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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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COMPARATIVE STUDY OF AFFIRMATIVE ACTION POLICIES IN HIGHER EDUCATION OF FRANCE, BRAZIL AND USA

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Abstract

Higher Education in most countries is often seen as a privilege for the rich and entitled. However, with modern understanding and recognition of different types of oppression, many countries have seen a rise in affirmative action policies when it comes to higher education allowing more students from disadvantaged communities into universities and other higher education programs. This paper hopes to investigate and compare the different types of higher education policies adopted in France, Brazil and USA. This paper also seeks to analyze the disadvantages and advantages of these policies with the political system in place in these respective countries.

Introduction to Affirmative Action

Affirmative action can be defined as positive policies and methods taking in order to ensure more visible representation of disadvantaged community with respect to race, gender, ethnicity, sexual orientation etc.¹ These policies are usually incorporated in employment opportunities, political representation, education and also health care. The conversation surrounding affirmative action takes a legal course in courts and through laws and law-abiding policies and also takes a political course with discourse and discussions regarding positive discrimination with the general public.² Affirmative action helps equal the level playing field by allowing everyone opportunities of various forms to less privileged individuals who have little to no capital. If not for affirmative action many individuals belonging to disadvantaged communities would not be able to get employment, education health care etc due to structural problems and societal discrimination. Affirmative action also gives rise to diversity and inclusiveness and allows for different perspectives and real-life experiences to be heard and dealt which in turn helps engineer much

¹ “Affirmative Action” <<https://plato.stanford.edu/entries/affirmative-action/>>

² “Affirmative Action” <<https://plato.stanford.edu/entries/affirmative-action/>>

needed change.³

Introduction to Affirmative Action in Higher Education

One quarter of states around the world have implemented affirmative action in their higher education system in order to ensure diversity and inclusiveness and representation in something as crucial as education. Most of these affirmative action's revolve around gender, race, ethnicity, sex etc and also some positive discrimination policies also adopt a combination of these to allow for students struggling with two types of oppression like gender and economic hardship to benefit from these policies.⁴ The Two popular disadvantaged groups that have recently been benefiting largely from affirmative actions are women and ethnic minorities as oppose to race, caste-based minorities etc. This shows how the application of affirmative action is not just limited to race.⁵ A primes example to this is in South Africa there are policies that give opportunities to disadvantaged while students and also policies that deal with family problems, housing etc.⁶ The increase in affirmative action policies all around the world when it comes to higher education has seen more individuals from impoverished and disadvantaged communities in policies, technology and other industries making it visible the need for positive discrimination to achieve a post- modern world.⁷ This paper will look into the affirmative action policies implemented in 3 vastly different countries like France, Brazil and USA and bring out and explore the difference between each country look at positive discrimination and analyze the benefit of the same.

France and Affirmative Action in Higher Education

Article 1 of the 1958 French Constitution states that “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralized basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility”⁸ This would mean that in France concepts of Race, ethnicity are not directly spoken about and not directly dealt with as France follows a colour-blind approach to the idea of equality. This makes gathering information for statistics and researchers quite difficult and so they rely on aspects such as first names and last

³ “Affirmative Action” <<https://plato.stanford.edu/entries/affirmative-action/>>

⁴ Dudley L and Moses MS, “Affirmative Action Initiatives Around the World”

⁵ Dudley L and Moses MS, “Affirmative Action Initiatives Around the World”

⁶ Dudley L and Moses MS, “Affirmative Action Initiatives Around the World”

⁷ Dudley L and Moses MS, “Affirmative Action Initiatives Around the World”

⁸ The French Constitution 158, Art. 1.

names and how French sounding they are to identify individuals and also look at place of birth and other indirect factors.⁹ Colour blindness as an approach has found its place firm in not just the government of France but also the general public as they believe concentrating on differences moves us further from equality.¹⁰ Due to this popular colour blindness approach class and geographical locations are looked upon as factors to recognise ones racial and ethnic background. It is also important to know that the notion of diversity for the French is a goal and not something they believed they have achieved and hence you will see political parties and ideologies move towards the notion of diversity rather than claiming it already exists. “Educational priority areas”¹¹ (ZEP) is where you find most of the racial and ethnic backward communities live.¹² ZEP is usually used to identify students that belong to disadvantaged communities going to high schools and primary schools in that area¹³. ZEP finds its influences from the American idea of what affirmative action it but it is firm in French notions of equality and egalitarianism.¹⁴ In 2001 Science Po was the first French Institution to introduce an affirmative action plan and helped in exploring the required balance between colour blind and colour conscious policies and method which best help diversify higher education in France.¹⁵

The reason why Science Po had decided to implement an affirmative action plan is because since the 1980s it saw a pattern of just homogenous students in terms of background and race and ethnicity attend college and recognised a structure change was required for a diverse higher educational experience and to reach the goal of diversity.¹⁶ Statistically as well Science Po realised only 81.5% of the students came from upper class families where as 1% came from middle class and it was undeniable that the racially and ethnically backward students belonged to the 1%.¹⁷ One way Science Po enrolled more students from disadvantaged communities was by creating a special admission process for students from high schools placed in ZEP areas which helped

⁹ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹⁰ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹¹ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹² Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹³ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹⁴ “A French Take on Affirmative Action Relies on Geography, Not Race” (December 5, 2016) <<https://www.pri.org/stories/2016-12-05/french-take-affirmative-action-relies-geography-not-race>>

¹⁵ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

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¹⁷ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in *Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

democratise and modify the admission process and the kind of students entering Science Po.¹⁸ The admission process for these students from ZEP high schools did not include writing a test but an essay and interview for selection as they recognised students from ZEP might not have access to the same level of education and resources and hence required a different admission process with additional financial aid and tutoring.¹⁹ One of the most important factor about this admission process was that it did not affect or reduce the seats available through normal admission process which disallowed other students to feel as the casualty of this program which is also an argument heard in the USA a lot against affirmative action in higher education.²⁰ A short coming of the application of the program was with the way ZEP was designed itself. Poverty stricken locations as a concept in France isn't has rigid or identifiable as it is in the USA and hence a lot of high income families and students have been able to take advantage of the program to enter elite France institutions like Science Po.²¹ Overall these affirmative action programs are now seen being implement in a lot more universities in France.²² 83% of students that entered Science Po in 2009 have been identified second generation immigrants²³ and Science Po has seen 1600 students enter the university using this affirmative action showing now necessary and beneficial it is to have such policies even in a colour blind state.²⁴

Brazil and Affirmative Action in Higher Education

Brazil has a unique relationship with the implementation of affirmative action policies in university. In 2012 the much-needed quota system was approved and made constitutional legally allowing for affirmative action policies to exist in higher education under the protection of the law.²⁵ Brazil has also seen a significant increase in students who joined higher education of ages 18 to 24 from 7.1% in 1997 to 17.6% in 2011 which shows that students attending higher education has quadrupled with time and with positive discrimination policies implemented both by the state

¹⁸ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

¹⁹ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

²⁰ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

²¹ "A French Take on Affirmative Action Relies on Geography, Not Race" (December 5, 2016) <<https://www.pri.org/stories/2016-12-05/french-take-affirmative-action-relies-geography-not-race>>

²² "A French Take on Affirmative Action Relies on Geography, Not Race" (December 5, 2016) <<https://www.pri.org/stories/2016-12-05/french-take-affirmative-action-relies-geography-not-race>>

²³ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

²⁴ "A French Take on Affirmative Action Relies on Geography, Not Race" (December 5, 2016) <<https://www.pri.org/stories/2016-12-05/french-take-affirmative-action-relies-geography-not-race>>

²⁵ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

and also other actors.²⁶ The public and private education system in Brazil reeks of inequality and disparity in terms of access and opportunity. The public schools in Brazil are more accessible and available as they are free but provide less quality education as oppose to private schools which are limited and expensive but provide better quality education.²⁷ Most upper-class families therefore send their children to private schools whereas you see more racial and ethnically disadvantaged students at public school because of their lack of social and economic capital to afford private schools.²⁸ After schooling in Brazil in order to enter university students are expected to write an entrance exam which determines if they go to public or private university²⁹. The irony of this system is the fact that in higher education the public universities are the institutions with better quality education and free and assessable whereas the private universities which are expensive are the ones the lower quality of education.³⁰ Therefore, students from upper class families that attend private schools end up at public universities having a well- rounded education throughout whereas disadvantaged and impoverished background students that attend public schools end up at private universities and are therefore denied good quality education resulting in lower paying jobs or even unemployment due to structural issues with the educational system that hierarchize them into inferior positions.³¹

In 1960s Brazil saw a movement to change in inequal education structure and this movement comprised mostly of middle-class families and students. The change brought about saw the growth of the private universities and substantial increase in seats and courses with also tax breaks etc.³² However, the biggest problems with private universities which was the fact it was unaffordable and inaccessible still existed. These problems were dealt with a second wave of the movement to reform education from the 1970s to 2000s which saw growth in the public studies and better gradate studies opportunities. Social movements for educational reforms were not always political in nature.³³ The Church played a significant role in helping students from disadvantaged communities get accepted to public universities for better education.³⁴ One such initiative was the PVNC which was a movement that provided preparatory courses for black and underprivileged

²⁶ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

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²⁸ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

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³⁰ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

³¹ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

³² Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

³³ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

³⁴ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

students supported by the Catholic church outside Rio De Janeiro.³⁵ It is important to note here that the church did not see problems with the need for entrance exams but provided support to students on how to tackle them with demands for things like waivers, quota system and transportation. Statistically according to a Census by the INEP due to these social movements for educational reforms 7.3 million students applied to UG Programs and 74% of them went to private universities while the rest went to public universities.³⁶ It was also discovered that from 1991 to 2012 there was 430 percent more enrollment into higher education and that between 2001 and 2012 173% more increase of students in public universities which truly did help bridge the gap between racially and ethnic minorities and upper-class white individuals in terms of not just access to better education but other avenues as well.³⁷ The National High School Exam (ENEM) Test is the examination which is used as an entrance exam by most high education institutions since 1998.³⁸ The state recognized the flaws in the educational system and in 2010 it introduced the National Unified Selection System (SISU) through which students from disadvantaged background can apply to 2 different institutions using their test scores. Additionally, PROUNI a fellowship was also introduced which allows private universities to choose students from disadvantaged racial and ethnic backgrounds. Brazil also saw a wide range of expansion in both public and private universities which more courses and buildings etc.³⁹

It is important to recognize how other historical struggles helped contribute to these changes. The World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance was a wake up call for Brazil to see the blatant racism that existed in the country and to amend it, with the help public statements by government entities, NGOs, social movements to change educational reform, in 2004 the country saw the first university to adopt affirmative action policies for underprivileged students which was then followed by the 2012 historic moment of the quota system becoming constitutional.⁴⁰ However, while these changes must be appreciated, The new reformed education systems had its disadvantages as well. The policies implemented for disadvantaged students was very financial in nature. They did not help students integrate and feel comfortable in the new environment of university which was a shock to students from very different background thereby threatening diversity as a whole⁴¹. One possible change the Brazilian

³⁵ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

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⁴¹ Johnson OA and Heringer R (eds), *Race, Politics and Education in Brazil* (Palgrave Macmillan)

government can implement to help disadvantaged students not just financially in college is by organising sensitivity workshops to other students and professors to help with the transition and also with programs and policies that look at other aspects of university life rather than just academics.

USA and Affirmative Action in Higher Education

USA has always pedestalized the notion of equality. The 14th Amendment in the US Constitution is their equality clause and it reads “no state shall deny to any person within its jurisdiction the equal protection of the laws”. John F Kennedy was the first to use the term affirmative action in a 1961 address.⁴² Diversity as a concept was well established in the US as oppose to France or Brazil as it was a given that diversity must exist and is centralised in American law and politics. Most states in the USA unlike France do not follow the colour-blind approach and provide incentives and opportunities that to those who identify themselves as racially or ethnically backward when it comes to admissions in universities.⁴³

The idea of affirmative action in education has been through a long legal journey and its now established that diversity in university applications is another factor or component to the admission procedure and must be considered and looked into. The 1960s and 1970s saw a wave of universities introduce affirmative action policies to include impoverished, racially and ethnically backward students to increase and diversify the universities. Racial quotas were held to be unconstitutional in the 1978 case Regent of the Univ. of Cal. V Bakke where a white man who was rejected from University of California at Davis medical college claimed that this was due to the fact there were seats reserved for economically and educationally backward individuals.⁴⁴ Justice Powell in this case held that racial quotas are unconstitutional but race can be a factor to be looked into during admission but only to increase diversity in the university experience.⁴⁵ Race conscious affirmative action policies were once again challenged in 2004 in Gratz v. Bollinger

⁴² Torres GB, “Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds” (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

⁴³ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity* in Selective Institutions of Higher Education in the United States and France (Cambridge University Press)

⁴⁴ Torres GB, “Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds” (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

⁴⁵ Torres GB, “Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds” (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

and *Grutter v. Bollinger* where the Supreme Court echoed the 1978 judgement and stated that race as a concept in university admissions can be only considered for the need to promote diversity.⁴⁶ In 2016 interestingly, the Supreme Court in *Fisher v. Univ. of Texas at Austin* denied Abigail Fisher's claims against a race conscious policy adopted by University of Texas and held that race conscious policies are constitutional as they help in sensitising students to racial issues and helps integrate and diversify universities while also solving bigger structural racial issues.⁴⁷ In 2019 however, it seemed like the courts were backing in its statements on race conscious policies as when the Students for Fair Admissions stated that there was visible discrimination against Asian students the Court held that there was no proof of the same but that even though the Harvard admission process had flaws it ensured diversity and that was paramount.⁴⁸

In status quo positive discrimination is welcomed and implemented in most states in America except nine which includes California, New Hampshire, Arizona etc as in these states race conscious policies do not exist.⁴⁹

It is important to recognise that in USA direct affirmative action is not well accepted by the general public as oppose to indirect affirmative action in education. In fact states were disallowed to have direct affirmative action policies in the 1990s. In order to combat this the University of Texas at Austin looked into indirect affirmative actions and introduced a policy through which the top 10 percent of every high school students would be admitted on the basis of their performance in select courses as oppose to test scores as there is an undeniable relationship with racially backward students and their performances in tests and test score.⁵⁰ However, though the policy was effective it was noticeable that Asian and White students still took up most space even in such a policy. With this realisation the University of Texas at Austin decided to implement this policy and take in students from specific high schools which had more percentage of black and disadvantaged

⁴⁶ Torres GB, "Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds" (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

⁴⁷ Torres GB, "Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds" (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

⁴⁸ Peck T, "What Is Affirmative Action? How Does It Impact College Admissions?" (April 19, 2020) <<https://blog.collegevine.com/what-is-affirmative-action/>>

⁴⁹ Peck T, "What Is Affirmative Action? How Does It Impact College Admissions?" (April 19, 2020) <<https://blog.collegevine.com/what-is-affirmative-action/>>

⁵⁰ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting Diversity in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

students.⁵¹ This can be compared to France as this identification of disadvantaged students required location as a factor. Another indirect affirmative action policy adopted was that admission was not solely on test scores but holistic in nature where things like individual essays that paid special notice on students ability to handle hardships was considered to allow for a broader evaluation of the student.⁵²

USA still faces extreme challenges when it comes to representation of black and other oppressed classes in universities. As it was noted that there is a 40% drop in enrolment of black students and a 5% drop in enrolment of Hispanic students in University in Hopwood v. Texas. California has a similar decrease with 55% decline in enrolment of black students which shows that there is serious underrepresentation of these communities in universities even with progressive and positive discrimination laws in place.⁵³ Reasons for this could be the states inability to recognise beyond financial help and look at other social factors that prevent students of colour from enrolling in universities. Although there is anticipation for better policies as this year California gets the choice to decide to repeal its ban on positive discrimination. The removal of this ban will help more students of racial backward communities to attend universities through the help of policies designed for them.⁵⁴

Conclusion

The 3 Countries analysed in this paper namely France, Brazil, USA show different views and routes affirmative action has taken in education. It is important to note that even in a colour blind country like France, the repercussions of racial discriminations are recognised through class and location. Whereas the way private and public institutions impact primary schools and higher education affects Brazils battle with effective affirmative action to tackle underrepresentation in education. In the US we see how the question of race conscious has travelled a long legal jurisprudence and how some states benefit from race conscious policies were are other states ban positive discrimination making representation of race and ethnicity in universities uneven. A

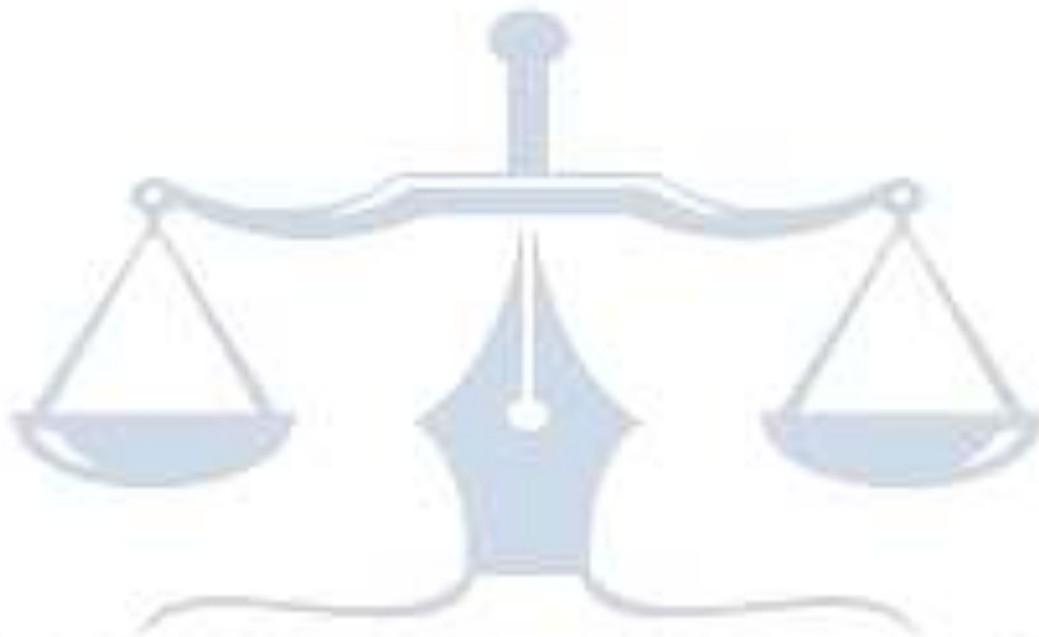
⁵¹ Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

⁵² Sabbagh D, *The Rise of Indirect Affirmative Action: Converging Strategies for "Promoting Diversity" in Selective Institutions of Higher Education in the United States and France* (Cambridge University Press)

⁵³ Torres GB, "Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds" (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

⁵⁴ Torres GB, "Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds" (January 6, 2020) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/>

common issue all three of the countries have which is highlighted in the paper is the limitation of affirmative action to just economic aid. It is important to recognise more factors such as social discrimination, mental health, families, healthcare etc go into deciding if a student from a disadvantaged background chooses to continue their education or not and so this can be looked upon to change the conversation of affirmative action to a more inclusive and well-rounded one. Finally, what is undeniable is the need for better and uniform affirmative action and the need for not just countries but international bodies to encourage affirmative action for education for a universal growth towards a more comprehensive, diverse, understanding and empathetic higher education which is accessible to all and not just a few.



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