PUNITIVE ANTI-RACISM LAWS IN BRAZIL: AN OVERVIEW OF THE ENFORCEMENT OF LAW BY BRAZILIAN COURTS

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Natália Neris da Silva Santos
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Abstract: This paper presents the main results of research on judicial decisions connected to the enforcement of punitive anti-racism laws in by Brazilian appeal courts. We analyzed 200 decisions from 1998 to 2010 which are available through the online databases of the appeal courts of nine Brazilian States: namely Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Rondônia, Rio Grande do Sul and São Paulo. The data presented allow us to diagnosis how the Brazilian judiciary deals with racism and racial discrimination and to understand the potential and limitations of existing legal instruments to confront the social problem of racism in Brazil. In the paper’s introduction, we will carry out a brief review of Brazilian punitive anti-racism laws, address some literature on the subject and, then, shift our focus to the specific legal provisions that regulate such crimes. In Section 2, we will explain our methodological choices and advance conclusions regarding the interpretation of the data. In Section Three, we will present our main quantitative findings. In the conclusion, we will discuss the implications of these findings, while raising some important issues regarding the strategy of juridificating racism via criminal law. Ultimately, we will posit future developments of this research agenda.

1 This paper is part of the research project entitled “Esfera pública e direito no Brazil: um estudo de caso sobre decisões envolvendo igualdade de raça” (Public Sphere and Law in Brazil: a case study on decisions involving racial equality) developed by the Section of Law and Democracy of the Brazilian Center of Analysis and Planning (CEBRAP) under the Thematic Project “Morals, Politic and Direito: Autonomia e Teoria Crítica” (Morals, Politics and Law: Autonomy and Critical Theory). The following researchers participated in this project, coordinated by Marta Rodriguez de Assis Machado and José Rodrigo Rodriguez: Carolina Cutrupi Ferreira, Fabíola Fanti, Marina Zanatta Ganzaroli, Flávio Marques Prol, Renata do Vale Elias, Carla Araújo Voros, Natália Neris da Silva Santos, Gabriela Justino da Silva and Haydée Fiorino Soula. We would like to thank all interlocutors that were present in a number of events when we addressed preliminary or final data of this research: at the Section of Law and Democracy of Cebrap, the Cebrap Internal Seminar, International Seminar of the Brazilian Institute of Criminal Science, the Latin American Institute of Frei Universität Berlin, the annual meeting of the Law and Society Association - 2011, at the 3rd Seminar of Social Policies and Citizenship of the Catholic University of Salvador, the Undergraduate Program of Law and Criminal Proceeding of the Law School of the University of São Paulo, the State Network of Combat Against Racism and Religious Intolerance of Bahia, the 7th Congress of Black Researchers in Florianópolis, the 1st Seminar against Excessive Incarceration and Criminal System at UNB (University of Brasilia) and at EPED (Empirical Law Research Meeting) in 2013. All inputs provided during these discussions are as invaluable to this research as difficult to be singled out at this time. Howsoever, we cannot but thank Márcia Lima, Sérgio Costa, Maíra Machado and Luísa Ferreira for the open dialog and suggestions.

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1- Introduction

The Brazilian black population was first entitled to the right to resort to the judiciary to report racial disputes starting the 1950s. Racial or color discrimination started to be considered a misdemeanor after the enactment of Law no. 1.390/51, known as the Afonso Arinos Act.

The law in question was enacted after a discrimination case that inspired major social debate—the refusal to host a U.S. black dancer in a luxury hotel in the city of São Paulo. At the time, the law was regarded ambiguously by activists of black rights. Some deemed it as a major achievement—as it forced white people to, even if only after legal coercion, to accept black people in their establishments. Others saw it a vote-seeking measure never to be enforced against dominant classes, which was solely targeted at weakening the social struggles and claims of black people. (FULLIN, 1999, p. 35).

In the 1980s, however, the demand for a statutory provision that would criminalize racism\(^5\) arose as a consensus objective among organized black activists. The majority opinion

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\(^5\) We understand Racism, for the purposes of this study, as any sort of hierarchical classification or justification of the domination, privileges and material and symbolic inequalities between human beings based on the imaginary concept of race and the arbitrary choice of bodily traits. From a social and economic standpoint, this hierarchical classification is expressed by practices that uphold a unequal opportunity structure and perpetuate the presence of a given group in lower strata of social indicators, with unequal access to employment, salaries, education, safety etc. On the other hand, racism has a political and cultural dimension to it that may be
regarding in period was that revoking the Afonso Arinos Act would be necessary as it turned out to be ineffective. Leaders within the Black Movement\(^6\) understood that the law’s wording was poor—down to describing cases of discrimination—and that treating Racism as a misdemeanor was conducive to impunity. There is still major dissatisfaction regarding the law’s enforcement: often asserting the inexistence of convictions. This perception is quite blatant in the justification of a bill proposed by Abdias do Nascimento\(^7\) in 1983:\(^8\):

For years the African-Brazilian community has been claiming that the Afonso Arinos Act, to wit, Law no. 1390/51, be revoked and replaced with a statutory provision that **actually punishes**, as laid down under Article 153, Paragraph 1, of the Brazilian Constitution, prejudice and discrimination against color and race. This bill, defining this sort of discrimination as crime against humanity, as the Nazi anti-Judaism and apartheid have previously been referred to in South Africa, does not belong to one representative, but the entire Brazilian black community, whose members and spokesmen are unanimously in agreement regarding the **ineffectiveness** of the so-called Afonso Arinos Act. The first reason is of an elementary simplicity: the existence of the said law in no way, from any perspective, was effective to reduce the perpetration of racism in our country. On a daily basis, we undergo cases of discrimination and racial prejudice that never make it to the judiciary or whose processes are filed under any legal excuse or stratagem which

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\(^6\) The study of anti-racist mobilizations in Brazil points not only to its longevity, since the colonial period, but to the plurality of ideological lines, strategies of action and political and cultural conceptions of these groups. In the 1970s, more specifically in 1978, the MUCDR (Unified Movement against Racial Discrimination) ---, subsequently referred to as MNU (Unified Black Movement) — is created as an attempt of collective denomination of different anti-racism groups (GUIMARÃES, 2002) or a set of varied efforts and organizations that only consolidate in one single platform due to events of major relevance (for instance, the mobilization pre-Constitution or the preparation for the World Conference against Racism in Durban) (COSTA, 2006). In spite of the diversity and heterogeneity of organizations and activists that may be grouped under this umbrella term, the term “Black Movement” in this work is used in the same meaning as that of these actors. In addition to this, at times we refer to the Black Movement’s positions as if they were consensual and this does not do justice to the diversity of positions underlying this field of mobilizations and its internal discussions. When we do it, owing to the scope and limitations of this work, we are solely referring to certain positions standing out of majority or more strikingly conspicuous, although scarcely unanimous or firm. In other words, we are here to a given extent to generalize internal differences among activists and organizations and would like to call the reader’s attention not to take the limitations of this work for granted.

\(^7\) Abdias do Nascimento (1914-2011) is considered one of the most important anti-racism activists in Brazil. He was a poet, painter, visual artist, dramatist, actor (founder of the Experimental Black Theater), politician (founder of the Frente Negra Brasileira, a political party composed of black people in the 1930s; federal representative from 1983 to 1987; senator of the Republic from 1997 to 1999) and scholar (lecturer and visiting professor in different universities in the United States, founder of subject of African Cultures in the New World at the Study Center of the State University of New York). The racial theme was central in all activities he developed (ALMADA S., 2009)

\(^8\) Justification of Bill no. 1661/83 that “Provides for crimes against humanity: discriminating against people, individually or collectively, due to color, race or ethnicity.”
may be resorted to. [...] Advocating on the “Afonso Arinos Act,” which regards racism as a misdemeanor (and not a crime, as many believe), is a recourse that the petit-middle class has already discarded for good — even because after more than thirty years (the law dates back to 1951), it has not served to convict one single racist. In fact, the “Afonso Arinos Act” does not serve well our racial reality as totally detached to the circumstances of discrimination in Brazil. [...] (Emphasis added.)

Over this period, organized black activists’ social groups began to demand the criminalization of racist behaviors, and the active effort to eliminate the crimes that the law prescribes, i.e., the enforcement of such cases by the judiciary.

Taking into account the sociopolitical context — the resumption of democracy and with it intense mobilization of the society in the years preceding the enactment of the Federal Constitution in 1988 — the Black Movement was successful in including a statutory provision in the new Constitutional wnot only classifying Racism as a crime, but also on imprescriptible and unbailable basis (Article five, Item XLII). In the next year, the Law 7716/1989 — known as the Caó Act as a homage to its author, Carlos Alberto de Oliveira — was approved as a constitutional provision.\(^9\)

The first version of the Act only established behaviors of discrimination of access as a crime under the penalty of imprisonment, mostly from two to five years. However, many of them were already misdemeanors under the Afonso Arinos Act. The statute underwent three amendments during the 1990s: by means of Law no. 8081, Article 20 was introduced, proscribing a broader definition of conduct as criminal: the perpetration, solicitation or inducement to discriminatory deeds of prejudice for race, color, religion, ethnicity or national origin by media outlets or publications. In 1994, Law no. 8882 added one paragraph to this article detailing the crime of manufacture, marketing, distribution or publicity of symbols, emblems, adornments, badges or propaganda that used the swastika or gammadion cross for the purposes of advertising Nazism. In 1997, Law no. 9459\(^10\) amended Articles 1 and 20 of the existing law to define as crime, in addition to prejudice against race and color, also the prejudice against ethnicity, religion or national origin; and defined the verbal expression of the prejudice as a form of racial disparagement. This change happened by

\(^9\) Upon the approval of Law 7716/89 the Afonso Arinos Act has been revoked.
\(^{10}\) Statutory provision also known as Paulo Paim Act in reference to its author. It should be noted that Paulo Paim has been an advocate of the Black Movement cause since his first office as a federal representative (1987-1991). Currently he is a senator of the Republic.
including one paragraph to the Article 140 of Decree-law No. 2848/40 (Brazilian Criminal Code).  

However, the mobilization of organizations connected to the Black Movement did not cease after the approval of the legal instruments designated for treating the subject. The diagnosis that the law was not enforced by the judiciary followed the entire history of the effectiveness of the law and its amendments. Intelectuals and jurists connected to these organizations saw the law as ineffective, as the Afonso Arinos Act had been. This prompted many associations to start working to improve its enforcement through the development of legal counseling and legal representation services, in addition to psychological assistance to the victims. The SOS Racism of Geledés — Black Women’s Institute and the works conducted by CEERT (Center of Studies on Employment Relationships and Unequality), both in São Paulo; the Program for Justice and Human Rights of NEN (Center of Studies on Black Peoples’ Issues), in Santa Catarina; IPCN (the Institute of Research on Black Culture) and SOS Racism — Program for Justice and Racial Inequalities of Ceap (Center for Advocacy for Marginalized Populations), both in Rio de Janeiro, stand as efforts undertaken with this aim, especially throughout the 1990s (SANTOS, 2013).

Nonetheless, the programs developed under said programs and specialized services did not change the negative evaluation about the scenario of enforcement of law by the Brazilian judiciary. The impediments to the implementation of the laws chiefly include the endurance of the conception of racial democracy,  

the numbness of the judiciary regarding the subject and institutional racism:  

[...] with regard to the concrete enforcement [of] the laws achieved by the black movements, one can see that these achievements were meant to be included in the group of “laws which are disregarded in practice” i.e., if, during the process of social mobilization that entailed the drafting of the Constitution of 1988 hampering important achievements of the social movements has not been possible, the strength of racism and the myth of racial democracy would impose limits for the legal institutions to punish and to regard the racial problem in its own sphere. (CARNEIRO, 2000, p. 318-9) (Emphasis added.)

[...] Judges fail to see the racist crime as they do not accept the fact that there is racism in the country. Oftentimes the assaults are understood as jokes. There is not

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11 We will address the possibilities of classification/definition of crimes relating to the said statutory provisions in the next topic.

12 According to George Andrews (1991), “racial democracy” is the widespread idea that different ethnic groups (black, mulattos and white) live under conditions of legal equality, and, to a great extent, of social equality. This idea gained momentum in the country in the 1930s, and still remains in the imaginary of the Brazilian nation, in spite of the intense rebuttal both by the academia, by means of the revisionist studies such as the one by Florestan Fernandes (1965, 1972), and the social movements of the 1940s. Guimarães (2006).
the slightest sympathy of the legal system regarding how painful this is for those who undergo prejudice. (SANTOS, 2009a) (Emphasis added.)

Convictions are rare, though they exist. In fact, people who serve their imprisonment sentences are, indeed, the inexistent reality. From July 3, 1951 (approval of the Afonso Arinos Act, which establishes that racism is a misdemeanor) until the last year, in the states of Rio Grande do Sul, São Paulo, Rio de Janeiro and Bahia, there were nine convictions for racist crimes. But there is a dreadful and unlawful solidarity between those enforcing the law, those who deal with the crime procedures, and the indictees who are generally white. I refer to the police chiefs, attorneys, judges and lawyers who leave their personal convictions imprinted in the procedures. And why is this solidarity dreadful and unlawful? Because, if it is true that there is a presumption of innocence when the indictee is white and the victim is black, otherwise, when the indictee is black, the presumption of guilt is also valid. It is common that attorneys resort to the color of the indictee as an evidence of guilt. (SILVA, Jr., 2010) (Emphasis added.)

Some evaluations or interpretations about the enforcement of the anti-racism laws were also developed in the academic realm, mainly by legal sociologists. One of the first studies about the subject dates back to 1998 and was conducted by sociologist Antonio Sergio Guimarães. In his work Preconceito e discriminação (Prejudice and Discrimination), the author reviews police reports and newspapers involving racial conflicts and one of the hypotheses he raised was the definition of crime given by police chiefs to the cases. These police chiefs avoided Law no. 7716/89 by defining Racism as segregation/exclusion that made the Racism existing in Brazil unenforceable, since

it always takes place in a situation of marked hierarchical inequality — a difference of status between aggressor and victim — and informality of the social relations, that transforms the disparagement into the main tool for reestablishing a racial hierarchy threatened by the victim’s behavior. (GUIMARÃES, 2004, p. 36)

In the field of sociology we also found the works of Fullin (1999), who studied police investigations carried out in the Police Station for Racist Crimes of São Paulo; Monteiro (2003), who addressed the subject observing the work of public servants active in the service of “Disque-Racismo” (Racism Hotline) of the Public Security Office of the State of Rio de Janeiro; Salles Jr. (2006), who analyzed the flow of cases of Racism referred to the courts based on the police investigation records in Pernambuco; Santos (2009c), who reviewed police reports recorded in Campinas and the definition of these crimes by the police chiefs; Santos (2011), who studied appellate decisions handed down by the Appeal Court of São Paulo from 1988 to 2008, seeking to “reach the values of the Brazilian society reflected on the decisions;” and Santos (2013), who addressed the subject based on the analysis of several legal documents, such as legal judgments, orders, opinions, investigations.
In the field of law the contributions are equality diverse. Santos (2001) analyzed the enforcement of legal instruments based on analyzing police reports, proceedings and rulings handed down about the subject; Costa and Carvano (in PAIXÃO et al., 2009 and 2011) collaborated in the Report of Racial Inequalities\textsuperscript{13} based on a qualitative analysis of the outcomes of decisions in the civil and criminal spheres of thirteen Brazilian courts\textsuperscript{14} by means of the categorizing “losers versus winners” in lawsuits between the years 2005 to 2008; Melo (2010) focused on the analysis of feasibility of the use of the Law no. 7716/89 for racist crimes on the internet; and Cruz (2010) researched cases involving racial conflicts (in general and, therefore, not only in the criminal sphere) in the Brazilian Federal Regional Courts.

Each of these works contributed to their fields in a particular way and from different facets of the social phenomenon. But, in general, they point to significant obstacles to the enforcement of antiracists laws, most sharing the explanations of intellectuals active in the Black Movement: the stubborn permanence of the concept of racial democracy, institutional racism or the racism institutionalized in the Brazilian legal system\textsuperscript{15}.

Our work is part of an effort to building diagnoses of the enforcement of the anti-racism law. Nonetheless, we propose an analysis underscoring the study of the internal dynamics of the Brazilian criminal legal system vis-à-vis the social problem of Racism and the racial discrimination. We suggest that this focus allows, on one side, direct attention to the inner working of the legal engineering while in operation, discovery of bottlenecks in the solution of cases, revealing the struggles undertaken in the field of the legal interpretation leading to wide array of possibilities in enforcement, as well as the disputes within the judiciary regarding enforcement of the laws.\textsuperscript{16}

In view of this, we have collected and systematized decisions regarding the enforcement of the punitive anti-racism laws in Brazil by appeal courts in the states of Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Rondônia, Rio Grande do Sul and São Paulo from 1998 to 2010. Before we proceed with the exposition of the main quantitative results of the study, we will briefly present in the next section a legal discussion about the possibilities of definition of the racist crimes. This is one of the most sensitive

\textsuperscript{13} The researchers developed their own database referred to as “Juris.”
\textsuperscript{14} Federal Distric, Goiâs, Maranhão, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Pará, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Santa Catarina and São Paulo.
\textsuperscript{15} Except for Fullin (1999), who beyond these points questions the punitive route — or the mobilization of the criminal law — by the Black Movement.
\textsuperscript{16} For different interpretations within the judiciary as a field of political dispute and their importance, see MACHADO, PUSCHEL and RODRIGUEZ (2009).
points of the discussion of the cases in the judiciary and is, therefore, essential for understanding the outcomes of many of the appellate decisions analyzed.

1.1 Preliminary Notes on Racist Crime, Racial Discrimination and Racial Disparagement.

The criminal category that describes the so-called “racist crime” was introduced in one of the reforms of the Caó Act, in its Article 20. It has an open texture, formulated as follows: “perpetrating, inducing or soliciting the discrimination or prejudice against race, color, ethnicity, religion or national origin.”

This open formulation of the crime points to the fact that the criminal designation given to most of the cases involving racial disputes is also one of the most discussed questions in the process of enforcement of the existing anti-racism laws. In other words, the definition of behaviors that may be qualified as criminal remained controversial in the judiciary.

In general terms, Brazilian law have three criminal categories involving racist elements: (i) the generic formulation of racism referred to above, provided for in Article 20 of Law no. 7716/89; (ii) criminal categories of racial discrimination which, provided for under other legal articles, describe behaviors involving discriminatory treatment, such as preventing or hampering access, denying or hampering employment, denying promotion of position, arranging distinguished treatment at work etc. due to discrimination against race, color, ethnicity, religion or national origin; and (iii) the criminal category of racial disparagement, an aggravated form of disparagement by the use of the racial element, set forth in the provisions regarding the crimes against individual honour in the Brazilian criminal code, in Paragraph 3 of Article 140.

Every effort of classification of a behavior in a criminal category entails a process of interpretation so that one can argue that the elements of the crime are present in a given situation. This activity may be more or less simple and more or less disputed, depending on the complexity of the situation or the complexity of the elements in the description of the criminal law. The specific behaviors of racial discrimination established under the law — for instance: “Preventing the access or refusing to serve in restaurants, bars, cake shops or similar

17 Currently the Senate is discussing the approval of the Bill no. 122/2006, which includes prejudice against sexual orientation and gender identity in Articles 1 and 20 of Law no. 7716/89, Paragraph 3 of Article 140 of the Criminal Code and Article 5 of the Consolidation of Labor Laws, approved by the Decree-law no. 5452, dated May 1, 1943. The said bill also tries to amend the wording of Articles 1 and 20 of Law no. 7716/89, so as to include the prejudice against the elderly or disabled persons since the Statute of the Elderly (Law no. 10741/2006) only changed the wording of Article 140, Paragraph 3 of the Criminal Code. These other forms of prejudice will not be the object of this paper and are not under the universe of this research.
places which are open to the public” — have more accurate descriptions of behaviors and do not prompt many quarrels in the Courts. The same does not happen to the criminal category of racism of Article 20, which, as we stated, is formulated in an open manner and thus entails a significant discussion about which type of behavior it encompasses.

In accordance with the appellate decisions analyzed in our research, most of the behaviors discussed in the Courts refer to slander with racist elements.\textsuperscript{18} In these cases, the victim, the defense and the legal system operators are presented with two major options to technically classify the disputes: the crime of “racism” and that of “racial disparagement.” As can be seen in more detail in the chart below, this alternative entails completely different procedures, with likewise different requirements and results. This is because, until the last amendment to the law dating back to 2009\textsuperscript{19}, the former crime is processed by means of criminal lawsuit upon public initiative (i.e., filed and developed by the Prosecutor’s Office) and the second by means of criminal lawsuit upon private initiative (i.e., filed and developed by a private lawyer that represents the victim). Only after the recent change of 2009 did the processing regime of racial disparagement start to be that of a public criminal lawsuit, though conditioned on the victim’s authorization (i.e., for the prosecutor to start and develop the lawsuit he needs the express authorization by the victim).

We prepared the chart below with details of the legal regulation to facilitate the visualization of differences in the processing of these criminal categories at the level of the criminal justice system:

\textsuperscript{18} On account of this, we do not assert that this type of Racist expression is the most frequent in Brazilian society. As we will address later on this paper, this datum is only connected to what is referred to the Courts, i.e., what reaches appellate courts. It also is not about what is treated under the judicial scope, as there is an important filter between what is under first instance and what is the object of an appeal before courts. One interesting study could address how these filters operate, i.e., what winds up being referred to the system (via police reports), what turns into criminal action and what is up to the courts. Also, which cases are treated under the judicial scope indirectly through other areas of law, such as, for instance, the civil and the labor law. Scopes and spheres that are out of the reach of this study. Besides this, and besides the internal filters of the legal system, the question of what makes some person to resort to formal institutions of law is also a question to be posed, which also is connected to one’s individual perception as entitled to rights and/or her trust in the judiciary.

\textsuperscript{19} Law no. 12033/2009 added a single paragraph to Article 145 of the Criminal Code: “Upon request of the Justice Minister, in the case of Item of the head provision of Article 141 of this Code, and upon complaint by the victim, in the case of Item II of the same Article, as well as in the case of Paragraph 3 of Article 140 of this Code.”
<table>
<thead>
<tr>
<th>Description of crime</th>
<th>Crime of Racism</th>
<th>Racial Disparagement</th>
<th>Racial Disparagement (after 2009)</th>
</tr>
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<tbody>
<tr>
<td>Article 20 – Perpetrating, inducing or soliciting the discrimination or prejudice against race, color, ethnicity, religion or national origin.</td>
<td>Article 140 – Libel against someone, offending his/her dignity or decorum: Paragraph 3 If the libel consists in the use of elements referring to race, color, ethnicity, religion, origin or personal condition of old age or disability.</td>
<td>Article 140 – Libel against someone, threatening his/her dignity or decorum: Paragraph 3 If the libel consists in the use of elements referring to race, color, ethnicity, religion, origin or personal condition of old age or disability.</td>
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<td>Legal provision</td>
<td>Article 20, head provision, of Law no. 7716/89, changed by Law no. 9459/97</td>
<td>Article 140, Paragraph 3 of the Criminal Code with the wording given by laws 9459/97 and 10741/03</td>
<td>Article 140, Paragraph 3 of the Criminal Code with the wording given by laws 9459/97 and 10741/03</td>
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<tr>
<td>Penalty</td>
<td>Imprisonment from one to three years and fine</td>
<td>Imprisonment from one to three years and fine</td>
<td>Imprisonment from one to three years and fine</td>
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<tr>
<td>Nature of the prosecution</td>
<td>Public criminal lawsuit</td>
<td>Criminal lawsuit of private initiative</td>
<td>Public criminal lawsuit conditioned on the victim’s complaint</td>
</tr>
<tr>
<td>Plaintiff</td>
<td>Prosecutor’s Office (Article 100 Paragraph 1, Criminal Code; Article 24, head provision, Code of Criminal Procedure, Article 129, I, Federal Constitution)</td>
<td>Victim represented by lawyer</td>
<td>Prosecutor’s Office</td>
</tr>
<tr>
<td>Need for hiring a lawyer/defense counsel</td>
<td>No</td>
<td>Yes(^{20})</td>
<td>No</td>
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\(^{20}\) For victims that cannot afford lawyers’ fees, access to the right to the *in forma pauperis* benefit initially involves resort to the Office of the Public Defender (in accordance with the Complementary Law no. 80/94, Article 4 XV.—this agency has the institutional responsibility of assuming the counseling in private lawsuits and the secondary counseling in public lawsuits). Nevertheless, in the State of São Paulo, we ascertained, by means of civil society organizations and the public defender that the Office of the Public Defender, in these cases, during the period during which the criminal lawsuit motivated by racial disparagement happened on private initiative (until 2009), provided services of legal counseling and forwarded the case for appointment of an assigned counsel to bring the criminal lawsuit.
| Term to initiate the lawsuit | Not any \(^{21}\) (Article 103, Criminal Code) | 6 months as of the date of the fact (Article 103, Criminal Code) | There is no term for this, but there is a term for the victim to express authorization: six months after cognizance of the identity of the crime perpetrator (Article 38, Code of Criminal Procedure, and Article 103, Criminal Code) |
| Court fees | Not any | 50 UFESP\(^{22}\), for lawsuit filed in the State of São Paulo | Not any |
| Statute of limitation | No statute of limitation (Article 5, XLII, Federal Constitution) | Reach statute of limitation in eight years (Article 109, IV, Criminal Code) | Reach statute of limitation in eight years (Article 109, IV, Criminal Code) |
| Diversion program: extinction of criminal liability through civil agreement on recovery of damages or plea bargain (Law no. 9099/95\(^{23}\)) | It is not possible for crimes whose maximum established punishment is larger than two years (Article 76, Law no. 9099/95; Article 2, Law no. 10259/2001) | It is possible, based on an interpretation of court decisions\(^{24}\) | It is not possible for crimes whose maximum punishment provided for under the law to be larger than two years (Article 76, Law no. 9099/95; Article 2, Law no. 10259/2001) |

\(^{21}\) Strictly speaking, the Code of Criminal Procedure establishes terms for the completion of the police investigation (Article 10), although these terms are renewable: defendant in custody: 10 days as of the date of receipt of the Police Investigation; defendant not in custody or released on bail: 15 days (Article 46, head provision, Code of Criminal Procedure). It also establishes a term for the Prosecutor’s Office to file a criminal lawsuit when the record of the police investigation is received. If it not charges someone with a crime within the legal term (Article 100, Paragraph 3 of the Criminal Code, and Article 29 of the Code of Criminal Procedure), the victim may file a private criminal lawsuit secondary to the public and the Prosecutor’s Office becomes the assistant, given it may amend the complaint or bring an alternative charge. This depends on a very thorough follow-up by the victim’s lawyer. In practice, it is very common that this term elapses without consequences to the Prosecutor’s Office.

\(^{22}\) Currently, the amount of each UFESP (Fiscal Unit of the State of São Paulo) is BRL 19.37.

\(^{23}\) Law no. 9099/95 establishes the jurisdiction of the Criminal Small-claims Courts to try petty offenses (defined as those in which the law prescribes a maximum punishment not above two years, Article 61 of Law no. 9099/95). The law establishes a special and swifter procedure for the processing of these cases and introduces some measures referred to as “decriminalizing”: (i) the award of damages from perpetrator to victim before bringing a criminal lawsuit as cause of termination of punishable; (ii) also before filing the criminal lawsuit, the plea bargain between the perpetrator and the Prosecutor’s Office, where the former accepts a restraint of right in exchange for not filing the suit; and (iii) if none of these alternatives is put into practice, after the lawsuit is filed, the diversion program, in which the judge may order the stay of the proceeding for two to four years upon the fulfillment of a number of conditions imposed on the indictee, which extinguish the punishable and terminate the criminal procedure if fulfilled. The diversion program is applied in other crimes that not petty
Diversion program: conditional suspension of the lawsuit (Law no. 9099/95)

<table>
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<tr>
<th>Possible</th>
<th>It is possible, based on the interpretation of court decisions</th>
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<td>(Article 89, head provision, Law no. 9099/95)</td>
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Alternative punishment to encarceration

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</tbody>
</table>

From the chart note that the main consequence among the different ways to classify racist acts is connected to how a lawsuit should start and be driven — upon initiative of a private lawyer or upon that of the prosecutor and, after 2009, the need or not for the victim’s authorization for the Prosecutor’s Office to bring the suit. The appellate decisions studied by this research (cases that were referred to the appeal courts until 2010) comprise the period before the change that transformed racial disparagement into a crime of public criminal lawsuit conditioned to the victim's authorization. Therefore, what was at stake in the discussion if a racial slander should be classified as racism or racial disparagement was the procedural treatment — whether public or private — of the lawsuit. In view of this, when the dispute revolves around these two criminal categories, the criminal qualification given to the case is paramount for defining how the legal prosecution shall occur.

The power to perform this qualification is given to a judge in her/his final ruling. Police authorities, in police reports, classify a case, which has important consequences connected to the imprisonment but this qualification does not link the legal qualification made by the prosecutor or the victim during the preparation of the petition of the criminal lawsuit.

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24 Strictly speaking, in accordance with the law provisions, neither the plea bargain nor the diversion program could take place in criminal lawsuits upon private initiative. Nevertheless, precedents have been cemented in such a way to allow its application in these cases. Check against the decision of the 5th Panel of STJ (Superior Court of Justice) that states that “Law no. 9099/95, provided that the authorizing requirements are met, allows the diversion program, including for criminal lawsuits of solely private initiative” (HC no. 13,337/RJ, rapporteur Justice Felix Fischer, j. on May 15, 2001). As explained by Nogueira (2003), “when connected to offenses under a private criminal lawsuit, the principles of discretion and waivability shall be observed, being thus understood that the formulation of plea bargain shall be strictly determined by the convenience of the victim, who, if refusing to make them, may render the plea bargain unfeasible, as this is not a public right of the perpetrator and indictee.” However, “STJ has been allowing the proposition of plea bargain by the Prosecutor’s Office and, provided that there is no formal opposition by the private prosecutor, there are different decisions.” The said author mentions with this respect RHC (Petition for Habeas Corpus) no. 8123/AP, STJ, 6th Panel, rapporteur Justice Fernando Gonçalves, 1999.
The classification of the indictment is crucial for the definition of the object of the proceeding and the procedure to be followed. In other words, the proceeding follows with a qualification of the indictment or complaint up until the judge rules on the case, where the need for amending or changing the charge may be felt. But the classification given by the charge and received by the judge may still be questioned in higher instances (before or after the final ruling by the first instance judge). Challenges to the classification in the first steps of the criminal lawsuit are what happens in many of the cases analyzed. The court’s positioning in this respect, especially when it alters the legal qualification already given in first instance, creates a quite troublesome situation: every time a case classified as racism its legal classification is changed to racial disparagement after the term of six months, which we referred to in the chart above—the right to file the criminal lawsuit for this crime has already reached its the statute of limitations. Or, yet, if this decision is handed down leaving insufficient time for the victim to proceed with the complaint. This shall be a relevant fact to increase the probability of this same outcome or, at least, make it difficult to prepare the lawsuit to be filed. There is still a possibility that the entire proceeding will be annulled, as until this time it followed a different procedure than that applicable under the new legal qualification.

In sum, as we will see below, the dispute about the legal qualification of the facts involving slanders with racial content is disputable due to the very open nature of the criminal category of racism. If, on one side, interpretative disputes are natural to the legal environment, on the other hand, in this case, and in the procedural configuration of the system until 2009, this brought troublesome results. In the cases analyzed, the disputes over classification and the movements of declassifications oftentimes brought on the early extinguishment of the cases.

25 Articles 384, 385 (amendment and change of charge) and 569 (amendment) of the Code of Criminal Procedure. The change of the legal qualification of the charge by the judge when receiving it happens on special occasions. The precedents lead to the understanding that this may only happen on special occasions where the defendant is in jeopardy: “when the behavior does not subsume in the criminal category described in it” or when “the permanence of the initial legal classification prevents the recognition of the prescription and brings on severe consequences to the indictee,” check against Strict Appeal no. 16.987 GO 0016987-78.2007.4.01.3500 (TRF-1). It is more reasonable that the cases of disagreement of the court of first instance with the classification referred to herein — the classification of the fact as racism or disparagement — result in motion to dismiss the indictment or complaint due to lack of standing of the party and not in change of the classification by the judge.
2- Methodology

2.1 Some Considerations about Empirical Research on Appellate Decisions

The quantitative study of court decisions in Brazil requires some reservations regarding the sources used, especially the partial manner of publishing the data by agencies of the court system and the possible interference of the said agencies.

First, it should be highlighted that the subject of this paper is a set of cases that reached appeal courts. We opted for this research design as the cases of first instance are not systematized in databases that would allow access per subject addressed. This means that one cannot, regarding of the sample studied here, come up with considerations about the representativeness of these cases relating to the entire criminal justice system, about how the cases are settled in the first instance and even less about the occurrence of actual conflicts involving racial issues.

Additionally, comments should be made on the use of the Brazilian Court databases as a source of empirical material.

All court decisions and appellate decisions handed down by the Brazilian judiciary, abiding by the principle of publicity of the procedural deeds, are made public in the Official Gazette, which is the core tool resorted by lawyers in following a lawsuit. These decisions are mostly digital and made public on the websites of the respective courts and can typically be spotted with the case number, alongside the name of the lawyers or parties.

Besides this, virtually all of the Brazilian appellate and superior courts, of state or federal levels, ordinary or special (military, electoral or labor), have a database of court decisions for online research containing decisions handed down by each of these institutions. However, the whole of the digitized decisions available online, as referred to above — which is complete in some cases — fails to match the database for research of court decisions where research can be made base on keywords. This means that only part of what is decided is made available at the website of the said institutions for online searches based on the object of interest of the researcher. In general, the responsible section of each Court chooses the decisions that will be made available at the institution’s website, but little is known about the criteria for this selection. Seemingly, these criteria change from court to court, as well as the intervals at which the databases are updated and the percentage of decisions made public by a court vis-à-vis the total cases.
Thus, this research is limited to this set of decisions, the ones made public for research on the online databank of courts. This means that it should be underlined that considerations about the set of cases filed and those actually tried per Court cannot be made based on this work. On the other hand, this is the only content made public by the Brazilian Courts to be researched based on the subject of cases and, simply because of this, although not exhaustive, it is a relevant universe. In addition to this, the finding that this universe allowed were relevant for the research purpose: we were less interested in measuring the frequency of phenomena, and more in the pursuit of understanding the dynamics underlying the enforcement of the law, the use of concepts and the legal arguments, the obstacles and bottlenecks that worked to trigger the generalized feeling of dissatisfaction about the law. The database of Courts — although incomplete and quite beneath contempt with regard to ease of access for empirical research — was still capable of revealing some patterns of how the system works, as well as disputed issues and points where the function of the systems was troublesome concerning these crimes.

Be that as it may, the need for improving the digitized databases of the Brazilian Court system for research purposes is urgent. Until now, digitization efforts are aimed at the system users and law professionals. Taking into account in this process, the concern about giving access to researchers seems to be of major relevance, to the extent that the empirical research is a powerful element of democratic control of an institution which has increasingly more decision power (given, for instance, the intense debate about the growing frequency of open laws and the magnification of the judges’ powers of interpretation; the treatment of collective claims and politics under the judicial scope, to name a few), but has not enhanced the means to make the result of its activities clear and transparent. It is clear that one cannot maintain the total insulation of this branch. There is a number of efforts targeted at its openness — for instance, the improvement of websites and newsletters, the live broadcasting of trials at the Federal Supreme Court (something that happens in few places around the world), and the initiatives of CNJ (the Brazilian Justice Council, an internal regulatory agency). But, generally speaking, we still can point out that information is not easy to access for researchers who only intend to find out how Brazilian Courts are trying on a given subject26.

26 We performed this discussion also in: MACHADO; RODRIGUEZ, 2012.
2.2 Survey of Data and Construction of database

The survey of court decisions was made at the websites of AASP (the São Paulo Lawyers’ Association), Federal Supreme Court, Superior Court of Justice and by appeal courts in the states of Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Rondônia, Rio Grande do Sul and São Paulo. In the surveys, search terms included the expressions “racismo” (racism), “injúria qualificada” (aggravated disparagement), “injúria racial” (racial disparagement) and “discriminação racial” (racial discrimination), resulting in 2061 decisions.

By means of manual screening, appeals solely regarding procedural aspects were discarded, in addition to those not directly connected to the research’s theme. Through this procedure, this sum was reduced to 200 appellate decisions related to Racism against black people across the nine appeal courts.

Each decision was classified according to a number of criteria defined to allow (i) identifying each appellate decision, (ii) the history of facts and procedures, (iii) decisions, and (iv) grounds. This information was processed in Excel.

3- Quantitative Results

3.1 Decisions of appeal courts

From the overall picture of the results of the decisions handed down by the appeal courts, there is a larger number of convictions (24.5%) vis-à-vis acquittals (20%). There are a significant number of motions to dismiss the indictment or complaint (15%) and extinguishment of punishability of the perpetrator (10.5%). The number of decisions in which the Court decides to accept the indictment or complaint is lower than their denials (8%). If we add the decisions to proceed with the case to the number of cases in which the courts decided to accept the indictment, we will have 33 cases (i.e., 16.5%). This number is lower than the cases in which the court decided not to initiate, or to annul, extinguish or suspend the lawsuit. In other words, grouping the said categories accounting for early termination of cases reveals that they are the most significant result in the universe of our research — 59 cases or 29.5%

27 The scarce number of decisions of the Federal Supreme Court and Superior Court of Justice has led to a qualitative study of these decisions. In that being so, they are not included in the results of this paper, which is targeted at presenting quantitative results.
of all of the courts’ decisions. Even having made all reservations about the non-exhaustive nature of our universe, we have some indication as for why there is dissatisfaction about the outcome of cases.

In the category “Other,” there are residual decisions which are connected to procedural management issues - decisions for dismissal, denial of injunction, matter related to the preliminary hearing, fail to entertain the appeal, improper acquittal and transfer of the case from the Court.

**Chart 2. Distribution of Judgments per Appellate Court Decisions**

<table>
<thead>
<tr>
<th>Appellate court decision</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conviction</td>
<td>49</td>
<td>24.5%</td>
</tr>
<tr>
<td>Acquittal</td>
<td>40</td>
<td>20%</td>
</tr>
<tr>
<td>Motion to dismiss the indictment/complaint</td>
<td>30</td>
<td>15%</td>
</tr>
<tr>
<td>(reject start of the criminal action)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extinguishment of punishability</td>
<td>21</td>
<td>10.5%</td>
</tr>
<tr>
<td>Continuance of the criminal lawsuit</td>
<td>17</td>
<td>8.5%</td>
</tr>
<tr>
<td>Entertainment of the indictment/complaint</td>
<td>16</td>
<td>8%</td>
</tr>
<tr>
<td>Annullment</td>
<td>5</td>
<td>2.5%</td>
</tr>
<tr>
<td>Conviction + Extinguishment of punishability</td>
<td>5</td>
<td>2.5%</td>
</tr>
<tr>
<td>Dismissed criminal action</td>
<td>3</td>
<td>1.5%</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>7%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>200</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Source: Prepared by the research team at Cebrap (Section of Law and Democracy).

After the presentating this general data, we will proceed with a thorough review of the decisions, presenting and discussing their grounds and quantifying the occurrences in accordance with the criminal category chosen, which seemed to be one of the most relevant controversial questions concerning the treatment of cases by the Courts.

**3.2.1 Decisions of Appeal Courts: Distribution per Criminal Categories of Racism and Their Grounds**

**Convictions**

With regard to the 49 convictions, we can note that most of them are connected to crime against the honour, given that 27 of them refer to aggravated disparagement using the racial element, while 14 cover other modalities of crime against individual honour (such as
defamation, simple disparagement, jointly or not with other crimes). In a lower proportion, we recorded convictions of racism (4 out of the total), racial discrimination (3 cases) and one case falling under “other” as it referred to Article 331 of the Criminal Code (contempt of public servant at work).

The convictions mostly included sentences of 1 year of imprisonment plus fine (15 cases), followed by 1 to 2 years of imprisonment plus fine (11 cases). The punishment of 1 year of imprisonment, which is the minimum for racial disparagement, was imposed on 7 of the convictions. The other frequencies may be seen in Chart 3 below.

**Chart 3. Distribution of Judgments per Amount of Punishment Imposed**

<table>
<thead>
<tr>
<th>Punishment</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year of imprisonment plus fine</td>
<td>15</td>
<td>30.6%</td>
</tr>
<tr>
<td>Up to 1 year of imprisonment</td>
<td>7</td>
<td>14.2%</td>
</tr>
<tr>
<td>From 1 to 2 years of imprisonment plus fine</td>
<td>11</td>
<td>22.5%</td>
</tr>
<tr>
<td>From 1 to 2 years of imprisonment</td>
<td>6</td>
<td>12.3%</td>
</tr>
<tr>
<td>From 2 to 3 years of imprisonment</td>
<td>3</td>
<td>6.2%</td>
</tr>
<tr>
<td>From 2 to 3 years of imprisonment plus fine</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>2 years of imprisonment</td>
<td>2</td>
<td>4%</td>
</tr>
<tr>
<td>3 years of imprisonment</td>
<td>3</td>
<td>6.2%</td>
</tr>
<tr>
<td><strong>Nihil</strong></td>
<td><strong>1</strong></td>
<td><strong>2%</strong></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>49</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Source: Prepared by the research team at Cebrap (Section of Law and Democracy).

At least 46 judgments out of the total of 49 convictions replaced the imprisonment with restraint of rights. The replacement is possible in keeping with Article 44 of the Brazilian Criminal Code for all cases where conviction amounts to less than 4 years, in the event of unintentional crime or when it is not perpetrated violently or severely threatening the victim. The convict cannot be a recidivist (or, in the case of non-specific recidivism, there may be an exceptional possibility of application by the judge) and should fulfill certain subjective
requirements which may be noticed by the judge (culpability, criminal record, social behavior, personality etc.).

The mostly imposed alternative punishment to perpetrators was the delivery of money plus community service (under the terms stipulated by the enforcer judge) – 14 cases. In other cases, each modality of restraint of right is enforced in an isolated manner — either delivery of money (10 convictions) or community service (10 convictions). There are 12 cases in which there is no specification concerning the punishment enforced. Based on the appellate decisions, neither could we trace which type of community serviced should convicts perform, nor details about their performance.

**Acquittals**

Fourteen out of the 40 cases of acquittal refer to aggravated disparagement due to racial element, 12 were cases classified as other crimes against individual honour, 10 were acquittals for racism, 2 had joinder of offenses (qualified disparagement and racism), and other 2 cases allowed no identification of the criminal categorization. There is not any decision out of this group that refers to discriminatory behavior as provided for under Law 7716/1989.

The acquittal of an indictee by a judge or court may have different grounds. Under the terms of the Code of Criminal Procedure, an acquittal may be justified in seven different situations: (i) the fact’s inexistence is proven (Code of Criminal Procedure, Article 386, I); (ii) there is no sufficient evidence of the fact’s existence (Code of Criminal Procedure, Article 386, II); (iii) the fact does not stand as a criminal offense (Code of Criminal Procedure, Article 386, III); (iv) it was proven that the defendant did not join the criminal offense (Code of Criminal Procedure, Article 386, IV); (v) there is no sufficient evidence that the defendant joined the criminal offense (Code of Criminal Procedure, Article 386, V); (vi) there are circumstances quelling the crime or exempting the defendant from punishment or there is doubt about the crime’s existence (Code of Criminal Procedure, Article 386, VI); or (vii) there is not sufficient evidence for conviction (Code of Criminal Procedure, Article 386, VII).

In the judgments of acquittal by the appeal courts, the most recurring grounds was that the criminal offense was not perpetrated due to the lack of intent by the perpetrator based on
Items III and VII\textsuperscript{28} (at a frequency of 22 out of total acquittals). The matter of the lack of enough evidence— based on Items II, V and VII — also grounded most of the decisions (frequency of 20). There are still a high number of acquittals based on Item VI (at a frequency of 10) and, as remainder, 2 of them which were based on Item IV, as we can see below:

Chart 4. Distribution of Judgments Per Grounds of the Appellate Court Decision for Acquittal\textsuperscript{29}

<table>
<thead>
<tr>
<th>Grounds of the acquittal</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>The fact’s inexistence is proven (Code of Criminal Procedure, Article 386, I)</td>
<td>0</td>
</tr>
<tr>
<td>There is no sufficient evidence of the fact’s existence (Code of Criminal Procedure, Article 386, II)</td>
<td>7</td>
</tr>
<tr>
<td>The fact does not stand as a criminal offense (Code of Criminal Procedure, Article 386, III)</td>
<td>15</td>
</tr>
<tr>
<td>It was proven that the defendant did not join the criminal offense (Code of Criminal Procedure, Article 386, IV)</td>
<td>2</td>
</tr>
<tr>
<td>There is no sufficient evidence that the defendant joined the criminal offense (Code of Criminal Procedure, Article 386, V)</td>
<td>2</td>
</tr>
<tr>
<td>There are circumstances quelling the crime or exempting the defendant from punishment or there is doubt about the crime’s existence (Code of Criminal Procedure, Article 386, VI)</td>
<td>10</td>
</tr>
<tr>
<td>There is not sufficient evidence for conviction (Code of Criminal Procedure, Article 386, VII)</td>
<td>11</td>
</tr>
<tr>
<td>Resort to civil commitment\textsuperscript{30}</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: Prepared by the research team at Cebrap (Section of Law and Democracy).

\textsuperscript{28} In 7 out of the 11 cases the judge states that the evidence produced was not sufficient for conviction, as the racist motivation/intent was not proven (malice aforethought). On account of this, we add them to the acquittals based on Item III.

\textsuperscript{29} This table does not show percentage data, as it is possible to acquit based on more than one item of Article 386 of the Code of Criminal Procedure.

\textsuperscript{30} The resort to civil commitment (outpatient treatment or hospitalization) takes place in our system when defendants are considered criminally incapable. Although it is largely connected to cases of imprisonment, it is “euphemistically” referred to by our procedural laws as improper acquittal. In this study, we adopted the technical classification of the Code and placed the case found with the other acquittals, but it should be noted that this way to refer to the civil commitment is misleading as for its punitive nature and conducive to suffering.
Motion to Dismiss the Indictment/complaint

Many of the appeals reviewed questioned the decision of the first instance judge that dismissed the indictment/complaint and resorted to the Court to revert the said dismissal. All of them were brought by the victim or by the Prosecutor’s Office. In 30 cases, the Court wound up confirming the motion to dismiss the indictment or complaint in first instance. Out of these, 11 referred to the crime of aggravated disparagement, 8 were about racism, 7 were connected to other crimes against individual honour, and 2 included a joinder of racism and aggravated disparagement. It was not possible tracing the criminal category in 2 of the 30 cases.

Half of the actions (15) were dismissed grounded on the absence of ground or evidentiary backing. 8 due to lack of standing of the Prosecutor’s Office to file suit (cases in which the Prosecutor’s Office tried to bring a public criminal lawsuit for racism and the judge understood that a private criminal lawsuit should be filed by the victim), and 4 due to the the statute of limitations (cases in which the judge of first instance changed the original classification understanding that it was racial disparagement and not racism, and consequently noticed the lapse of the the statute of limitations term of 6 months, due to the second classification but not to the previous one). The denial of initiating the criminal lawsuit both for the cases of lack of standing to sue by the Prosecutor’s Office and due to the statute of limitations happened when there was a shift in the classification of criminal category — from racism to racial disparagement.31

Extinguishment of Liability

We realize that a significant amount of cases (21) were extinguished on the occurrence of some cause of termination of punishability32, mostly for the statute of limitations and prescription.

31 We also counted 1 case in which the appeal was not entertained and 2 cases that lack grounds and we classified as “other.”
32 These circumstances that lead to the termination of the government’s punitive claim are provided for under Article 107 of the Criminal Code and are: death of perpetrator; amnesty, executive pardon or general pardon; retroactiveness of law that does not consider the fact as a criminal offense; prescription, lapse of time or peremption; waiver of the right to complain or acceptance of pardon, in the crimes of private action; admission by the perpetrator and pardon by the judge in the cases provided for under the law.
This often happened in the cases of racist crime (8 cases). Six of the appellate decisions that wound up with extinguishment of punishability were cases of aggravated disparagement due to use of racial element and 3 due to discriminatory behaviors. Joinder of different crimes against honour and joinder of racism and aggravated disparagement accounted for 2 cases each.

The decisions of the appeal courts about the extinguishment of punishability mostly arise out of the statute of limitations of the term of six months for filing of the criminal lawsuit (10 cases). It should be noted that in 8 out of the 10 cases of the statute of limitations, it happened because justices declassified the case, i.e., understood that they were cases of aggravated disparagement (private criminal lawsuit subjected to the 6 months time limit) and not racism (public criminal lawsuit). The declassification brought on the the statute of limitations to the extent that, by the time it was recognized the judge, the term of 6 months between the fact and the filing of the private criminal lawsuit by the victim had lapsed. The combination of this reclassification decision and the statutory provision that provides the lapse of the statutory period of limitation led to a situation paradoxical: the victim — although having until that time the case dealt by other agents of the criminal law system (police chief, prosecutor, judge of first instance) which classified it as a case of racism, is surprised by the court’s decision that his case will be extinguished as, due to being a racial disparagement and not a racism case, he should have filed it her/himself as a private criminal lawsuit within a term that already lapsed. The critique of this set of decisions should be careful. The dispute around the classification of cases is an important trait of the process of enforcement of the criminal law and is quite common that they make their way to the courts (for instance, if a given case is drug traffic or use; fiscal offense or money-laundering, and so forth). The decision to regard Racist slanders as racial disparagement and not racism is justifiable and defendable — there are principles of interpretation of the criminal law, such as specialty, which uphold this understanding, although both are feasible and disputable (MACHADO, 2009). In addition to this, one may not argue that the decisions for reclassification had the unspoken motivation to extinguish the case due to the statute of limitations; at least not without further research, one that goes over and above the review of appellate decisions. On the other hand, the virtually irrational aspect underlying the outcome of these cases is undeniable, and although the criminal procedure laws made no exception

33 Article 103 of the Code of Criminal Procedure, check against Chart 1 about the differences in procedural standards that are imposed on different legal classifications.
about the lapse of time that a private acusator has to fulfill the complaint, it would not be
farfetched that the judiciary, given the lack of provisions under the law, resolved to prevent an
outcome deemed unfair. Also, it would not be the first time. Anyway, regardless of the
critique of the justices’ work, it is perfectly understandable that this outcome is highly
frustrating to victims and Black Movement organizations, supporing the feeling of the
ineffectiveness of the law.

With respect to the other cases of extinguishment, 7 were terminated due to the reach
of the statute of limitations, which is connected to the neglect and expiration of the lapse of
time to punish the indictee. At a lower frequency the criminal lawsuits were terminated due to
the victim's lawyer failure to comply with formalities of the private criminal action (2 cases)
—pardon by the victim (1) and pardon by the judge (1).

Continuance of the Criminal Lawsuit

The appeal courts decided to continue with the criminal lawsuit in 17 cases. Out of
these, 16 were challenged by the perpetrators, who claimed the termination of the suit upon
several grounds, mostly: absence of intent, lawfulness of the behavior and lack of evidentiary
backing. There are also requests for declassification. In the case challenged by the victim, the
latter demanded recognition of the imprescriptible nature of the crime due to the fact of being
a case of racism, since the lawsuit had been extinguished in first instance. Out of these, 8
referred to racist crimes, 6 aggravated disparageme nts and 3 other cases of crime against
individual honour and other (joinder).

Commencement of the Criminal Action

In the 16 cases in which the Court validated the indictment/complaints and thus
determined the commencement of the criminal action, 15 appeals were filed by the victim —
pursuing the change of first instance decision (which denied the charge). One of the cases
including Habeas Corpus was filed by the perpetrator alleging criminal coercion due to the
entertainment of complaint in the first instance.³⁴ Out of the total of cases under this category,
11 referred to aggravated disparagement, 4 were cases of other crimes against individual honour, as well as other (joinder), and in 1 case the criminal category could not be traced.

In these cases, the Court decided a criminal lawsuit should be commenced as it acknowledged it was started within the term, the behavior fell under a criminal category and that the indictment/complaint fulfilled the requirements provided for under the Code of Criminal Procedure.\textsuperscript{35}

**Annulment**

The annulment of proceeding happened in 5 cases. In 2 cases whose criminal categorization was provided for under Article 20 of Law 7716/1989, the annulment took place due to crime declassification (what removed the standing of the Prosecutor’s Office to file suit). In the 2 cases of joinder of different crimes against individual honour, the judgment was annulled on the grounds of denial of fair opportunity to be heard and error of criminal categorization in the first instance. Last, in the case of aggravated disparagement, annulment was handed down on the grounds that the matter alleged by one of the parties was not analysed in first instance.

**Conviction plus Extinguishment of Liability**

In 5 of the cases reviewed there was conviction and, subsequently, declaration of extinguishment of punishability. This means that the justices entertained the existence of crimes and reasons to convict the respective perpetrators, although they extinguished the punishability by virtue of the reach of the statute of limitations to enforce the concrete penalty resulted in the sentence. Here, apart from the previous cases, the reach of the statutes of limitation does not happens in the middle of the proceeding — calculated in accordance with the abstracto maximum punishment — but, indeed, after the conviction. In this vein, the calculation of the time lapse happens according to the penalty sentenced, generally set as lower than the maximum limit. Thus, in these cases, although coming to a decision that recognizes the criminal offense perpetrated and the perpetrator’s responsibility, the possibility of enforcing the punishment expires. This happened to 4 cases of crimes against individual honour.

\textsuperscript{35} The Articles 41 and 44 are referred to under the cases at hand.
honour (simple and aggravated disparagement) and in 1 case of racial discrimination. In all of them, the crime category had been previously declassified.

**Termination of the Criminal Lawsuit**

There were three decisions of termination of criminal lawsuit handed down in habeas corpus filed by the perpetrators/defendants that questioned the filing of the suit in first instance. Two cases referred to crimes against honour in joinder and 1 was about a discriminatory behavior provided for under Law 7716/89. The Court recognized that the criminal lawsuit stood as a criminal coercion on account of the following reasons: absence of intent, lack of standing of the perpetrator to file a criminal lawsuit and inexistence of minimum evidence.

**4- Final Considerations**

The contemporary Brazilian Black Movement has long been employing, as one of its strategies of anti-racist struggle, the enactment and improvement of criminal laws. The first anti-racism law, the Afonso Arinos Act of 1951, already embraced a punitive rationale, and was the first legal initiative to describe discriminatory behaviors as unlawful—classifying them as misdemeanors. As we have seen, since its inception, the enforcement of this law by judges was criticized by activists. In these critiques, we can also trace the very logic of a punitive rationality\(^{36}\) pervading the speech of the Black Movement, which not only criticized the lack of enforcement of the law by the court system agents, but also undertook to compare the (minimal) severity of punishment imposed and the lack of importance given by the society to the violation of the black people’s right to equality.

In this context, one of the core claims of the Movement arises, namely that racist and discriminatory behaviors be severely treated by the criminal law. The establishment of the racist crime as unbailable and imprescriptible in the Constitution was considered one of the

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\(^{36}\) In fact, we can recognize here what Alvaro Pires (2004) describes as modern criminal rationality whose logic is "a medieval way of thinking according to which the painful punishment is that which conveys the behavioral norms and the degree of disapproval in the case of disrespect. This way, the painful punishment should always be imposed and its *quantum* should be in line of the degree of care about the involved good, things pointing to the value of the behavioral norm."
achievements of the participation of the Black Movement in the Constitution’s framing.\textsuperscript{37} The Caó Act, which regulates the statutory provision enacted one year after this process, then became the main legal tool of the anti-racism struggle in Brazil. The history of this law is the history of the critiques and the generalized dissatisfaction about its enforcement. Successive amendments to the laws were meant to improve this statutory provision and remedy some of the difficulties of its enforcement\textsuperscript{38} — this way the generic description of racist crime was introduced and offense of racial disparagement was created. Disparagement aggravated by the use of a racist element sought to tackle the interpretive discord over whether racist slanders would be treated as racist crimes or as simple disparagement (defamation, punishable by one to six months in prison). The interpretation of the racist insult as simple disparagement was considered by the Black Movement as giving to the dispute a trivial character, which fully disregarded its racial constitution. The senator Paulo Paim - traditionally linked to the Black Movement - then proposed the creation of the concept of aggravated disparagement, with a punishment as severe as that of the crime of racism, outspokenly aiming to “fight against impunity.”\textsuperscript{39} The outcome of the amendment to the laws did not regard the procedural route of these cases within the criminal court system: as well as other crimes against individual honour, aggravated disparagement continued to be processed by means of a criminal lawsuit of private initiative (which was changed only in 2009). This procedural difference in the prosecution of racial disparagement and other racial crimes, in addition to having access to justice implications (as the victim is responsible for arranging a lawyer and be heedful of the progress of their case), wound up bringing about pathological mishaps in the procedural flow of the cases. This was one of the most relevant findings of our research.

Although cases of discriminatory behavior appeared in the set of decisions reviewed (denial of access, different treatment etc.), the most frequent cases in our research universe

\textsuperscript{37} Activists directly engaged in the pre-constitution framing see the inclusion of Article 68 in the act of transitory provisions also as an achievement — which provides for the recognition of the definitive responsibility of the government to grant the respective titles to remnants of quilombo communities. Please check out the activists’ accounts in: ALBERTI; PEREIRA, 2007.

\textsuperscript{38} Taking into account the recent cases of racism in the media outlets (especially in soccer), the discussion about the improvement of the anti-racism laws is in vogue again. The bill no. 6418/2005, created by Paulo Paim — which provides for a number of changes chiefly to the criminal categories of discrimination and aggravated disparagement —, had an opinion approved on December 18, 2013, and is currently under the appraisal by the Full Court. This amendment keeps the discussion of the anti-racism legal remedies in the sphere of the criminal law, even establishing the extension of the unailable and imprescriptible nature to other crime categories connected to Racist behaviors.

\textsuperscript{39} In the justification of the Bill no. 1.240/95, the author avers: “[...] This bill, which increases criminal categories with the addition of articles to Law 7716/89, created by the former representative Carlos Alberto Caó, is aimed to criminalized discrimination or the prejudice against race, color, ethnicity and national origin, to rescue values and \textbf{fight against impunity}. By means of this bill the offenses referred to will no longer be categorized as slander, disparagement and defamation, but as racist crimes” (emphasis added).
were connected to interpersonal slanders with the use of elements connected to race and color. As stated above, these cases were the ones that triggered the largest interpretive divergences: victims, Movement members and legal professionals advocate that these cases should be considered racism and treated under Article 20 of the law. Oftentimes, however, cases initially classified as racism were subsequently declassified and considered racial disparagement. The dispute around the legal classification of the facts subject to the criminal liability is something common amid the dynamics underlying the criminal proceeding. In many cases, fighting for the legal classification is an important defense strategy and may lead to a more beneficial treatment of the defendant, as is, for instance, the dispute around the classification of a case as drug trafficking or personal drug use. In the discussion about racism, although the reclassification does not involve relevant consequences concerning penalties (they are all the same), it has a symbolic importance for most of the involved people and activists. Besides this, the rules about the imprescriptible and unbailable basis are raised by such discussion. Beyond this dispute, reclassification has a crucial impact on the outcome of the cases due to the procedural differences that imply a sort of procedural short circuit. Thanks to this, there were many indictments dismissed and proceedings extinguished.

In our research universe, we could trace a significant set of cases which were dismissed in first instance, as the judge disagreed with the classification of racism made by the Prosecutor, and decided the Prosecutor lacked standing to file suit. Understanding that it was a case of racial disparagement, the lawsuit should have been filed by the victim, by means of his lawyer. In the appeals questioning this decision, the courts mainly upheld the judge’s understanding and confirmed the motion to dismiss the cases. It should be noted that we had access only to appellate cases, and we thus are not able to ascertain the frequency of events like this in the first instance. In other words, it is possible that this outcome is much more common than we could establish.

We also discovered that a significant number of criminal lawsuits that were filed in first instance and classified as racist crimes, were declassified by the courts, when the defendants questioned their classifications. As we exposed, the declassification had the undesirable consequence of extinguishing these cases due to preemption or annulment.

Needless to say, the failure to entertain indictments or the early termination of cases is an unexpected effect of the dispute around the interpretation of facts and may be seen as a pathological aftermath of the procedural rules of the court system.
To further develop the understanding of this phenomenon — if it was a systemic short
circuit, numbness of the judiciary, institutional racism or even judges’ resistance to enforcing
the punitive law owing to its harshness (these assumptions are all reasonable) deepening our
research is necessary, employing another strategy beyond the review of appellate decisions.
However, this type of judicial outcome helps us understand the dissatisfaction about its
operation. And if the critique should be grounded in the understanding of the internal legal
mechanisms and the fact that the interpretation as racial disparagement by judges may indeed
be advocated, in turn, it is possible to allege that it is also the judiciary’s responsibility to fill
the gaps in the law to avoid unreasonable outcomes such as those involving preemption. As
we asserted above, this would not be exceptional for the judges.

Another relevant issue to understand the failure of racism cases in the legal system is
the evidentiary standard. We pointed out that many cases were dismissed at the onset or ended
up as acquittals due to the insufficiency/lack of evidence (30 cases out of the total of appellate
decisions and, at a rate of 20 acquittals out of 40). This outcome should be understood in light
of the type of case at hand — i.e., interpersonal slanders which are mostly bereft of witnesses
or have disagreeing witnesses, which hinders the production of valid evidence and satisfying
the evidentiary requirements of the criminal law. Owing to its punitive nature and due to
involving imprisonment and a serious restraint of freedom, the criminal convictions demand a
firm threshold of certainty about the facts and the existence of elements of the offense and
perpetrator. Even to file a criminal lawsuit a certain factual standard and strong indications of
the perpetrator are required. The standard of proof is totally under the responsibility of the
charging party, and in a doubtful case, the judge must find for the defendant.

In principle, it is reasonable that the cases that did not successfully become criminal
lawsuits or end up in acquittal have poor evidentiary production. This could be explained by
the very nature of the facts that are hard to substantiate. But it would not also be the case to
discard the possibility of improper functioning of the institutions in charge of producing
evidence (police stations and first instance courts). This assertion, however, would require
further research. A criticism about the manner by which judges exercise the principle of free
finding of fact—perhaps more demanding in cases of racism—would also demand a
qualitative study about the records and comparison with other similar situations that did not
involve racial disputes.

In any case, it should be noted that, by demanding to regulate the social conflict via
criminal law, one should consider the characteristics of racist behaviors (in many cases they
are not explicit, or else they are expressed by means of verbal and interpersonal offenses) and the difficulty of assembling a body of evidence. Besides this, the matter of the standard of proof in the criminal sphere—mostly overshadowed by the claim for more severe treatment—deserves attention, as it exerts, as we saw, a decisive effect on the judicial outcomes.

When we review the cases that had their merits analyzed, some characteristics of our database stand out. First, the finding that there are a significant number of convictions (49 cases out of the total of appellate decisions studied) is noteworthy, insofar as it goes against the widespread feeling that “nobody is convicted.” However, only four of these convictions are for racist crimes. They are mostly (27 cases out of the total) for racial disparagement, which may help explain the discontent by the Movement, which advocates the understanding that a racist slander is racism.

Other interesting information to be considered in this sense is the high frequency of convictions requiring imprisonment that were replaced with restraints of right (the so-called “alternative punishments”). In these cases, the criminal system concluded the entire procedure and even asserted that the behavior was unacceptable, stands as a criminal offense, and the defendant was responsible for its perpetration. Although these conclusions by the legal system are relevant, it may go unnoticed when the focus is on the imprisonment. Besides this, in these cases, there was a sanction, but not imprisonment. The possible frustration about the substitution of imprisonment for an alternative restraint of right is also raised here solely as a hypothesis, but it seems reasonable given the punitive bias shared by Brazilian society. Without space to further develop this issue, but only to point out a relevant datum about this subject, let us remember the findings of ICJBrazil (the Index of Reliability on Justice) produced by the São Paulo Law School of the Getúlio Vargas Foundation (DIREITO GV), which reveals that for 71% of the population with incomplete higher education believe alternative punishments lead to impunity; 63% who have not completed high school and 64% of those that had completed higher education provided the same answer (CUNHA et al., 2011).

Following the analysis on the merits of what we found in our database, even though it is not our intent at this time to qualitatively review the arguments provided by the courts, it seems important to draw attention to a type of reasoning that has been repeatedly resorted to by justices to justify acquittals in a group of 22 cases out of the total of 40: the absence or lack of evidence of malice aforethought to perpetrate a racist offense. This happened in many cases where the offenses, having their racial element and the perpetrator confirmed, the court still
demanded something more to substantiate the charge of racism. As an example of what happened in these cases, the grounds by TJSP (São Paulo Appeal Court) in one of the appellate decisions reviewed seems to be significant: “It is quite clear that the single defendant’s intent was to disrespect the public servant, who was not serving the claim of this defendant. Nonetheless, to consider that the words uttered by the indictee had intent to discriminate against an entire race as a whole different situation” (TJSP, AC (Civil Appeal) 990.08.092769-8).

What the justices of this case are demanding here to be present as an essential element for a behavior to be considered as a crime — the intent — is more than the intent to accomplish the behavior categorized as a crime. To wit, the offense possessing a racial element would not be enough, but substantiation of not only the intent to defame the victim, but also the “intent to discriminate against an entire race.”

Therefore, slander using racist terms and the expressing the intent to carry out racist acts would not be sufficient. Expressing the “intent to discriminate” beyond the very offense itself would be necessary. The requirement to investigate the subjective element constituting the intent to perform a deed considered as crime is, in fact, established in the general body of our criminal code and its theory of law. According to Article 18, Item I: “an intentional crime happens when the perpetrator pursued the outcome or assumed the risk it would occur.” The criminal doctrine understands the free and aware intent to perpetrate a criminal offense as malice aforethought. The awareness of the unlawfulness in concert with intent means that the analysis of the malice aforethought should go beyond the mere will to perform a mechanical gesture.

With this, malice aforethought is understood, if this element can be derived from the facts, as the product of an interpretative effort of legal professionals. Given the impossibility of accessing the subjectivity of the perpetrator, it will always be inferred from objective elements present in the facts. In other words, the conclusion about the existence or not of intent will always be a construct based on on tangential elements of the case. One may state that it is relatively arbitrary and, on account of this, should be backed by the reasonability of the grounds. In this sense, the understanding of the courts that the perpetrator of an offense with racial content did not possess malice aforethought required to commit a racist offence is quite controversial. Up to this point, this could be seen as routine in the realm of law, but the matter that seems troublesome is that the decisions handed down by the courts in this respect follow the example reproduced above, i.e., they do not engage in convincingly grounding the
lack of racist intent. As such, this set of decisions seems to be rather susceptible to criticism, in addition to highlighting another key issue regarding the enforcement of the criminal law. Once more we can see that this dispute lies in-between the lines of legal concepts and procedures, by means of doctrinal construction.

This seems to be an important element to be considered by social reformers when they are deciding to juridify the object of their struggles. If, on one side, the field of law has been important to advance the struggle for equality and rights, it also poses the extra burden of adjusting to a vocabulary and rules through which the legal discussion happens — i.e., understanding law’s procedural engineering and appropriating of the doctrinal language. It is clear that it takes much effort on the part of the movement organizations to use the field of law as the forum to develop their struggles, acquiring technical resources along with the specialized legal counseling. But if there is an inaccessible specificity in the operation and language of the legal system; this specialization, in a democracy, may mean the estrangement of citizens from its operation.

The case of anti-racist laws in Brazil is a conspicuous example of a chronic dissatisfaction with the judiciary. The widespread perception within the relevant social movement was that its legislative achievements were put in jeopardy by the judges’ failure to enforce the law.

Part of this dissatisfaction comes from insufficient familiarity with the function of the legal system. It could also be partly mitigated by denaturalizing some deeply rooted concepts about. For instance, formalist visions that do not see the interpretation as a dispute; those which cannot see a social meaning out of the conviction itself; or those which understand the substitution of imprisonment judgments for restraint of right as impunity.

On the other hand, in some cases, the system’s operation, disguised in legal and procedural language, [has been less close to a sort of tooling to be understood and appropriated by citizens, as it seemed to be a play of unreasonable results.] This raises important questions for the legitimacy of decisions. No wonder the judiciary is so often considered numb to racism or even actively racist itself.

Here, this represents a core issue through which to reflect on the role of the judiciary in contemporary democracies and how responsive and transparent it need to be to guarantee its legitimacy. In our opinion, the operation of judicial institutions, as technical and specialized as this system may be, need to be understood by the victims so that they can effectively make
measured legal decisions, and by social movement so that they may properly advocate for the
construal and the rules for enforcement of the law, for instance.

The empirical research of law plays, therefore, a relevant political role in a democracy
where the access of citizens to the exercise of power by the legal system is still undergoing a
incomplete process of institutionalization.

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