

RACIALISING THE DEBATE ON HUMAN RIGHTS

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- *Limits and possibilities for criminalisation of racism in Brazil* •

ABSTRACT

The work develops the category of amefricanity developed by Lélia Gonzalez as the base of a human rights analysis that is both afrodiasporic and anchored in the processes of resistance to coloniality in Abya Yala. In order to develop possible implications of the functioning of the law in the terms described above, we will analyse the political construction of the criminalisation of racism and the challenges arising from its mobilisation in jurisprudence. Embodying the subjects who are socially positioned as representatives of the zone of non-being, we seek to explore the limits and possibilities of human rights discourse to account for the genocidal reality to which we have traditionally been submitted.

KEYWORDS

Amefricanity | Human Rights | Racism | Decolonialism

1 • Introduction

We begin by centralising the category of race through an analytical, political, and normative lens when considering human rights. We attempt to racialise the discussion on human rights in order to politicise it, offering an *Amefrican* proposal that allows for redirection of the discussion in an Afro-centric way rooted in the Brazilian experience and engaged with the intersections of race, class, gender, sexuality, and capacity as structural and structuring intersubjective and institutional relations (and not as attributes of identity).

Based on the category of *amefricanity*,¹ a human rights analysis, one that is both Afro-Diasporic and anchored in the processes of resistance to coloniality in Abya Yala, can be developed.² Embodying individuals that are socially positioned as representations of the *zone of non-being*, we seek to explore the limits and possibilities of human rights discourse to account for the genocidal reality that we have historically been subjected to.

Influenced by Frantz Fanon,³ we advance the concepts of the *zone of being* and *the zone of non-being* to make the explicit premises that are the foundations of this paper. The modern/colonial project mobilised the category of race to draw a line that unequivocally separates two zones: that of the human (*zone of being*) and that of the nonhuman (*zone of non-being*). As the standard of humanity is determined by the sovereign subject (man, white, cis/hetero, Christian, and in the economic sphere, a property-owner and without debts), this will also define the subject of law from which all juridical narrative will be constructed.

Based on the premise that normative construction (both theoretical and jurisprudential) is produced from the experience of the *zone of being*, we seek a narrative that repositions the role of human rights regarding the processes of violence over the *zone of non-being*. The protection and promotion of human rights is based on the reality of the *zone of being*. This has produced a society incapable of understanding and responding to the violence that manifests in the *zone of non-being*. This makes this not being a possible condition that sustains that humanity is an exclusive attribute of the *zone of being*.

The normalisation of the *zone of being* as representative of the complete, autonomous, and centred processes of violence that structure and condition the very perception of what can be understood as violence. Violence, as a standard model of conflict resolution in the *zone of non-being*, is underscored in aspects such as ineffectiveness or violation of law, which replicate the illusory protection that legal colonialism offers to non-white bodies and experiences. In order to discover some of the possible implications of the functioning of the law in the terms described above, we will analyse the political construction of the criminalisation of racism and the challenges arising from its mobilisation in jurisprudence in the Court of the state of Rio de Janeiro.

2 • The complicities of human rights discourse in the (re) production of violence

A belief in the ideas of universality and neutrality of human rights have resulted in appropriation of this agenda in a hierarchical and violent form for social groups that are marginalised and deprived of material and symbolic goods for well-being.

These aspects are not exclusive to human rights, they are present in the broader dynamics of the law. Therefore, it is necessary to highlight these limitations so that initiatives seeking to produce full living conditions and curb dehumanisation processes are given significance not just through their potential but also from what they are complicit in.

Confidence in the universality and neutrality of human rights is accompanied by the development of economic-political models based on inequality and removal of conditions for living well in the *zone of non-being*. The shared belief that a “neutral” legislative activity will pave the way for the promotion of an equal, just, and democratic society has become a very efficient “truth” to legitimise an unequal and racially selective reality.

The construction of nation states was based upon determination of a colonial model that hierarchised, in ethnic-racial terms, the civilised and rational (European) compared to the barbarian and savage (indigenous and black), as well as by a form of appropriation of nature that puts it at the service of capitalist accumulation. This perverse hierarchy was justified by theoretical currents such as scientific (biological and culturalist) racism, social Darwinism, and positivism, which reinforced the humanity of some at the expense of many others.

Objectified, dehumanised, infantilised, subdued; there are many expressions that denounce the treatment of those who are in the *zone of non-being* due to the modern colonial slave project and by updated forms of disrespect and extermination.

Given the effects of legal colonialism, it only makes sense to consider strategic actions utilising law (using the law against itself) if we agree that there are limitations of that field. The potential of human rights only makes sense if understood based on representations about the human that define the very contours of legal protection itself. The cruel reality of those living in the *zone of non-being* does not reveal a violation of law, but the most well-enforced application of law (and human rights), under the terms for which it was conceived to act and for the subjects for which it was considered to function.

Legal categories were created by and for the *zone of being*. From the point of view of development of the law and its application process, the experiences of violence that occur episodically in the *zone of being* determine the contours of protection and the vocabulary from which the violations will be made intelligible and accessed. Beyond this spectrum violence is naturalised, institutionalised, and often legitimised as a policy of public (un)

safety. The composition of conflicts in the *zone of non-being* is based on violence as a norm, especially when it is afflicted by the state.

We need courage to face an illusory model of human rights protection, which considers violence in an abstract and occasional way, so that we may construct legal categories that can respond to concrete and permanent structural violence that presents (im)possibilities for recognition and exercise of our full humanity.

3 • Criminalisation of racism

Legal norms reflect moral hierarchies and power strategies, revealing sociability and mechanisms of production of and of coping with inequalities. Contrary to the common narrative that legal segregation does not exist in Brazil, an analysis of the criminal justice system does not exhaust this hypothesis, but allows us to access the clearest examples of public initiatives of apartheid. This apartheid has been shown as successful by, among other aspects, the statistics that show the skin color of the world's third-largest prison population.

Officially exercising the right to segregate goes beyond developing legal statements with an affirmatively discriminatory character. The following can also be considered examples of institutional racism: failure of anti-racist norms and measures to promote racial equality and strengthening the image of the black man as nonhuman, inferior, delinquent, primitive, lascivious, and servile.

The primary function of the penal system is to determine deviant conduct based on specific social conflicts. The racially selective Legislature, Judiciary, Public Prosecutor, Police, and Prison Departments choose social groups (and ways of life) that are worthy of protection while their enemies' lives are treated as disposable.

The system of values represented in criminal law expresses the moral universe of a bourgeois-individualist culture, which places the greatest emphasis on the protection of private property and is predominantly oriented towards diverting socially marginalised groups.⁴ The processes of law-making questioned through the lens of class must reach other standards of oppression within it, under penalty of not portraying all the dimensions that comprise the processes of dehumanisation over the *zone of non-being*.

Racism and, consequently the racial selectivity of the penal system, is not a black problem; it is a problem of the racist, sexist, classist, Christian, and cis/heteronormative hierarchy that has been structured herein, and it is necessary to declare it in such terms.

In this paper, we do not aim to analyse the factors for denouncing racism of the primary, secondary, and tertiary criminalisation bodies when they apply criminal rules for "protection" of the object of the law and disproportionately punish those who inhabit the *zone of non-being*. We are interested in unveiling what the criminal justice system understands as racism.

When tasked with deciding if a particular conduct constitutes the crime of racism, the Judicial Power must state the terms in which the conduct is perceived. In addition, such actions have the potential to inform us about the contours that define the application of anti-discrimination legislation. That is, in these cases, we can observe how the criminal justice system behaves when the normalised subject of law is subverted: moving from the *zone of non-being* to the “model” on which legal protection needs to be informed and the figure of the delinquent linked to bodies that inhabit the *zone of being*.

In the constitutional context of 1945/46 and its resumption in 1987/88, the proposal for criminalisation of racism, disputed by the Brazilian Black Movements, intended to detach racism as a “problem” of the private order. The constitutionalising of their demand aimed to make racism a problem of public order, whose combat would pass to the responsibility of political institutions.

The measure repositioned in public discussion the cruelty of Brazil’s social stratification, demanded respect of bodies traditionally violated and showed that invisibility, exclusion, and discriminatory acts of speech represent serious violence which is not only reflected in direct victims (disproportionately and violently), but also in their aggressors (as demonstrated by Guerreiro Ramos in *A patologia social do branco brasileiro*).⁵ As much more than “simple offenses” or “misunderstandings”, the behaviours were classified as representations of the crime of racism that, if not curbed, offer the conditions for the maintaining of hierarchies of humanity among us, and public justifications for our extermination.

The criminalising of manifestations of disrespect appears as a political hallmark of minority social groups, as a way of making visible the violence perpetrated against them and by making the Public Power assume its responsibility in confronting material and symbolic conditions that support its vulnerabilities. The text of the constitution, for the first time, was positioned to seriously curtail discriminatory treatment of blacks, turning the practice of racism into an imprescriptible and felony crime.

Based on Article 5, XLII of the Federal Constitution, Law 7.716/89 classifies some of the behaviours recognised as resulting from discrimination or prejudice of race, colour, ethnicity, religion, or national origin.

Law 7.716/89 establishes two ways of dealing with the crime of racism: on a case-by-case basis (Articles 3 to 14 and 20, Paragraph 1) or under general conduct “Practicing, inducing or inciting discrimination or prejudice of race, colour, ethnicity, religion or national origin” (article 20, caput). If the conduct fits into the types defined in detail (in articles 3 to 14 and 20, Paragraph 1), the application of the general rule transcribed does not apply.

The specific conduct basically refers to acts related to preventing, denying, or refusing anyone access to the following: employment, commercial establishments, schools, hotels, restaurants, bars, sports facilities, hairdressers, the social entrance of buildings

and elevators, public transportation, serving in any branch of the Armed Forces, or preventing/denying marriage or familial/social co-existence.

When discrimination takes on the form of insults or exchanges of offences with racial motivation, the action is known in Brazilian law as *injúria qualificada* (aggravated disparagement), provided for in Article 140, Paragraph 3 of the Penal Code, introduced by Law No. 9.459, of May 13, 1997. The racial offence is therefore found when the offender refers to race, colour, ethnicity, religion, origin, or even the status of an elderly or disabled person. But if the offences precede the behaviors typified in the Caó Law, the special type and the consequences must be applied (felony crime, imprescriptible and with the corresponding penalty).

The crimes provided for in Law 7.716/89 are subject to unconditioned public prosecution, meaning that they do not depend on a complaint from the offended person, and the Public Prosecutor is responsible for filing charges and demonstrating the accused's accountability. Prior to establishment of Law 12.033/09, aggravated disparagement was punishable through private criminal cases. That is, the injured party had to file a criminal complaint, with a six-month deadline to bring the matter to the attention of the courts.

A change occurred in the text of article 145, single paragraph of the Penal Code in 2009, through Law 12.033, which made these crimes liable for public prosecution, as representative of the injured party. For this reason, in earlier proceedings, for many of the cases analysed, the lawsuit was filed as a complaint by an injured party and not a criminal complaint.

From the analysis of its mechanisms, it can be noted that most of the normative statements refer to practices of open racism. In Brazil, a country where the dynamics of racism present themselves through denial⁶ rather than open practice, article 20 of the Caó Law (mentioned above) remained to restrain such manifestations.

Understanding the dynamics upon which racism operates in each context is fundamental to creating political-institutional responses that confront its functioning in a concrete way. Racism manifests itself through individual conduct that promotes racial discrimination in its most varied forms of violence or through the full performance of public and private bodies in the expropriation of humanity, the disposal of lives, and the disproportionate mobilisation of violence against racially sub-alternated social groups. In relation to the analysis of the aforementioned legislative texts, we aim to emphasize two aspects: the way in which it treats the intersubjective dynamics of racism and its institutional dimension.

The first of these refers to the great investment of Law 7.716/89 in punishing racist acts that manifest themselves individually and in requiring that the intent (offence) of offending/removing/excluding can be proven. The dynamics by which racism operates in intersubjective relations must be understood so that the norm can be fully applied. In this sense, it must be emphasised that the myth of racial democracy masks the interpretations

about the behaviours that constitute practice of racism in Brazil, in addition to the fact that, according to Lélia Gonzalez, a great part of racist manifestations is more often expressed through denial than through open racism.

Secondly, from the perspective of legislative categorisation, measures to promote accountability against institutional racism are precarious. In the text of the Caó Law there is no legislative protection based on dynamics in which institutional racism is manifested, even if it is possible to mobilise Article 20 of the Caó Law, especially if applied in accordance with the Statute of Racial Equality (Law No. 12.288/2010), international human rights treaties effected in Brazil, and in accordance with the guidelines for national human rights plans.

In the jurisprudential context, with the Court of Justice of the state of Rio de Janeiro as an empirical reference, court cases are negligible compared with real frequency of racism and present an argumentative repertoire capable of showing the residual character of the cases.

Criminal cases in appeal from 1989 (the year Law 7.716 was issued) were analysed up until July 2018, with a 150 cases involving racism (in any of its forms) against black people. In 57.33% of the cases, there was a conviction and the classification of aggravated defamation (article 140, paragraph 3, of the Penal Code) was applied in 83.33% of the cases.

The choice of aggravated defamation as the main classification was mobilised for some time to prevent applying the felony and imprescriptible nature of the Caó Law. In August 2015, the Superior Court (STJ) stated in RE686.965-DF the recognition of racial insults as a crime of racism, applying all the consequences related to it, an understanding followed by the Federal Supreme Court (STF, ARE 983.531-DF) in August 2017. Due to the proximity of these Supreme and Superior court decisions and the fact that only appeals cases were analysed, it was not possible to measure their impact on judgments on racism cases by the Court of the state of Rio de Janeiro.

As previously explained, with the enactment of Law 12.033 in 2009, the hypotheses of aggravated defamation began to be the object of public criminal action. If by 2009 the Public Ministry had acted only in 36.95% of cases of racism, in the period between 2012 and July 2018 the index reached 87.8%. Despite the low number of cases (150) found during the period 1989-2018, there were 51 cases by 2011 and 99 cases under appeal from 2012 to July 2018.

In the reading of the judgments, one notes that the perception of racism is reduced to an intersubjective, willful, and open dimension, and that the courts have opened the doors to a narrative historical processes of dehumanisation, according to the following examples.

In case 0016651-42.1999.8.19.0001 (2000.050.04827), the defendant was convicted of *injuria simples*, or a simple insult (as opposed to aggravated defamation) on the grounds that “not every expression of ‘black shit’ ... will be informed by prejudice. [...] The first element is only designative, indicator of the recipient of the offense”.

In the judgment of case no. 0132379-29.2002.8.10.0001 (2003.050.04038), the defendant, assuming that the victim attacked her pet animals, uttered the following words: “repellant black, disgusting, black pestilence...the place of the blacks is in slave quarters”. The defendant was acquitted on the grounds that “when she saw her pets being mistreated by the respondent, a cholera took over the appellant, who, taken by strong emotion, ended up venting her anger.”

In Criminal Appeal 0027910-32.2013.8.19.0037, the allegation is what the defendant said:

This bastard monkey breed is good for nothing. I do not know why they put these people here. Blacks are not people. Go back and live on a hillside, you monkeys. Go back to the bush, go back there, you bunch of monkeys, and take this blond, white monkey with you.

The issue was treated as “a disagreement” between neighbors, resulting from the irregular construction of windows next to the defendant’s house.

The criminal legislation, which used to publicly exhibit conduct considered harmful and unacceptable, has always been very effective in affirming to black men and women the behaviors they should avoid and showing them their place in society, but is less effective in protecting us against racism. Institutional racism, mass incarceration, and the historical ineffectiveness of anti-racist criminal standards create a scenario in which the criminal justice system is a cruel cog for the grinding of black bodies.

The historical political agenda of the black movements is traditionally against the standard processes of incarceration, torture, and servitude. From the promulgation of the Constitution of 1988 until the first half of 2016 there has been progress in affirmative action in the field of education and in the labour market, in access to land, and through other recovery and valorisation measures of our culture and memory in the process of formation of Brazilian society.

The message that says that insults should not be naturalised, exclusions should not adopted with resignation, and that determined social places are related to a system of privileges that intended to be broken causes blacks to confront the privileges of whiteness in all forms (judicial or extrajudicial) that are democratically admitted, in which the criminalisation of racism does not cease to be a part.

4 • Amefricanising human rights

Given the way that the justice system mobilises anti-discrimination legislation, a commitment to access other references for the construction of the law is needed, so that it may respond to the demands of the *zone of non-being*. The political-cultural category of amefricanity seeks the experiences of re-existence that the black praxis constituted in Abya Yala and whose historical importance was denied to us. The intention is to bring these

experiences to the heart of the analysis so that they become sources of new practices, new institutions, and new responses.

This *amefricanity* is produced, according to Lélia Gonzalez,⁷ based on re-existence and creativity that sustained the black diaspora struggle, carried out by women from a colonial legacy that was forged here, in the direct, concrete, and permanent confrontation with genocide, in all its dimensions. The category makes it possible to rewrite the historically (in)tense cultural dynamics between Afro-diasporic, Amerindian, and European heritages, which constituted us from processes of resistance, acculturation, assimilation, and creation of new ways of being in the world of daily and institutional violence.

This is an epistemic-methodological proposal that takes seriously the challenges of self-inscription due to a warning by Achille Mbembe⁸ about the need to radically break with the hierarchical descriptions that coloniality has made of us. We do not dispute the possibility of being included (always in a controlled way) in the notion of subjects of the law; we dispute the possibility of producing the law, the State and the politics from our place and in our terms.

The *amefrican* experience has much to contribute to the redefinition of human rights, with the determination and creativity that allowed the Black Diaspora to survive centuries of oppression. These re-orientations aim to respond to the world it has in fact inherited, not to the world idealised by human rights declarations. The category of *amefricanity*, informed by denouncing the myth of racial democracy and public policies for whitening, hosts a sophisticated racial literacy to think about the context of the political dispute that we are experiencing.

In the creation of politically complex societies such as *quilombos* and in the many experiences of *quilombo* residents,⁹ we develop the concepts of resistance and liberty imbued with its own contours that can inform alternative mechanisms for co-existence, (im)material production, relationships with nature, and political organisation.

A longing and respect for Mother Africa, boycotts, hunger strikes, teachings from black culture, the Black Experimental Theater, Black Press, Brotherhoods, research centres that were created in the 1970s and 80s, the soul dances, and samba schools, among many other initiatives, indicate that the concepts of resistance and freedom that are mobilised to apply the law cannot fully account for the reality experienced in the *zone of non-being*.

The *amefrican* experience makes it possible, for example, for violence to be thought about based on the disproportionate impacts of the processes of dehumanisation in the *zone of non-being* and not from the processes of destabilisation of hegemonically stated normality and that maintain freedom as an exclusive attribute of the *zone of being*.

The battle against racism is based on a fight against the structures that support the colonial-slave legacy embedded in a model of modernity that is racist, sexist, cis/heteronormative, and capitalist. As long as the model of production and appropriation of bodies built under

the logic of dehumanisation and discarding of human beings remains, forms of hierarchy of persons will continue to be (re)produced and naturalised. Against all this, there is renewed efforts in the political sphere, in law created from the *zone of non-being*, and in intercultural co-existence for construction of a free and concretely democratic reality.

NOTES

1 • Lélia Gonzalez, "A Categoria Político-cultural de Amefricanidade," *Tempo Brasileiro*, nº 92/93 (jan./jun. de 1988): 69-82.

2 • According to Yuderkys Espinosa-Miñoso, *Abya Yala* is the name in the Kuna language to designate "Land in full maturity" or "land of vital blood", ie. the territory that represents the continent that the Spanish colonizers came to call America. For more information, see: *Tejiendo de Otro Modo: Feminismo, Epistemología y Apuestas Descoloniales en Abya Yala*, eds. Yuderkys Espinosa Miñoso, Diana Gómez Correal e Karina Ochoa Muñoz (Popayán: Editorial Universidad del Cauca, 2014): 15.

3 • Frantz Fanon, *Pele Negra, Máscaras Brancas* (Salvador: EDUFBA, 2008).

4 • Alessandro Baratta, *Criminologia Crítica e Crítica do Direito Penal – Introdução à Sociedade*

do Direito Penal, trad. Juarez Cirino dos Santos, 3ª ed., Coleção Pensamento Criminológico nº 1 (Rio de Janeiro: Revan, ICC, 2002): 176.

5 • Alberto Guerreiro Ramos, *Introdução Crítica à Sociologia Brasileira* (Rio de Janeiro: Editora UFRJ, 1995): 215-240.

6 • Lélia Gonzalez, "Nanny," *Humanidades* 17, ano IV (1988): 23-25.

7 • *Ibid.*

8 • Achille Mbembe, "As Formas Africanas de Auto-inscrição," *Estudos Afro-asiáticos* 23, no. 1 (2001): 171-209.

9 • Abdias Nascimento, "Quilombismo: Um Conceito Emergente do Processo Histórico-cultural da População Afro-brasileira," in *Afrocentricidade: Uma Abordagem Epistemológica Inovadora*, org. Elisa Larkin Nascimento (São Paulo: Selo Negro, 2009): 197-281.

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