

THE JURIDIFICATION OF SOCIAL DEMANDS AND THE APPLICATION OF STATUTES: AN ANALYSIS OF THE LEGAL TREATMENT OF ANTIRACISM SOCIAL DEMANDS IN BRAZIL

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INTRODUCTION

The goal of this essay is to reflect on how the application of statutes by courts can influence the juridification of social demands, as evidenced in the African-Brazilian movement. To achieve this, first, this essay analyzes

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how the African-Brazilian movement approached its fight for racial equality. We show how, traditionally, the African-Brazilian movement has chosen the enactment of specific criminal statutes as the main legal strategy in its movement against racial discrimination, and how it has judged the effectiveness of this legislation in terms of the number of convictions made: a low conviction rate has been interpreted as a sign of the courts' lack of sensitivity concerning racial issues.

Secondly, we contrast the evaluation made by the social movement with data collected from rulings made by the São Paulo Court of Appeals (the *Tribunal de Justiça do Estado de São Paulo*, or TJSP).¹ Such data allows us to prove that a lack of condemnations does not mean that the law is ineffective or that judges are not sensitive to racial issues. The low number of convictions for racism can be understood better in terms of incongruent regulations rather than biased judges. Furthermore, the lack of convictions does not necessarily mean that there are no court rulings against racist behavior. Our research has shown that, on the contrary, most of the cases brought before the TJSP have prompted judges to stress that racial discrimination is illegal and should be taken to trial.

Therefore, Part III questions the inability of the African-Brazilian movement to perceive how statutes are applied by the judiciary. We argue that this inability is the result of a legalist vision of the application of norms that does not allow social agents to thematize the moment of sentencing. As a result, these social agents have failed to develop specific strategies to present to the judiciary, which is regarded as being an activist judiciary. The inability to discuss and develop a clear strategy to deal with this problem has led the African-Brazilian movement to fight for new statutes, which has in some cases served to perpetuate a situation characterized by the low number of convictions.

We conclude by discussing the results of our research regarding the importance to democracy of the dispute involved in the interpretation of norms and, therefore, the importance of lawyers in a democracy. We will show that a legalist position that defends the elimination of the indeterminacy of legal norms can produce authoritarian practices, which, in seeking to eliminate the dispute over the meaning of norms, favor the creation of a single point of view about the meaning of laws.

1. Brazilian law is part of the civil-law tradition. The country has 27 state appeals courts. For our case study, we chose to focus on the São Paulo Court of Appeals, which is responsible for judging civil as well as criminal cases in one of the most populous states in the country. Brazil has 183,987,291 inhabitants, and the state of São Paulo has 39,827,570 inhabitants. INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE), CONTAGEM DA POPULAÇÃO 2007 tbl.1.1 (2007), available at http://www.ibge.gov.br/home/estatistica/populacao/contagem2007/contagem_final/tabela1_1.pdf. The available data shows that, as of 2005, 30.9% of the São Paulo population identified itself as being of African descent. GOVERNO DE SÃO PAULO, FUNDAÇÃO SISTEMA ESTADUAL DE ANÁLISE DE DADOS, INDICADORES DE DESIGUALDADE RACIAL: POPULAÇÃO tbl.1 (2005), available at <http://www.seade.gov.br/produtos/idr/download/populacao.pdf>. The corresponding data for the 2007 census has not yet been published on the IBGE website.

I. THE CASE OF ANTIRACIST DEMANDS IN BRAZIL

A. *The History of the African-Brazilian Movement*

Racism and how it is dealt with in the judicial sphere became an issue after the Getulio Vargas dictatorship (1937–1945) because of the rise of organizations and the influence of the press affiliated with the African-Brazilian movement, and because of demands made by the general public for legal regulation on the subject, especially criminal legislation.² A legislative turning point came with the issue of Law No. 1.390/51, known as the Afonso Arinos Act, which made it an offense punishable by law to refuse to serve or deny access in any way to a person based on skin color, whether in a privately owned or public place.³ This was, without a doubt, the most important legal instrument issued⁴ until the subject resurfaced at Brazil's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) at the U.N. Convention in 1968.⁵ From that moment on, Brazilian law made the incitement of hatred or racial discrimination a crime against national security.⁶ In civil legislation, a significant breakthrough came with the Law of Public Civil Action, which authorizes the Public Prosecutor's Office to defend ethnic minorities through civil suits.⁷

The legal perspective on racism underwent major changes in the Constitution of 1988. African-Brazilian activists who made important contributions in public forums shared considerable reservations about the Afonso Arinos Act. These criticisms arose from the law's lack of enforceability and what they perceived to be the main cause of the problem—the way the law was drafted, namely the way conduct was

2. It is worth noting the contents of the Manifesto to the Brazilian Nation (*Manifesto à Nação Brasileira*), which resulted from the debates between 1945 and 1946 that were instrumental to the National Convention of the Black Brazilian (*Convenção Nacional do Negro Brasileiro*), expressly sought to pass an “anti-discriminatory law, with concrete measures to make sure that the measure is not just an empty legal proclamation without any real effect.” Carmen Silvia Fullin, *Direito e Racismo: Observações Sobre o Alcance da Legislação Penal Antidiscriminatória no Brasil*, in 6-II REVISTA DA FACULDADE DE DIREITO DE SÃO BERNARDO DO CAMPO 21, 21 (2000) (translation provided by authors).

3. See Lei No. 1.390, de 03 de julho de 1951, D.O.U. de 10.07.1951. (Brazil).

4. In addition to this law, there were legal statutes that broached the subject tangentially by prohibiting broadcasting campaigns or discriminatory announcements: Lei No. 4.117, de 27 de agosto de 1962, D.O.U. de 05.10.1962. (Brazil) (law within the Brazilian Telecommunications Code (*Código Brasileiro de Telecomunicações*)); Lei No. 4.737, de 15 de julho de 1965, Col. Leis Rep. Fed. Brasil, 5: 62, jul. 1965 (law within the Brazilian Electoral Code (*Código Eleitoral*)); Lei No. 5.250, de 9 de fevereiro de 1967, Col. Leis Rep. Fed. Brasil, 1: 617, fev. 1967 (regulating freedom of expression and information).

5. EDWARD E. TELLES, RACE IN ANOTHER AMERICA: THE SIGNIFICANCE OF SKIN COLOR IN BRAZIL 38 (2004).

6. Lei No. 6.620, de 17 de dezembro de 1978, D.O.U. de 20.12.1978. (Brazil).

7. See Lei No. 7.347, art. 1, § IV, de 24 de julho de 1985, Col. Leis Rep. Fed. Brasil, 5: 28, jul. 1985, *as amended in* CÓDIGO CIVIL, CÓDIGO DE PROCESSO CIVIL, CÓDIGO COMERCIAL, LEGISLAÇÃO CIVIL, PROCESSUAL CIVIL E EMPRESARIAL, CONSTITUIÇÃO FEDERAL 1119 (10th ed. 2008) [hereinafter CÓDIGO CIVIL].

typified in very specific, detailed ways, making it difficult to characterize it in practice. Criticisms were also leveled at the insufficient gravity of the legal definition of discriminatory acts as misdemeanors,⁸ rather than as crimes *per se*.⁹ In light of this, incisive demands were made to criminalize such acts, and, in response, racism was made an “unbailable and infeasible crime,” pursuant to article 5, section XLII of the Federal Constitution of 1988.¹⁰ The new terms of the law made racism a serious crime and sent a clear signal that punishment for the offense would be the main means of addressing the problem of racial discrimination.

The federal legislation promulgated after this constitution focused on regulating racism as a crime. To that end, the Caó Act (Law No. 7.716/89) was passed, which established new crimes related to racial discrimination.¹¹ It referred to conduct addressed in the previous law’s definition of misdemeanors, but also added new conduct and increased the sentences considerably: a simple prison sentence of three months to one year became a one-to-three- or two-to-five-year sentence of confinement.¹²

This was modified by Law Nos. 8.081/90¹³ and 8.882/94,¹⁴ which created new types of criminal offenses, and later by Law No. 9.459/97.¹⁵ Law No. 9.459/97 was put forth by Representative Paulo Paim, whose

8. Within the Brazilian system, the distinction between a crime and a misdemeanor is outlined in article 1 of the Law of Introduction to the Penal Code and the Law of Misdemeanors, No. 3.914. In simple terms, a crime is a penal infraction that the law punishes with reclusion and/or a fine. A misdemeanor is punished by the so-called simple prison sentence (a less severe prison regime, more likely to be converted into an open prison regime, for instance) and/or a fine, administered in conjunction in some cases. Although the main difference lies in the type of sanction applied, a difference in the seriousness of the offense is implied. Decreto Lei No. 3.914, de 9 de dezembro de 1941, Col. Leis Rep. Fed. Brasil, 7: 612, dez. 1941.

9. In 1983, as a result of the second black cultural week, the National Congress of Brazil debated Draft Legislation No. 1661, which foresaw the “criminalization” of racial discrimination and its typification in a wider sense. *See, e.g.*, Statement of Abdias Nascimento, DIÁRIO DO CONGRESSO NACIONAL—SEÇÃO 1 6473 (julho 1983); *see also* EUNICE APARECIDA DE JESUS PRUDENTE, PRECONCEITO RACIAL E IGUALDADE JURÍDICA NO BRASIL: A CIDADANIA NEGRA EM QUESTÃO 243–44, 257 (1989). The draft was rejected, but some of the demands were taken into consideration in later legislative reforms, which we describe below. *See, e.g.*, Constituição Federal [C.F.] [Constitution] art. V, § XLII (1988) (Braz.); Lei No. 7.716, de 5 de janeiro de 1989, Col. Leis Rep. Fed. Brasil, 181 (1): 10–11, jan. 1989; Lei No. 9.459, de 13 de maio de 1997, Col. Leis Rep. Fed. Brasil, 189 (5): 2773–75, mai. 1997.

10. Constituição Federal [C.F.] art. V, § XLII (1988) (Braz.).

11. Lei No. 7.716, de 5 de janeiro de 1989, Col. Leis Rep. Fed. Brasil, 181 (1): 10–11, jan. 1989.

12. *Id.*

13. Lei No. 8.081, de 21 de setembro de 1990, Lex, 1087, set. 1990 (Braz.).

14. Lei No. 8.882, de 3 de junho de 1994, Col. Leis Rep. Fed. Brasil, 186 (7): 2420, jun. 1994.

15. Lei No. 9.459, de 13 de maio de 1997, Col. Leis Rep. Fed. Brasil, 189 (5): 2773–75, mai. 1997.

primary concern, as outlined in the justification of his project, was to “attack impunity.”¹⁶

The most important decisions concern the changes introduced in article 20 of Law No. 7.716 of 1989; instead of outlining behavior and assigning detailed descriptions, it supplies a generic characterization of the crime of racism, described as “practicing, inducing or inciting discrimination or prejudice based on race, color, ethnicity, religion or nationality”.¹⁷ Secondly, the law added to article 140 of the penal code a more serious form of slander, with a sentence of one to three years confinement plus a fine, “if the grievance derives from affronts to race, color, ethnicity, religion or origin.”¹⁸

According to the draft of the statute presented before the National Congress of Brazil, this last device aimed to correct one of the issues that adversely affected the application of the previous law: the fact that the courts continued to consider instances of slander with racist content to be simple crimes against honor, with punishments less severe than those for racism. This change also meant that the offended parties had to bring the cases. Unlike cases commenced by the state, suits brought by private individuals are subject to a series of limitations: procedural rules are extremely strict, suits must be brought within six months, and they involve considerable costs—such as those for retaining and paying for personal legal representation.

It is worth noting that the original draft legislation included racial slander as part of the Caó Act, making clear a concern, present in the justification of the proposal of the new statute, that racial slander should be considered a “racial crime.”¹⁹ Apparently it was also intended that such cases not be tried in courts through private individual initiative. Nevertheless, the wording of the final version of the statute established that these behaviors would not be an autonomous part of the Caó Act, and would instead be deemed simply a more serious form of slander by article 140, section 3 of the Brazilian Penal Code.²⁰ The crime would be subject to a smaller sentence than the one outlined in the draft and tried according to the same procedure as every other crime against subjective honor—that is, through private, individual initiative. In the end, the draft was unable to sort out the problems that had been put in place through privately sponsored cases. The distinction between racism and racial slander and their respective submission to different legal procedures is, as we shall see, a factor that has

16. See Projeto de Lei No. 1.240, art. 21, de 21 de novembro de 1995, Diário da Câmara dos Deputados, 163: 24,632, set. 1996 (Braz.).

17. Lei No. 7.716, de 5 de janeiro de 1989, Col. Leis Rep. Fed. Brasil, 181 (1): 11, jan. 1989.

18. Lei No. 9.459, de 13 de maio de 1997, Col. Leis Rep. Fed. Brasil, 189 (5): 2774, mai. 1997.

19. See Projeto de Lei No. 1.240, de 21 de novembro de 1995, Diário da Câmara dos Deputados, 163: 24,632, set. 1996 (Braz.).

20. Decreto No. 2.848, art. 140, § 3, de 7 de dezembro de 1940, D.O.U. de 31.12.1940. (Brazil), as amended in CÓDIGO CIVIL, *supra* note 7, at 253, 282.

considerable consequences for the application of this law. Research that we have carried out thus far has not offered any insight into why the draft of the statute was changed.

Until recently, it is easy to see that the African-Brazilian movement centered its legislative efforts on strategies that increased, toughened, or perfected the criminalization of discriminatory and prejudicial acts. To a large extent, the legislative powers conceded to the movement's demands. As a result, Brazil's antiracist legislation today is characterized by strong, commanding, and coercive language and, for the most part, by the application of strong penal measures.²¹ Despite this trend, discussions about other types of intervention and legal action have only recently gained importance with the advent of rhetoric focusing on affirmative measures.

It was only through mobilizations originating from Brazil's participation in the 2001 Racism Conference organized by the UN in Durban that governmental agencies and legislatures began to publicly discuss an antiracist platform based on affirmative action policies.²²

Such a discussion coincides with a generation of critical reflections—both in academic circles and within the African-Brazilian movement itself—regarding the lack of appropriate measures to deal with racism, arguing in favor of using other legal measures to eliminate social inequality motivated by racism.²³ The theme of affirmative action was brought to the Congress with considerable emphasis on the discussion about the law on social and racial quotas in federal and state universities.²⁴ These projects

21. The punitive solution had prominence as a way to assign social relevance to the problem of racism. The demands to criminalize racism and issue severe sentences correspond to a vision in which the larger the sentence, the greater the degree of social relevance attributed to the infraction. See Fullin, *supra* note 2.

22. Examples of these measures include the adoption by several ministries of the system of assigned places for black employees; the implementation in May 2002 of the Affirmative Action Program, which sought to increase black, female, and handicapped employment in federal management positions; and the institution of a system of preferential treatment in some universities. Furthermore, the Supreme Tribunal Court (*Supremo Tribunal Federal*) approved the constitutionality of affirmative action, and some tribunals started to adopt obligatory measures to establish a minimum number of black employees in companies outsourced by the justice system. LUCIANA DE BARROS JACCOUD & NATHALIE BEGHIN, *DESIGUALDADES RACIAIS NO BRASIL: UM BALANÇO DA INTERVENÇÃO GOVERNAMENTAL* 22–23 (2002).

23. *Id.* at 18; Fullin, *supra* note 2, at 34; Joaquim B. Barbosa Gomes, *O Ministério Público e os Efeitos da Discriminação Racial no Brasil: Da Indiferença à Inércia*, in II-15 BOLETIM DOS PROCURADORES DA REPÚBLICA 15–25 (1999); Sérgio Salomão Shecaira, *Racismo*, in *ESCRITOS EM HOMENAGEM A ALBERTO SILVA FRANCO* 401, 416–18 (Revista dos Tribunais 2003).

24. It was brought to Congress through Draft Legislation No. 73/99 signed by Representative Nice Lobão, with its diverse amendments and attachments. Draft Legislation No. 73/99 is currently under review by the Senate after it was reviewed by the House of Representatives. Additionally, there is the Statute for Racial Equality (Draft Legislation No. 213/03), signed by Senator Paulo Paim, which has been under review at the National Congress since 1998. See Projecto de Lei No. 75, de 1999, *Diário da Câmara dos Deputados*, 09,546–47 (Braz.); Projecto de Lei No. 213, de 2003, *Diário do Senado Federal*, 13,459–70 (Braz.).

focus on the establishment of a series of affirmative action that involves “special programs and measures adopted by the state to correct racial inequalities and the promotion of equal opportunity.”²⁵ This changes the focus from legislative policies that vetoed behavior under threat of sanction to policies centered on the establishment of a series of positive measures adopted by the State, aimed at correcting distortions and inequalities, and assuring “equal rights for African-Brazilians in the country’s economic, social, political and cultural life.”²⁶

B. The Diagnostic of the Inefficiency of the Law and Its Critique Based on TJSP Data

We can assume that there is a common discourse, both on behalf of the social movements and a significant part of the legal community, that the antiracist legislation is “ineffective”—that it has not been applied as extensively within the judiciary as had been hoped,²⁷ seeing as there have been almost no criminal condemnations.²⁸ Included in this diagnosis is a

25. Projecto de Lei No. 213, de 29 de maio de 2003, Diário do Senado Federal, 13,459 (Braz.) (translation provided by authors).

26. More specifically, article 4 of Draft Legislation No. 213/03 states that:

equal rights for African-Brazilians in the country’s economic, social, political and cultural life shall be guaranteed in the followings ways:

I – inclusion of racial issues in social and economic development public policies;

II – adoption of affirmative measures, programs and policies;

III – modification of state-wide institutional structures to ensure adequate procedures to deal with and overcome racial inequality resulting from prejudice and racial discrimination;

IV – advancement of normative measures to combat racial discrimination in all its structural, institutional and individual manifestations;

V – elimination of historical, socio-cultural and institutional obstacles that thwart the representation of racial diversity in the public and private sphere;

VI – stimulus, support and strengthening of civil society initiatives directed towards the promotion of equal opportunities and the fight against racial inequality, including the implementation of incentives and criteria to condition and prioritize access to public resources and contracts;

VII – the implementation of affirmative action programs destined to combat racial inequality in such sectors as education, culture, sport and leisure, health, work, media, land rites (especially land associated with slaves and their descendents), access to Justice, public financing, outsourcing and tendering.

. . . Affirmative action shall be activated immediately through reparatory initiatives destined to initiate the correction of racial inequalities and distortions derived from slavery and other discriminatory and racist practices adopted, in the public and private sphere, throughout Brazil’s social formation and make use of the quotas system to reach the required objectives.

Id. at 13,459–60 (translation provided by authors).

27. Irahya Baptista de Abreu, *O Racismo e a Jurisprudência do Egrégio Tribunal de Justiça do Estado de São Paulo*, in JAQUES DE CAMARGO PENTEADO, 6 JUSTIÇA PENAL 306, 306–09 (Revista dos Tribunais 1999).

28. Flávia Piovesan & Luis Carlos Rocha Guimarães, *Convenção Sobre a Eliminação de Todas as Formas de Discriminação Racial*, in DIREITOS HUMANOS: CONSTRUÇÃO DA LIBERDADE E DA IGUALDADE 353–68 (Centro de Estudos da Procuradoria do Estado de São Paulo 1998).

series of elements that make up a system of filters and obstacles impeding the processing of demands associated with the issue (which involve all sorts of difficulties in getting access to the judiciary, as well as a lack of legal representation, the absence of police authorities, the inertia of the prosecutor, etc.). As far as the judiciary goes, frequent remarks are made about judges who are impermeable or insensitive to the problem of racism. In the words of an important African-Brazilian activist, “[T]he judge’s free interpretation of facts is generally influenced by social theories that undervalue the gravity of racist violence—both in real and symbolic terms—turning racial relations into a carnival and feeding into an ideology of racial democracy.”²⁹

Data gathered at TJSP using rulings from 1998 to 2007 allow for the diagnosis to be seen in relative terms.³⁰ A search in the TJSP data bank for rulings related to racism was carried out using the databases available at the Lawyers’ Association of São Paulo (the *Associação dos Advogados de São Paulo*, or AASP)³¹ and at the TJSP³² with updates that run through December 2007. The search used the keywords “*racismo*” (racism); “*injúria qualificada*” (serious slander); “*injúria racial*” (racial slander); and “*discriminação racial*” (racial discrimination), and came back with 1275 rulings. Manual searches discarded nonpenal rulings, as well as cases that debated exclusively procedural or incidental matters, leaving 116 court decisions. Qualitative analyses revealed that 5 of those 116 cases constituted discrimination cases based on the plaintiff’s nationality (German and Portuguese) or religion (Jewish and Islamic) and therefore were excluded from our research.

For the remaining 111 decisions made between 1998 and 2007, there were: 40 criminal appeals; 25 criminal interlocutory appeals (*recursos em sentido estrito*); 20 writs of habeas corpus; 18 private criminal actions (*queixas-crime*); 3 appeals against decisions on habeas corpus; 2 atypical proceedings involving petitions to prosecute public officers; 2 criminal actions conducted solely by the appeal court (special jurisdictions); and 1 prejudicial appeal arguing the nonimpartiality of the judge (*exceção de suspeição*).

As shown in Figure 1, most of these cases (45 in total) reached the court after the announcement of the judgment of merit (condemning or absolving)

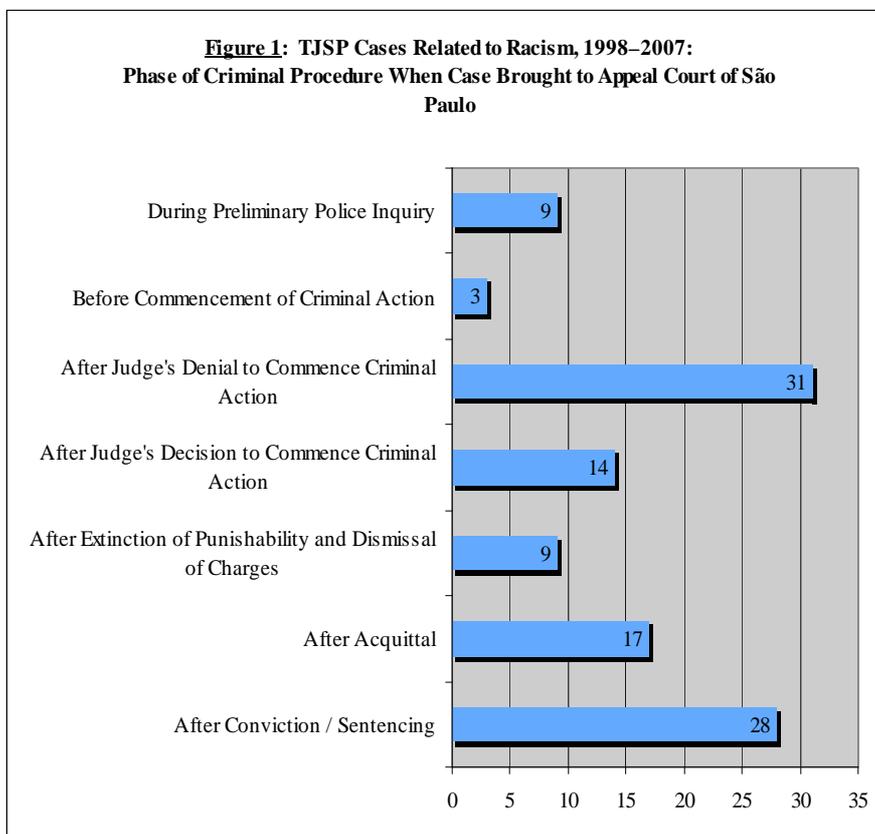
29. OBSERVATÓRIO NEGRO, PARECER DO PROJETO DE LEI DO SENADO NO. 309 DE 2004, at 13 (2006), available at http://www.lesiagonzalez.org.br/material/ParecerPLS309_Observatorio-Negro-PE.pdf.

30. For an analysis of the TJSP cases, we used data gathered by Marta Machado, *A Legislação Anti-racismo no Brasil e Sua Aplicação: Um Caso de Insensibilidade do Judiciário?*, 74 REVISTA BRASILEIRA DE CIÊNCIAS CRIMINAIS (forthcoming 2009).

31. Associação dos Advogados de São Paulo, <http://www.aasp.org.br> (last visited Feb. 27, 2009). The website of the Lawyers’ Association of São Paulo has a private database only for associates; it is not possible to enter without a membership identification and a password.

32. Tribunal de Justiça do Estado de São Paulo, Portal de Serviços e-SAJ, <http://esaj.tj.sp.gov.br/cjsg/consultaCompleta.do> (last visited Feb. 27, 2009).

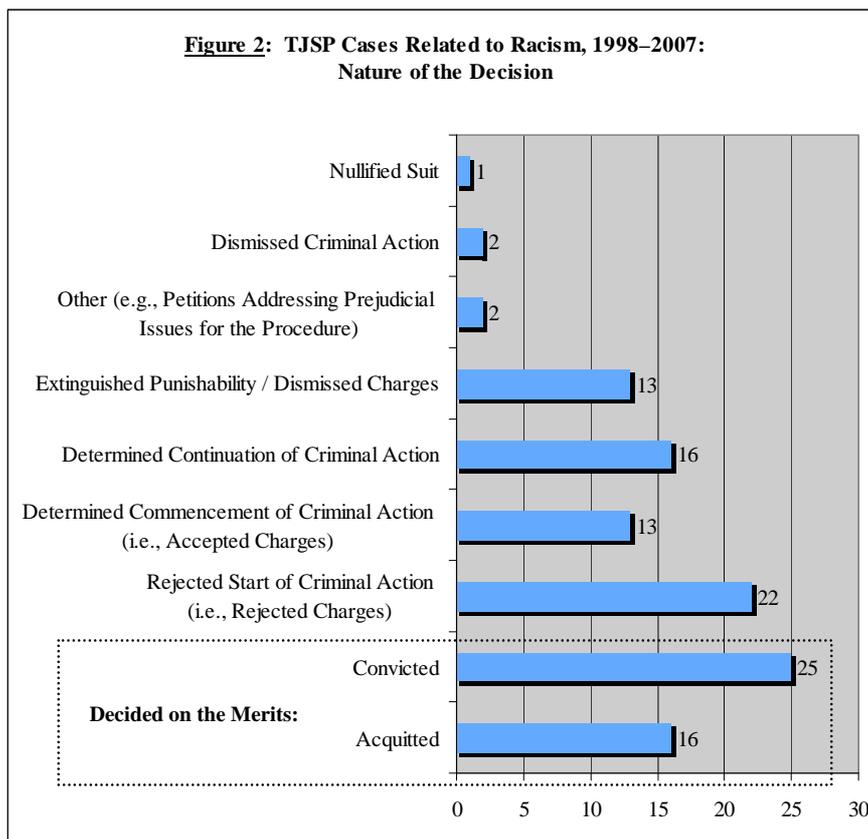
in the first instance. A significant number of cases (40) were tried in court after the judge's initial ruling that rejected the complaint or extinguished punishability, thwarting the continuation of the case. Twelve cases were taken to court before criminal action began and 14 of them while criminal action was underway.



As for TJSP rulings, if we only take into consideration the decisions that analyzed the merits of the case—either acquitting or convicting the suspect (41 in total)—it becomes evident that the court condemned more than it absolved: 25 condemnations compared with 16 absolutions. As for procedural outcomes and annulments, the number of cases closed (based on rejection of charges, extinction of punishability, dismissal or annulment of the case), compared with those that were sent to trial are as follows: 38 decisions of the former compared with 29 of the later, which represents 34.3% compared to 26.1%, respectively.

Taking into consideration all 111 cases (that is, condemnations and absolutions, as well as decisions to proceed, dismiss, or annul cases) we notice a prevalence of cases in which a decision was taken to end a case prematurely (38 cases in total, including rejections, extinction of punishability, dismissal, or annulment of the case). In other words, this is

the most common outcome for cases that reach the TJSP. Following this, there are 29 cases that were sent for trial and a total of 25 condemnations and 16 absolutions. This data is reflected in Figure 2.



Condemnations, as indicated in Figure 3, primarily were for slander (plain slander or racial slander), with or without sentencing increases. We located only one condemnation for racism in accordance with article 20 of Law No. 7.716/89 and one condemnation through article 4 of the same law based on the denial or obstruction of employment.³³

As for the sentences applied, 12 of the 25 condemnations established 1 year in prison and a fine of 10 days, which corresponds to the minimum sentence for serious slander. In 6 cases, the sentence was fixed at 16 months, which corresponds to the minimum legal limit for higher degree slander with a one-third increase based on circumstances from article 141 of

33. T.J.S.P-4, Ap. No. 202.256-3/1/00, Relator: Des. Leite, 04.03.1998, available at <http://esaj.tj.sp.gov.br/cjsg/resultadoSimples.do> (Brazil) (condemnation through art. 20 of Law No. 7.716/89); T.J.S.P-5, Ap. No. 313.895-3/1/00, Relator: Des. Braga, 11.08.2004, available at <http://esaj.tj.sp.gov.br/cjsg/resultadoSimples.do> (Brazil) (condemnation through art. 4 of Law No. 7.716/89).

the penal code. The largest sentence found was for two years' imprisonment, set by the court on 3 occasions. In many cases, penalties of imprisonment were replaced with community service.³⁴ In 2 cases, the condemnations were followed by the extinction of the penalty (*extinção da pretensão executória da pena*).³⁵

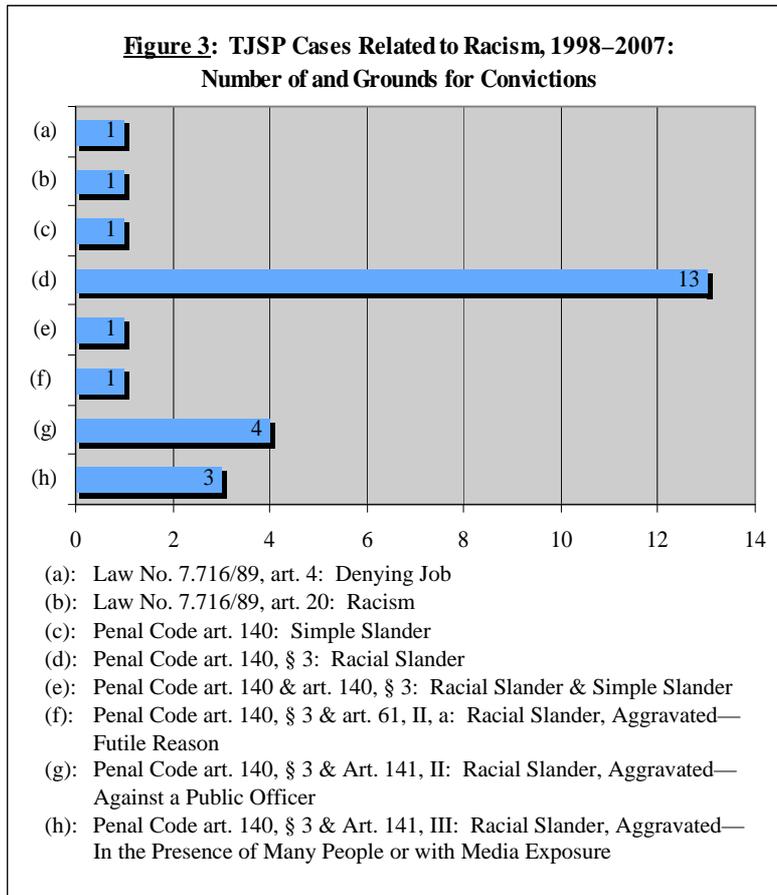


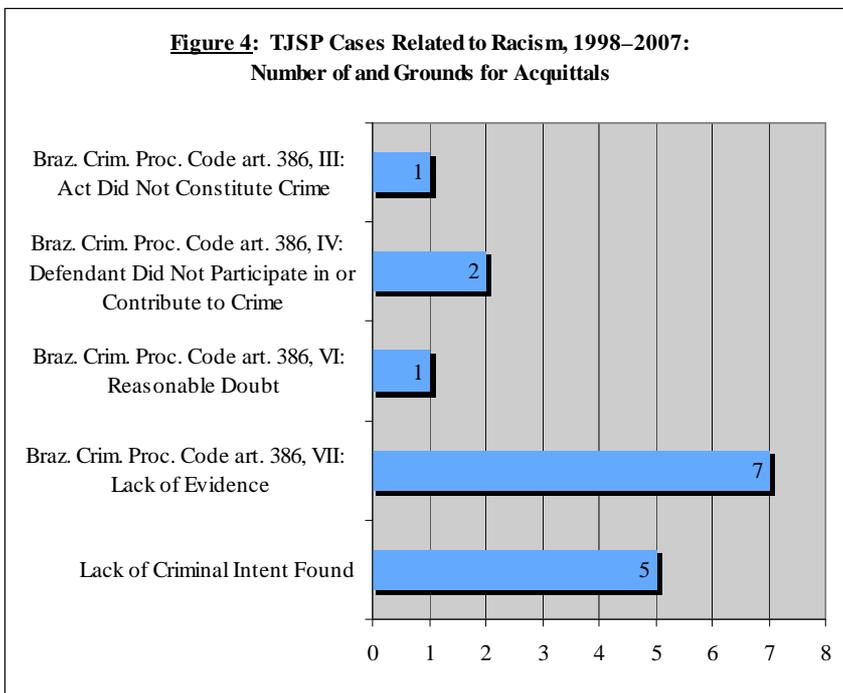
Figure 4 breaks down the cases that ended in acquittals. Acquittals were justified in half of the cases (8 of 16) based on a lack of evidence. In only 6 of the cases involving acquittals did the judges analyze the merits of the case and make rulings based on the lack of crime. Within this set, the argument that the offender did not act with harmful intent, or in bad faith, is

34. According to article 44 of the Brazilian Penal Code, it is possible to replace penalties of imprisonment up to four years with so-called “alternative penalties,” such as community service.

35. These cases were calculated as condemnations because we deem it relevant that the procedure came to an end and reached a legal conclusion that recognized the perpetrator’s responsibility and wrongdoing.

significant. This happened even though the court admitted that racial offenses took place.

In a significant number of the cases analyzed (38 cases), the court decided on an early closure of the case—opting for a rejection of the charges pressed, nullifying or dismissing the suit, or extinguishing punishability.³⁶

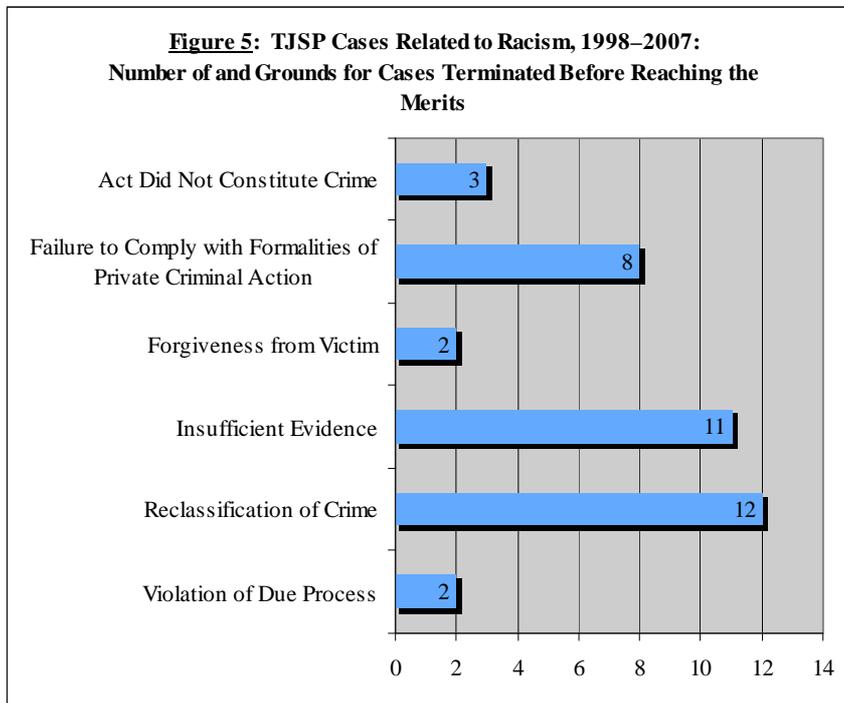


As demonstrated in Figure 5, the most common reason for this outcome (12 cases) is the disagreement in court over how to define the case legally—whether as racism, simple slander, or racial slander. In 5 cases, the disagreements in relation to the judicial interpretation of the kind of attacks proffered resulted in a rejection of the charges filed. In 7 cases, it resulted in the extinction of the possibility that the defendant could be punished by the state due to the plaintiff's lack of timeliness in filing the initial charge for racial slander. Therefore, about 10% of cases have been withdrawn for this reason.

In these 12 cases, the court in its decisions reevaluated the previous judicial definition of the crimes as racism, establishing that the crimes at issue should be considered slander or racial slander. Defining a set of facts as slander or racial slander rather than as racism often has the practical

36. We state above that the two cases that failed to administer punishment after ruling to condemn were in fact counted as condemnations and not put into this group. *See supra* note 35 and accompanying text.

effect of the dismissal of the case for lack of timeliness in the filing of the initial charge. This happens because of the different manners in which each type of case is processed: racism is tried through a public penal trial; in other words, it is tried by an executive of the state—in this case, the State Prosecutor (*Ministério Público*). Racial injury—such as racial slander—is tried through private action by an offended party who seeks a lawyer and has six months from the time she learns the identity of the perpetrator to file suit.



The different procedures for these crimes outline a problematic situation: every time racism is redefined as racial slander after the six-month deadline mentioned above, the offended party will no longer be able to initiate the required procedure. Even if the statute of limitations has not yet expired, the decision may be handed down so late in the process that the offended party barely has time to bring together a penal case.

The second most relevant cause for the premature termination of cases was a lack of evidence. This factor ruled out 10 private criminal actions and grounded the dismissal of a criminal action. Most of the cases simply provided a police report, which was deemed insufficient to justify a penal action. In general, the question of proof was significant to the outcome of almost all of these cases. In addition to the cases in which lack of evidence was the sole reason for the termination of the case, it was a decisive factor

in half of the cases that ended with acquittal. In other words, the lack of proof was dispositive in the termination and absolution of 19 cases.

Also significant was the termination of 8 cases before or during the hearing because of failure to comply with an established formality associated with private criminal actions. As mentioned above, privately sponsored criminal cases are subject to stricter controls, and, as a result, any faults perpetrated by the accuser during the trial end up drawing the case to a close.

The data presented allows us to question the diagnosis of insensibility attributed to TJSP when dealing with racial discrimination. It throws light on the dynamics of the penal system, which can help one to correct its shortcomings. The perception that there are no convictions was not upheld, at least in terms of the TJSP. Overall, the number of convictions reached approximately 22.5% (or 25 rulings), which is significant. These were convictions for racial slander. What seems troublesome and frustrating from the point of view of the judicial system output is the many cases (38) in which trials ended before the judge declared a sentence. This number is not only greater than the number of cases in which the court proceeded with the case (26), but also represents the most common outcome of the cases tried by TJSP—34% of the total cases analyzed.

To understand these results, one must be sensitive to the inner workings of the country's legal system, and more specifically, to the dynamic of the application of criminal and procedural rules. The main questions to consider relate to the problem of changing the classification of racial cases and recognizing a lack of timeliness. The lack of mechanisms to instruct private accusers of the proof that must be presented—especially when the suit is filed—and the failure to comply with the protocols and formalities of privately sponsored cases are significant factors in the dismissal of numerous cases.

First, the disagreement over the classification of cases of personal affronts involving a racist element is one of the most debated legal issues associated with this subject. As we have outlined above, this dispute results in the termination of many criminal actions. Critically, we must not presume that this termination is the desired result of judges when they call for the case to be reassessed—especially because the classification of cases brought about by insults of a racial type, such as racial slander, is justifiable from a legal point of view.

The question of judicial qualification of the facts is not that simple. Before the changes were made to Law No. 9.459/97, insults that contained racist elements frequently were classified as plain slander by the courts. The classification was criticized, however, because it resulted in low sentences: the crime of plain slander carried a sentence of one to six months or a fine, typically was tried through private avenues, and was

viewed by the law as an affront to individual honor instead of racist conduct.³⁷

In order to correct this conflict about the application of norms, Law No. 9.459/97 created a more serious form of slander: racial slander. The penalty for this behavior is significantly higher; Law No. 9.459/97 increased the penalty from one to six months of detention and a monetary fine to one to three years of confinement and a fine. The increased sentence is premised solely on the conduct having a racial component.³⁸ This new form of slander, “which uses elements that refer to race, color, ethnicity, religion, origin or someone’s age or physical impairment”³⁹ contemplated both the worthlessness of the conduct in terms of how it affects individual honor, as well as the discriminatory character of the conduct in terms of how it insults a group of people based on race. The new law attempted to eliminate disputes over interpretation, but left the procedural problems unaltered. Therefore, racial slander must be tried through private penal actions.

The fight over the legal classification of the crime continues well after the aforementioned change in legislation. It is possible to hold that the generic crime of racism consisting of “practicing, inducing or inciting discrimination or prejudice based on race, color, ethnicity, religion or national origin” can include a racial slander.⁴⁰ In other words, an offense that implicates racial elements can be considered a type of racism. This stance relies on the plain meaning of the verbs in the statute to defend the possibility of increasing its reach through the assimilation of a series of behaviors associated with the words “to discriminate.” Or better still, it can also be stated that the accomplishment of the two crimes simultaneously by one single action should be recognized. Rebecca Duarte, a lawyer and activist of the African-Brazilian movement, interprets the concept “to discriminate”⁴¹ as keeping with the definition produced by ICERD, ratified by Brazil in 1968.⁴² According to Rebeca Duarte, “offensive jargons such as ‘damn nigger,’ among others, for example, not only distinguish, but characterize the person offensively, not only as an individual, but as

37. See *supra* Part I.A.

38. Lei No. 9.459, art. 2, de 13 de maio de 1999, Col. Leis Rep. Fed. Brasil, 189 (5): 2774, mai 1997.

39. Decreto Lei No. 2.848, art. 140, § 3, de 7 de dezembro de 1940, D.O.U. de 31.12.1940. (Brazil), *as amended in* CÓDIGO CIVIL, *supra* note 7, at 253, 282.

40. REBECA OLIVEIRA DUARTE, SOS RACISMO, PRÁTICA DO RACISMO E APLICAÇÃO DA LEI: CONTRIBUIÇÃO À ANÁLISE DA LEGISLAÇÃO ANTIDISCRIMINATÓRIA 5 (2003).

41. *Id.* at 1.

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

International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965), *available at* <http://www2.ohchr.org/english/law/pdf/cerd.pdf>.

belonging to a specific racial group, inhibiting the black population of the fundamental right to their racial identity, free of discriminatory names and comparisons.”⁴³ And so, the apparent conflict of norms between racial slander and racism should be resolved by accepting the simultaneous incidence of both crimes because the perpetrator of the crime, in one fell swoop, targets personal honor and also “associates the derogatory idea with the racial/ethnic group the insulted party belongs to.”⁴⁴

The generality/specificity dichotomy inherent within these norms brings into question whether it is possible to recognize their simultaneous incidence. Racial slander can be understood as a more specific kind of crime than both plain slander and racism. In comparison to slander, it has the addition of the racist element. In comparison to racism, there exists a special requirement that the discriminatory practice be concomitant with an offense to one’s honor. Keeping in mind that considering racial slander as a special kind of offense determines that the more general rule cannot be applied, the compliance with this principle eschews simultaneous condemnation for both crimes in favor of only racial slander.

Another principle of penal law could be called upon to challenge this opinion: the concept of *ne bis in idem*, that is, the ban on condemning or worsening the defendant’s situation two or more times for the same fact. In this case, the racist element as manifested in the conduct is tried twice: first, to aggravate ordinary slander so that it is then interpreted to fall within the more serious category of racial slander, and second, to constitute racial discrimination, a central element to the crime in article 20 of Law No. 7.716/89.

In sum, one must recognize that different interpretations are possible, and that the defense of the thesis that two crimes are accomplished simultaneously by one action is, in accordance with the positive legal system and rules for interpreting penal laws, as plausible as defending the classification as racial injury.

There are intrinsic elements to the system of legal argumentation that show that the court’s classification of this type of conduct as racial slander, although far from being the only form of legal dogmatics interpretation, can be considered plausible. The dispute over how to interpret facts and apply the law by means of legal dogmatic debate is to be expected. To discuss the application of statutes without considering the indeterminacy of legal norms and the room for dogmatic argumentation would be a mistake. It seems evident in these cases that the judge applying the law must be familiar with a whole range of categories (such as “racism,” “racial discrimination,” “racial slander,” the principle of legality, the principle of speciality, etc.), henceforth increasing the range of interpretations, and the indetermination of norms.⁴⁵

43. See DUARTE, *supra* note 40, at 2–3 (translation provided by authors).

44. *Id.* at 5–6 (translation provided by authors).

45. The conclusion of this essay provides a more detailed discussion on interpretation and indetermination in law.

The main reason for the premature termination of cases was the different procedural regimes involved in the dispute. In reading and assessing these cases, one must consider the legal dogmatics problem inherent in the competition between the two definitions that can be adopted from the facts (“racial slander” and “racism”) and the paradoxical procedural rules applied to the problem—namely, that the recognition of a new classification subjects the case to new procedures that harken back to a preceding moment and end up suppressing rights. In other words, the offended party is required to have taken measures that were not necessary at the outset, due to a change in legal requirements, under threat of seeing the case dismissed. The rule that determines the six-month deadline from the moment the perpetrator’s identity is disclosed is a determining factor in the problematic results found. The difficulty in accepting solutions that escape the application of this penal procedural rule, which has no legally established exceptions, shows us that, when it comes to this point, we are facing a systematic problem that would be better resolved by means of a change in legislation calling for the crime of racial injury to be tried by means of a criminal procedure commenced by the district attorney, which is not subjected to the problems related to private, criminal action procedure.⁴⁶

This change would also help avoid the procedural problems faced by privately sought penal cases—problems of access to justice, difficulties arising from briefing, and questions involving how to comply with the stricter rules involving the submission of a criminal action—which prompted the closure of eight cases in the data above.

Additionally, as we already have mentioned, most of the dismissals and acquittals were due to a lack of evidence. The relevance of this problem, which was revealed by the data collected, also specifically was mentioned by the Inter-American Commission on Human Rights in its 1997 report about human rights in Brazil, which stated,

[L]aw 7,716 has proved difficult to enforce since it [does not] establish[] mechanisms to facilitate proof that a crime has been committed. Moreover, by making it necessary to prove that discrimination was intended leads to situations in which the aggressor and the aggrieved must confront one another and the offense must be proved objectively.⁴⁷

46. Draft legislation No. 309 issued by the Senate addresses this matter. See *Projecto de Lei No. 309, art. 4, de novembro de 2004, Diário do Senado Federal, quinta-feira 4, 34,708 (Braz.)*.

47. Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, ch. IX, ¶ 15, OEA/Ser.L/V/II.97, doc. 29 rev. 1 (Sept. 29, 1997). Note that, within this paragraph of the report, the Portuguese and English versions differ: the English version reads “it establishes mechanisms,” whereas the Portuguese version, when translated into English, reads “it does not establish mechanisms.” Compare Inter-American Commission of Human Rights, Chapter 9 – Country Report on Brazil, <http://www.cidh.oas.org/countryrep/brazil-eng/Chaper%209%20.htm> (last visited Feb. 28, 2009), with Inter-American Commission of Human Rights, Capítulo 9 – Country Report on Brazil, <http://www.cidh.org/countryrep/brazil-port/Cap%209%20.htm#Legisla%C3%A7%C3%A3o> (last visited Feb. 28, 2009). We have quoted the available English version with corrective alterations.

Proper critique of the suitability or lack thereof in these rulings can be made only after a qualitative appraisal of these cases, taking into consideration the principle of the judge's freedom to evaluate evidence. As difficult as it is to evaluate cases that involve intersubjective insults that are hard to prove, the number of dismissals and acquittals due to lack of evidence points to the need to reevaluate legal institutions and the way they deal with racism in court.

This matter is certainly worth examining. We do not know, for example, if the difficulties over proof arise from poorly briefed cases (which can be corrected through measures that improve the quality of legal services and the quality of police investigations and guidance), the out-of-date doctrine (which sees in the category of "criminal intent" a need for proof of a psychological order and, hence, the necessity to vie for the prevalence of another mode of understanding the elements that comprise the notion of crime), "excess demand" on the court's behalf or some sort of predisposition to absolve (which should certainly be the object of democratic and critical control, but which can only be confirmed through empirical analyses), or the fact that most of the cases depend on personal evidence.

It is evident that the premature termination of the cases is not the kind of response expected from the social movements or affected parties who submit their demands to the legal system. But there are a whole series of possible explanations for the termination of these cases; these statistics cannot be reduced to the unproven thesis that the legal system is impermeable to racism cases, or that it is somehow acting in an ideological manner and has an interest in undermining antiracist legislation.

All in all, the number of cases in which the court orders a trial or issues a condemnation is more or less equivalent to the number of cases in which it terminates the criminal action or absolves. In other words, within the universe analyzed, there is a reasonable amount of recognition that racist practices are illegal and should be persecuted and condemned.

In fact, rulings exist that describe racist attacks as "archaic slang, devoid of racist content" or "destitute of any pejorative meaning," in cases in which neither the event itself, nor the identity of the perpetrator were being questioned. It is only in the context of these cases that one can state firmly that the judge trying the case is insensitive to racial conflict. However, these cases occur on a much smaller scale: in six cases of acquittal and in three cases of annulment of the case. These cases represent only 8.1% of cases.

II. CREATION AND APPLICATION OF LAWS IN THE JURIDIFICATION OF SOCIAL DEMANDS

The African-Brazilian movement's vindications of specific laws that criminalize racism have given little importance to the internal dynamics of the judiciary. The articulated defenses of theses about the interpretation of laws or a specific strategy that understands the judiciary as a sphere where

legal norms are hotly debated are not central to the movement's discourse. The African-Brazilian movement does not have among its core fighting strategies one that takes into consideration the autonomy of the judiciary in relation to the text of the statute.⁴⁸ In failing to recognize this, its discourse seems to operate on the supposition that a perfect coincidence can be attained between the written law and the result of its application, which we can describe as "legalist." Such a position is characterized by not focusing their discourse on the dispute of the meaning of the rules—that is, a discourse addressed to the authority applying the law.

We differentiate between a legalist and a literal point of view. The latter is characterized by literal interpretation of the laws, or rather, by adhering closely to the text, avoiding an interpretation that takes into consideration substantive objectives aimed at the norm and its application context.⁴⁹ A stance such as this leaves room for interpretation, but maintains that, in certain cases (or in most of them), in keeping with the fundamental principle of legal certainty, judges must come as close as possible to sentencing in accordance with the literal sense of the text. We describe the African-Brazilian movement's stance as legalist because we do not identify in its core strategy an articulated and specific discourse aimed at an attempt to argue about the meaning within the judiciary, not even to stand by eventual literal interpretations. Such a strategy is based on the fight for antiracist laws, but does not address the application of the law as a relevant moment.

The dominant legalist discourse of the African-Brazilian movement seems to rule out the development of a strategy to debate the meaning of statutes that does not expressly and specifically address racial issues. Brazilian law offers another path for the trial of racist acts in the legislation drafted on civil responsibility. This exemplifies a sanctioning regulation—albeit a civil one—though not specifically aimed at the sanction of racism. Research carried out in the TJSP database⁵⁰ showed that there are victims of racism, although not yet very numerous, who are seeking this path. This

48. A contemporary formulation of the independence of the moment in which judicial norms are applied is discussed in KLAUS GÜNTHER, *THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW* (John Farrell trans., State Univ. of N.Y. 1993). The classic formulation of the theme is in HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1932).

49. See, e.g., Larry Alexander, "With Me, It's All er Nuthin'": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 614 (2005).

50. For the analysis of court rulings in civil responsibility suits, we performed exploratory research on the TJSP database. We did not carry out a complete search; therefore, regarding this point, we cannot make any quantitative statement. See Tribunal de Justiça do Estado de São Paulo, Portal de Serviços e-SAJ, <http://esaj.tj.sp.gov.br/cjsg/consultaCompleta.do> (last visited Feb. 27, 2009). Even though it is still not conclusive from a quantitative point of view, we feel it can already offer some interesting qualitative points for reflection on the question of how racism may be dealt with within the Brazilian legal system.

constitutes a typical strategy of involvement in the process of the application of a legal norm—that is, of the juridification of the demands for racial justice by means of the dispute over the meaning that should be attributed to norms in the legal system.

It is worth noting that if drawing on this strategy presents the typical problems associated with the interpretation of norms, it also presents some advantages when compared to Brazilian criminal law. First, civil responsibility does not require the proof of the intention to cause harm; lack of care or diligence is sufficient. Furthermore, there are many cases of strict liability. Besides that, vicarious liability is also accepted, which is not the case in criminal liability.

Another interesting difference in relation to criminal responsibility is that there is no restriction in the civil sphere in trying legal entities. In Brazil, criminal responsibility of legal entities is confined to cases expressly specified in the law, which is not what happens with the crimes of racism and racial slander. An interesting piece of data is that of the civil suits tried by TJSP that we analyzed; several such suits were filed against legal entities.

It is also worth noting that civil responsibility can have a punitive character, which is something we also found in the TJSP decisions. As mentioned, the legalist strategy impedes or makes it difficult to address and explore alternative means of articulating legal avenues for trying such cases.

Laws are applied in specific ways that must be taken into consideration for such an articulation to take place. These specific characteristics are related to the circumstances of the concrete cases and to the relation between the normative text in question and all other existing texts in the legal system. The competent authority whose task it is to apply the law should take into consideration the specificities of the case and try to understand the norms systematically, relating them to each other.⁵¹ Obviously, if the perfect coincidence between the legal text and the result of the application process is a chimera, one can talk about the need for certain congruence even if the judiciary does not take a literal stance. Such congruence is essential, because authorities cannot simply ignore the norm's text and try cases without parameters.

The problem is that the lack of criminal convictions for racism is perceived by the social movements as a failure of the judiciary to apply the law independently of the internal dynamic evidenced by our research—that

51. There is not enough space to delve into this issue, but it should be noted that the process by which a norm is "elected" can often be described as an activity of "construction" because the normative material does not always make clear the rules to be applied. A vast array of statutes and other sets of norms have to be set forth in order to formulate an intelligible legal proposition. For a didactic description and complete discussion of this process, see KARL ENGICH, *INTRODUÇÃO AO PENSAMENTO JURÍDICO* (J. Baptista Machado trans., Fundação Calouste Gulbenkian, 6th ed. 1988). Ronald Dworkin explicitly characterizes the legal argument as constructive. See RONALD DWORKIN, *LAW'S EMPIRE* 52–54, 336, 423 (1986).

is, independently of the dispute over the meaning of the legal norms being applied and of the problematic incidence of specific penal procedures, which only became apparent after close examination of the way the laws were applied.⁵² The general evaluation of the way the court has been applying antiracism legislation does not take into consideration the specific legal dogmatic circumstances of criminal law. As we have seen, the law's enforcer has to deal with a whole series of categories ("racism," "racial injury," legality, specialty, and *ne bis in idem*), which increases the possibilities of interpretation, thereby increasing the indeterminacy of the norms.

As shown, the introduction of the category of "racial slander" through a new statute has not reduced the room for interpretation, as hoped. Furthermore, it was only through the reconstructing of the act of application, the procedural problem of the expiration of the period for the victim to bring the case before the court, that the main reason for the premature termination of cases became apparent. This fact allows us to say that the creation of a new statute does not necessarily eliminate the possibility of multiple interpretations, and it also throws light on the importance of the internal dynamics of the judiciary's power.

CONCLUSION

The evidence gathered in this essay allows us to conclude that, even considering the legal dogmatic difficulties that lead to a low conviction rate, the Brazilian judiciary is not indifferent to racism, at least in the country's most rich and populated state, São Paulo. The majority of the judicial decisions of the São Paulo Court of Appeals that we researched acknowledged that racism is illegal and that the incidences of such acts must be curtailed, even when not by means of enforcing the crime of racism. Such an acknowledgement makes it possible to go beyond a pessimistic and generalized outlook in which judges are racist or our judiciary is insensitive to the fight for equality, and to investigate further the very elements within the system that contribute to the absence of satisfactory answers. This recognition permits the development of better strategies to safeguard one's right to not be discriminated against, including a strategy directed specifically toward lawyers who bring cases before the judiciary.

Beyond this, a more general diagnosis of the judiciary's alleged insensitivity could not be restricted to criminal issues, a concept that has been the main strategy in the discourse of the African-Brazilian movement.

52. It is worth emphasizing that we are not discussing the social effectiveness of the law—that is, its real effects in society—because such a concept would demand the verification of not only the rulings, but also of whether the response of the judiciary actually changed the situation in society. We are only debating whether the judiciary, or more specifically, São Paulo's judiciary, has been sensitive to the question of racism in its application of the law.

The civil cases should also be included, as well as others we did not include in this study.

It is worth emphasizing that the evidence found shows that, in terms of civil responsibility, there are nowadays lawyers working to obtain antiracist results from laws that were not specifically construed to deal with racial issues, even though this strategy does not appear in the discourse of the African-Brazilian movement. Possibilities such as these, which can be applied to other areas, such as work relations, reveal the importance of the room for arguing about the meaning of legal norms and the important role of lawyers in actively pursuing this process.

As we have already shown, in terms of penal legislation, the data confirms that the judiciary does not consider such discriminatory acts as legally irrelevant. A significant problem was the creation of the crime of racial slander without allowing the district attorney to initiate the criminal procedure, instead leaving the victim to initiate the case. In a large number of cases, the court's ruling in favor of racial slander is justifiable from an internal legal standpoint. The practical, undesirable result of this type of decision cannot be evaluated without taking into consideration the procedural problems we have outlined, which indicate that the creation of a specific statute resulted in further complexity without solving the problem it set out to solve. In terms of the current situation, it seems that, in this case, a statute for solving the problem of duplicity of procedures could avoid the early termination of cases by eliminating the difficulty arising from the victim's failure to comply with deadlines.

A discussion of the juridification of racism cannot be reduced to the concern over criminal condemnations. Whatever the strategy adopted, if it is dependent on the application of legal norms—by a judge or other authorities—it will not avoid the question of incongruence between the norm and its application. This implies that any social movement developing a legal strategy must take legal dogmatics into consideration. In other words, it must take part in the debate over how to establish the meaning of the norm. Ignoring this problem can be dangerous to democracy.

At the very least, the defense of legalism as the suppression of the judge's freedom and the complete elimination of the possibility to interpret laws constitute an authoritarian strategy that controls the judiciary and constitutes a threat to its sovereignty. Of course, a radical position like that appeared only in fascist regimes. Nevertheless, there is an antidemocratic bias in ignoring the inner dynamics of the application of norms, even if only an unconscious one.

An independent judiciary should be able to interpret, for itself, public opinion.⁵³ Historically, the judiciary has severed ties to the Executive power and this has guaranteed that judges cannot be arbitrarily removed

53. See OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 186 (1961).

from their posts—a process that consolidated the judiciary into an independent political player, whose decisions cannot be subordinated in administrative terms, neither to the Executive nor to the legislature.⁵⁴

In its separation from the Executive, the judiciary establishes a direct relationship with society. Its foundation of legitimacy is public opinion, not orders that come from another superior power. The judiciary solves the conflicts that come before it independently according to the law it deems best to apply to each case. For this reason, the corollary of judicial independence is the indetermination of the law—the impossibility of predicting a solution to be applied to a conflict.⁵⁵ An independent court is one in which the plaintiff does not know what to expect and in which an element of risk faces the accuser. Indetermination, from the judge's point of view, best describes the process of choosing the appropriate norms for the case as well as how to interpret those norms.

The freedom to interpret and apply legal norms is current in various western legal systems. No one asks the plaintiff what legal rules should be applied to the case at hand (*jura novit curia*); the court is obliged to know the applicable law, which means that the court has the power to determine independently what rule should be applied to the case. Such a possibility allows the judge to rule not only in light of the affected parties, but also to consider the interests of third parties or society as a whole, as long as they can be founded in legal norms. Concomitant with the freedom of the courts is the duty to justify rulings or, rather, to make clear the reasons behind rulings. Such decisions are addressed directly by the litigating parties, but are also directed at the public sphere, which is interested in a judiciary that treats similar cases in a similar way and protects both third-party and societal interests by applying legal principals and rules.

Some aspects of the repression of the judiciary's freedom clearly show the atrophy of the justification of judicial decisions in authoritarian regimes and the centrality of this characteristic in defining modern Western courts. According to Otto Kirchheimer, authoritarian regimes prohibit the development of private commentaries made on laws, tantamount to prohibiting the development of extraofficial doctrines. In the German Democratic Republic, for example, there was an official legal journal in which lawyers associated with the regime outlined decisions every lawyer and judge had to follow.⁵⁶ Furthermore, the legal profession lacked prestige and the lawyer's role as representative of specific social demands was repressed.⁵⁷ The whole system was set up so that the government's reasons were faithfully passed on to the judge to suppress her power to interpret and apply the law.⁵⁸ The "justification" of the decision was

54. *Id.* at 18, 186.

55. *See id.* at 426.

56. *See id.* at 269.

57. *See id.* at 274.

58. *See* FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933–1944, at 453–54, 630–32 (Octagon Books 1963) (1942); FRANZ NEUMANN,

already contained within the government's dictate, and the court's job was not to convince the general public, but to reaffirm sovereign authority. The judge, if he or she failed to follow governmental decrees, could be removed; such was the almost nonexistent level of his or her freedom.⁵⁹

These observations allow us to point to the importance of clearly distinguishing between legalist positions that perceive interpretation as something untoward, and literalist positions that recognize the existence of a space for interpretation but defend that judges should adopt a particular way of exercising their power. The lawyer who advocates for the creation of certain rights in spite of a lack of specific legislation plays an important role in interpreting existing laws. The suppression of the indeterminacy of law, as we have already shown, is also the suppression of the judge's and the lawyer's freedom to act, and favors the creation of a centralized power base for interpreting existing laws.

THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 294–96 (1986).

59. Recent research shows that, even in authoritarian regimes, courts can be relatively autonomous:

Even when courts are used for social control, they vary a good deal in the extent to which they enjoy real autonomy. Stalinist show trials—though a tiny part of the criminal caseload of Soviet judges—utilized courts for political education and the statement of regime policies, employing the form of law without any autonomy given to courts. But other regimes may be less willing or able to dictate outcomes in individual cases. One might categorize the levels of autonomy of courts involved in implementing regime policies, ranging from pure instruments in which outcomes and punishment are foreordained to situations of relative autonomy in which courts can find defendants innocent.

Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 4 (Tom Ginsburg & Tamir Moustafa eds., 2008).