dubious, whether under these circumstances the right to education as implemented in Brazil is compatible with international human rights standards.

The implication of the current funding models for higher education in South Africa and Brazil thus far, bluntly formulated, are that poor black students continue to be excluded from accessing higher education. Particularly in South Africa, there is no change on the horizon, and student unrest will surely continue. In Brazil, the *Lei de Cotas* had to be implemented by 2016. Future statistics on participation rates in public higher education will show the efficiency of these quotas, in ensuring equal access to higher education. However, the issue of privatisation remains and time will tell whether the dynamics of student movements awaken social mobility on this issue.

By means of the adoption of an interdisciplinary, human rights-based approach to the issue, this thesis has highlighted through a legal and comparative analysis, gaps in

the implementation of equal access to higher education in South Africa and Brazil. The #FeesMustFall protests have shed light on a deeply embedded issue and brought it to the surface of social discourse, not only in South Africa but globally – showing the power that lies in mass mobilisation and the importance of the voice of the people in claiming their human rights. This concern meets at the intersection of two issues that must remain on the table of discussion: States are by international law obliged to make higher education accessible to all and to move towards free education; moreover States must respect and ensure equality and non-discrimination, as a fundamental principle for the enjoyment of all other human rights that empower individuals to shape their lives in accordance with liberty, equality, and dignity.

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ABSTRACT

Globally, student protests are on the rise, particularly in response to neoliberal policy reform and tuition increases. South Africa saw a rise in protests at higher education institutions over the last few years, mainly regarding affordability, climaxing with the 2015/16 #FeesMustFall protests. Meanwhile, in Brazil, public universities are fee-free, and the conversation has instead revolved more around the limited availability of public universities and the privatisation of higher education. The importance and value of education are well acknowledged and as such, the right to education, including higher education, is extensively established in human rights law at the international, regional and national levels. By means of the adoption of an interdisciplinary, human rights-based approach to the issue, this thesis highlights through a legal and comparative analysis, gaps in the implementation of equal access to higher education in South Africa and Brazil, and the implications thereof. Student protests have shed light on a deeply embedded issue and brought to the surface the intersection of two issues that must remain on the table of discussion: States are by international law obliged to make higher education equally accessible to all by every appropriate means, and in particular by the progressive introduction of free education; moreover States must respect and ensure equality and non-discrimination, as a fundamental principle for the enjoyment of all other human rights that empower individuals to shape their lives in accordance with liberty, equality, and dignity.

ABSTRACT (auf Deutsch)

Weltweit sind Studentenproteste auf dem Vormarsch, vor allem in Reaktion auf die neoliberale Politikreform und steigende Studiengebühren. Südafrika sah in den letzten Jahren einen Anstieg der Proteste an Hochschulen, vor allem im Hinblick auf die finanzielle Erschwinglichkeit, die mit den 2015/16 #FeesMustFall Protesten den Höhepunkt erreichten. Mittlerweile sind in Brasilien die öffentlichen Universitäten kostenfrei, und die Diskussion hat sich stattdessen mehr um die begrenzte Verfügbarkeit öffentlicher Universitäten und die Privatisierung der Hochschulbildung gedreht. Die Bedeutung und der Wert der Bildung ist eine durchaus anerkannte Tatsache, und so ist das Recht auf Bildung, einschließlich der Hochschulbildung, weitgehend im Bereich der Menschenrechte auf internationaler, regionaler und nationaler Ebene verankert. Mittels eines interdisziplinären Menschenrechtsansatzes zu diesem Thema werden in dieser Arbeit durch eine rechtliche und vergleichende Analyse, Lücken bei der Umsetzung des gleichberechtigten Zugangs zur Hochschulbildung in Südafrika und Brasilien sowie deren Auswirkungen hervorgehoben. Studentische Protestbewegungen haben ein tief eingebettetes Thema aufgeworfen und an die Oberfläche gebracht, um den Schnittpunkt zweier Themen zu vermitteln, die weiterhin auf dem Tisch der Diskussion stehen müssen: Die Menschenrechte verpflichten den Staat dazu, Hochschulbildung mit allen geeigneten Mitteln für alle gleichermaßen zugänglich zu machen, insbesondere durch die fortschreitende Einführung der freien Bildung; darüber hinaus müssen die Staaten Gleichheit und Nichtdiskriminierung respektieren und sicherstellen. Dies ist ein Grundprinzip für die vollständige Achtung aller anderen Menschenrechte, welches es ermöglicht, das Leben in Übereinstimmung mit Freiheit, Gleichheit und Würde zu gestalten.