

Working Paper, No. 18, 2012

**Transnational Articulations
of Law and Race in Latin America**
A Legal Genealogy of Inequality

Manuel Eduardo Góngora-Mera



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Research Network on Interdependent
Inequalities in Latin America

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Góngora-Mera, Manuel Eduardo 2012: "Transnational Articulations of Law and Race in Latin America. A Legal Genealogy of Inequality", **desiguALdades.net** Working Paper Series, No. 18, Berlin: **desiguALdades.net** Research Network on Interdependent Inequalities in Latin America.

The paper was produced by Manuel Eduardo Góngora Mera during his postdoctoral fellowship at **desiguALdades.net** from 08/2010 to 07/2012, from research conducted at the Lateinamerika-Institut (LAI, Berlin), the Ibero-Amerikanisches Institut (IAI, Berlin) and the United Nations Research Institute for Social Development (UNRISD, Geneva).

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Transnational Articulations of Law and Race in Latin America

A Legal Genealogy of Inequality

Manuel Eduardo Góngora-Mera¹

Abstract

Until quite recently, Latin American countries widely assumed that legal discrimination against ethno-racial groups was a practice that took place elsewhere but not in the region. Somehow, the articulations between law and racial inequality remained successfully covered for almost two centuries. By tracing how such articulations could be hidden for so long, this article changes the focus on domestic legislation and offers a legal transnational approach for the analysis of the multi-scale intercrossing of racial discourses through law. It aims to elucidate the chronological and epistemic concurrence between different legal projects of racial stratification operating in different world areas and to expose the crucial role that law played in the racialization of society under colonial rule, and the continuities of such role in Latin America until the twentieth century.

Keywords: Race | Inequality | Legal Discrimination | Histoire Croisée | Transnationalism

Biographical Notes

Manuel Góngora is a post-doctoral researcher at the Institute for Latin American Studies of the Freie Universität Berlin as member of desiguALdades.net, Research Dimension IV on theory and methodology. He is a lawyer and holds the degree of Magister in Economic Law from the Pontificia Universidad Javeriana in Bogotá; as well as Magister of International Economic and Development Policy from the Friedrich-Alexander Universität Erlangen-Nürnberg. He earned his Ph.D. in Public Law from the Humboldt University of Berlin within a Deutsche Forschungsgemeinschaft (DFG) Research Training Group on multilevel constitutionalism. He has written extensively on international constitutionalism, international human rights law, social rights and other human rights issues. His current research interests lie in the links between transnational/international law and social inequalities both on a global scale and with a focus on Latin America.

¹ I would like to thank the participants of the desiguALdades.net colloquium for their comments and feedback. I am especially grateful to Sérgio Costa, Barbara Göbel, Marianne Braig, Manuela Boatcă, Juliana Ströbele-Gregor, Hilda Sabato, Bernd Reiter, Víctor Hugo Acuña and André Cicalo for their advice and valuable comments. I am indebted to the research staff of the United Nations Research Institute for Social Development (UNRISD), especially to Yusuf Bangura, Katja Hujo and Peter Utting for reading and commenting on the first draft. Any errors in this article are my own.

Contents

- 1. Introduction**
- 2. Race and Inequality: A Legal Transnational Approach**
 - 2.1 Addressing Race as Transregional Inequality – The Central Role of Law
 - 2.2 The Legal Lineage of ‘Race’
 - 2.3 Transnational Articulations of Inequality Regimes
- 3. Inequality Regimes in Latin America from the 17th to the 20th Century**
 - 3.1 Transregional Articulations of Law and ‘Race’ in the Caste Regime
 - 3.2 From the Caste Regime to Racist Nationalism: Ruptures and Continuities in the Articulations of Law and Race after Independence
 - 3.3 From Racist Nationalism to Mestizo Nationalism: Legal Attempts of Blanqueamiento and Invisibilization
- 4. Conclusion**
- 5. Bibliography**

1. Introduction

The relationships between law and 'race'² throughout world history can be characterized as Janus-faced. On the positive side, law has been used as instrument to fight racial discrimination 1) by the provision of accessible (criminal and civil) remedies for individuals who have suffered direct discrimination or 2) by the provision of preventive measures in order to obtain some tangible reduction in the incidence of racial discrimination. Moreover, law can go beyond reactive and preventive measures against racial discrimination and also be used 3) as a vehicle of social engineering to counteract not only direct discrimination but also the social, cultural, political and other factors which can underpin indirect discrimination and racial disadvantage.³

On the negative side, law has been used to naturalize and institutionalize racial discrimination and exclusion: from general laws regulating citizenship,⁴ housing/land,⁵ the right to vote,⁶ or the official language⁷ to legal (or even constitutional) racist provisions banning interracial marriage and sex ('anti-miscegenation laws'⁸), restricting freedom of movement and free choice of employment to secure the supply of cheap

² The term 'race' is used here as socio-political construct. Cf. in detail: Bangura/Stavenhagen 2005: 3-7.

³ On this tripartite classification see MacEwen 1999: 427.

⁴ E.g. the 1935 *Reichsbürgergesetz*, one of the 'Nuremberg Laws' that deprived Jews of German citizenship; the US federal naturalisation statutes that restricted US citizenship to free white persons until 1954; or Israel's 2003 Citizenship Law banning Palestinians who marry Israelis from gaining Israeli citizenship.

⁵ E.g. the South African 1913 Natives Land Act, which made it illegal for blacks to purchase land from whites except in reserves.

⁶ E.g. the Felony Disenfranchisement Laws in the United States, prohibiting people that have been convicted of a criminal offence from voting. Such laws (complemented with other regulations on property qualifications to vote) were performed with conscious impact against African-Americans particularly by Southern States upon the passage of the 15th Amendment in 1870 (that gave non-whites the right to vote) in order to reduce political participation of blacks, although technically they did not deny the right to vote based on race. According to Human Rights Watch (HRW), as of 1998, 13% of African-American men (1.4 million) were disenfranchised, representing just over one-third of the total disenfranchised population (estimated in 3.9 million US citizens); in eight states, one in four black men was disenfranchised. See HRW 1998.

⁷ E.g. the British monolingual laws in Hong Kong that established English as the exclusive language in legislation and judicial proceedings and that according to Cheung resulted in 'linguistic apartheid' and 'alienated Hong Kong's local population, which is ninety-eight percent ethnic Chinese, from the legal system (...) leading to inequality and injustice.' Cheung 1997: 315-316.

⁸ E.g. the US anti-miscegenation legislation (from the seventeenth century until 1967); the 1935 *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* (Law for the Protection of German Blood and German Honour) of Nazi Germany; the South African 1927 Immorality Act; or the current Danish immigration and marriage laws establishing unreasonably strict requirements for foreign would-be spouses and for those already in Denmark who wish to marry a Dane.

labor (e.g. 'pass laws'⁹ and 'black codes'¹⁰), restricting the right of certain groups to have children or to live with them (e.g. forced settlement,¹¹ forced sterilization and other eugenic law¹²), establishing hierarchies among racial groups,¹³ or instituting slavery¹⁴ and racial segregation.¹⁵

Until quite recently, Latin American countries widely assumed that state discrimination against ethno-racial group¹⁶ was a practice that took place elsewhere but not in the region.¹⁷ For almost two centuries, a legal veil of formal equality stimulated the intuition

⁹ South African 'Pass laws' (the first one introduced in 1760) regulated movements of blacks, who were required in urban areas to carry pass books with the name of the district where the pass owner was allowed to look for work. This system helped the white mine-owners control the supply of black miners.

¹⁰ 1860s Black Codes in several southern states in the United States prevented blacks from entering into skilled occupations and declared blacks to be vagrants if unemployed and without permanent residence.

¹¹ E.g. the Aborigines Act 1905 in Australia, which institutionalized the policy of removing so called 'half-caste' Aboriginal children from their parents for their biological absorption into white society.

¹² E.g. Virginia's Racial Integrity Act of 1924 and other eugenic laws with emphasis on racial segregation in the United States; or the 1933 *Gesetz zur Verhütung erbkranken Nachwuchses* (Law for the Prevention of Hereditarily Diseased Offspring) of Nazi Germany, that allowed the sterilization of African-German children.

¹³ E.g. The 1930 Portuguese Colonial Act (that divided the population into indigenous and nonindigenous) and the 1938 *leggi razziali* (a set of laws enacted in Fascist Italy that declared the Italians to be descendants of the Aryan race to justify subordination of 'races' that were seen as naturally biological inferiors).

¹⁴ E.g. the Slave Laws in the British colonies (in detail, see Nicholson 1994 38-54) and some slavery clauses of the 1787 US Constitution, in particular, Article 1, Section 2, clause 3 (the 'three-fifths' compromise); Article 1, Section 9 (the international slave trade clause, where Congress was limited from prohibiting the 'importation' of slaves for twenty years, thus states could continue the international slave trade) and Article 4, Section 2, clause 3 (the fugitive slave clause, fundament of the fugitive slave laws of 1793 and 1850, an assurance that slaveholders would be guaranteed the right of capturing fugitive slaves even in states where slavery had been abolished). In detail, see Higginbotham 2010: 101-114.

¹⁵ E.g. the US 'Jim Crow Laws' (1876-1965); the anti-Chinese legislation in Indonesia (1959-1998) or the Apartheid legislation in South Africa (1948-1994).

¹⁶ Although the concept of 'race' does not necessarily coincide with ethnicity, both terms converge when referring to racial discrimination. According to UN standards, 'racial discrimination' encompasses discrimination based on race and ethnicity (see Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)). Thus, for the restricted purposes of this paper, groups that have suffered historical disadvantages based on race or ethnic origin will be considered together as 'ethno-racial groups'.

¹⁷ Ariel Dulitzky illustrates this point particularly well: 'Nothing epitomizes Latin Americans' view on this issue as well as the declaration of the presidents and heads of state of South America that was issued in 2000 at a meeting in Brasilia. This statement reads: "The Presidents [of South America] view with concern the resurgence of racism and of discriminatory manifestations and expressions in other parts of the world and state their commitment to preserve South America from the propagation of said phenomenon." Or as the Mexican government put it, "the Government of Mexico opposes any form of discrimination, institutionalized or otherwise, as well as the new forms of discrimination, xenophobia and other forms of intolerance that have emerged in several parts of the world, particularly in the developed countries." (CERD/C/260/Add. 1. Paragraph 155). In short, these leaders concur

that, contrary to the experiences in other world regions, Latin America had escaped the Janus-faced articulations of law and 'race': some countries conceded citizenship to ethno-racial groups as early as the independence; slavery was legally banned some few decades later; *de jure* segregation systems (as in the United States or South Africa) did not exist; anti-miscegenation or sterilization laws were a rare exception.¹⁸ But this constitutional and legal idealism masked the deals that the political elites made to keep their privileges and manage social hierarchies; this ultimately resulted in structural discrimination: ethno-racial groups were *de facto* not identically situated with 'whites' and were legally ignored and socially excluded¹⁹ from the community of equals. Indeed, in most Latin American countries, the constitutional recognition of indigenous peoples or/and Afro-descendants as such and their collective rights took place only at the end of the twentieth century.²⁰

In order to understand how such articulations could remain covered for so long, this article changes the focus on domestic legislation²¹ by proposing a legal transnational approach, largely inspired by Foucauldian thinking and the methodology of *histoire croisée*, for the analysis of the multi-scale intercrossing of racial discourses through law.²² The article aims to expose the crucial role that law played in the racialization of society under colonial rule, and the continuities of such role in Latin America until the twentieth century.

that racism and racial discrimination are practices that take place in other regions and that Latin Americans possess a moral fortitude that cannot and does not allow any discrimination to go on in their countries. Moreover, this statement echoes the widespread sentiment of the region. (...) [T]his type of denial is synonymous with saying that there has never been any racial discrimination or racism in the past nor is there any at the present time. Over the past few years, different governments of Latin America have made statements to the Committee on the Elimination of Racial Discrimination claiming, among other things, that "racial prejudice" does not exist (CERD/C331/Add. 1, 1999, Dominican Republic: 6), "in our country problems of discrimination do not exist," (CERD/C263/Add. 8/Rev 1, Venezuela: 77); "racial discrimination does not exist," (CERD/C/336/Add. 1, Haiti: 15 and 17); "today racial problems practically... do not exist any longer" (CERD/C/SR. 1317, Peru: 78); "this phenomenon does not appear in our country" (CERD/C/260/Add.1. Mexico: 157), or "in society... at the present time racial prejudices, are practically negligible..." (CERD/C/319/Add. 4, Cuba: 16).' (Dulitzky 2001: 86 and 89-90).

¹⁸ E.g. the 1923 Civil Code of the state of Sonora (Mexico) that prohibited marriage between Mexican women and Chinese men; or the Act 116 of 1937 regulating eugenic sterilization to control population growth of the Puerto Rican people.

¹⁹ Social exclusion is defined here as 'the denial of equal access to opportunities imposed by certain groups of society upon others.' See Buvinic 2005: 5.

²⁰ 1987 in Nicaragua (Art. 8); 1988 in Brazil (Preamble); 1991 in Colombia (Arts. 1, 7 and 8); 1992 in Mexico (Art. 4) and Paraguay (Arts. 62-67); 1993 in Peru (Art. 2, para. 9); 1994 in Argentina (Art. 75, para. 17) and Bolivia (Art. 1); 1996 in Ecuador (Art. 1); and 1999 in Venezuela.

²¹ On the shortcomings of methodological nationalism for the analysis of inequalities on a world scale, see Weiss 2005: 707–728; and Korzeniewicz/Moran 2009.

²² On the methodological contributions of *histoire croisée* in relation to the comparative approach and transfer studies, cf. Werner/Zimmermann 2006.

For this purpose, I introduce Sérgio Costa's definition of 'inequality regime'. This concept serves to depict transnational interconnectedness between legal texts and to place norms in the center of the analysis of racial inequalities. The concept is also useful for the study of long periods of time, because it allows a focus on regime change (i.e. major shifts in the racial conceptions and legal standards and their effects in terms of ethno-racial inequalities). The first part introduces the legal transnational approach applied here to conceptualize 'race' as transregional inequality and the central role of law in this regard. The second part presents some articulations between law and 'race' in Latin America as conditioning ethno-racial discourses, social hierarchies and inequalities during European rule (*cf.* section 2.1) and the most significant continuities of such articulations after independence (*cf.* section 2.2) and in subsequent regime transitions in the twentieth century (*cf.* section 2.3). Particular attention is devoted to transregional legal influences in times of transition from one regime to another.

2. Race and Inequality: A Legal Transnational Approach

2.1 Addressing Race as Transregional Inequality – The Central Role of Law

From its inception in the seventeenth century, inequality is what 'race' is all about. The concept was formulated to rationalize the new global political and economic order derived from the trans-regional interactions of large numbers of populations from Western Europe, sub-Saharan Africa and the Americas: the operation of a race-based system of transatlantic slavery and the subjugation of Native Americans for the colonization of the 'New World.'²³ 'Race' was an inter-continental category of inequality with a hierarchical vision of humanity, configured as a mechanism to naturalize domination by structuring unequal relations among the newly encountered peoples and establishing a world hierarchy in which white Europeans were deemed innately (or divinely predetermined) superior to all other 'races.' 'Race' as category of inequality is a major feature that distinguishes European colonialism from other previous forms of domination. In this sense, the global diffusion of the fiction of 'race' and its real consequences in the development of a colonial regime based on white supremacy and the enslavement, dispossession and economic exploitation of the other 'races'

²³ 'Race as a mechanism of social stratification and as a form of human identity is a recent concept in human history. Historical records show that neither the idea nor ideologies associated with race existed before the seventeenth century. (...) When "race" appeared in human history, it brought a subtle but powerful transformation in the world's perceptions of human differences. It imposed social meanings on physical variations among human groups that served as the basis for the structuring of the total society. (...) "Race" was a form of social identification and stratification that was seemingly grounded in the physical differences of populations interacting with one another in the New World, but whose real meaning rested in social and political realities.' (Smedley 1998: 690, 693-694).

represents one of the most prominent cases of a transregionally constructed form of inequality in world history.

Looking at the diffusion of this trans-hemispheric, race-structured inequality elucidates how racialization and colonialism operated as interdependent processes and the key role that law played. For the functioning of a global colonial empire based on the natural supremacy of white Europeans, both parts, the dominant and the subjugated peoples, must believe in its validity and legitimacy. Only after the disastrous experience of World War II, when that hierarchy was questioned on both sides, this global racist regime finally collapsed. Certainly, even if military preponderance seems to be sufficient in the short and middle run for the exploitation of under-defended territories, colonists (that usually had to manage the problem of numeric inferiority) could rule for centuries only because the subjugated peoples internalized racial hierarchies and deviant behavior was effectively punished. And here is where regulatory and disciplinary technologies of power play a major role. From Francisco de Vitoria's *De Indis Noviter Inventis* of 1532 (widely considered as the first international law text), law and legal argumentation were instruments to justify colonization and legitimate race-based inequalities;²⁴ this (almost obsessive) recourse to law is a major feature of the Iberian conquest and colonization of America (See Zavala 1988).

2.2 The Legal Lineage of 'Race'

Furthermore, the origin itself of the concept of 'race' and the resulting assumptions and beliefs expressed in racial discourses in Latin America have been transregionally connected through law. Since the early times of the Iberian rule in the region, racial identities were constructs produced and reproduced through different forms of law. Several 'blood purity' statutes (*estatutos de limpieza de sangre*) enacted shortly after the end of the *Reconquista* – without a direct relation with the status of indigenous

²⁴ As Anghie points out, Vitoria's work exemplifies the formulation of law for the justification of colonialism, and this at the very beginning of the discipline *international law*. Contrary to other opinions, Vitoria argued the rationality of the Indians and established a formal equivalence between the Spanish and the Indians by using the doctrinal and jurisprudential resources of natural law. However, from that formal equality, Vitoria justified the Spanish war against the Indians, considering that, as Indians are ascribed within an overarching system of *jus gentium*, Indian resistance to Spanish presence was a violation of the law of nations. In Vitoria's words, '[i]f after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against foresworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature of the circumstances and of the wrongs done to them.' Anghie 2007: 24.

or blacks²⁵— had major effects in the colonies, as genealogy/lineage became a significant social reference. Through the transmission of this way of thinking during the first stages of colonization, ‘race’ became foremost a matter of lineage and purity of blood.²⁶ Coexistence between Europeans and indigenous peoples was regulated by the establishment of two separate racial categories: a ‘Republic of Indians’ subjected to the servitude of a ‘Republic of Spaniards.’ But the logic of this binary racial stratification was broken due to miscegenation and the arrival of enslaved Africans. Miscegenation derived in social stratification (‘castes’) based on percentages of racial intermixtures between Iberian, Indigenous and African blood.²⁷ When miscegenation became more complex over the generations, the term ‘race’ changed the meaning to become a morphological phenomenon -skin color, hair texture, etc. This led to a wide range of color prejudices and discriminatory laws (especially against blacks, in both Spanish²⁸ and Portuguese²⁹ legislations), which in turn legitimated social hierarchies and progressively encouraged the belief in the biologic superiority of whites. The outcome was an inequality regime that offered privileges based on ‘race’ and assigned

²⁵ The blood-purity statutes were adopted to discriminate *conversos* and non-Christians (Jews, Arabs and Moors living in Spain). This derived in a discriminatory legal system between Christians, Muslims and Jews. As Kuznesof explains, the concept of ‘race’ in Spain evolved from an issue of religious purity in the 15th century into a question of blood relationship to Jews and Moors and other non-Christians. Cf. Kuznesof 1995: 160.

²⁶ ‘The Spanish association of *raza* with purity of blood and blood lineage was adapted to fit the specific circumstances of the conquest. In Mexico, the Spaniards found themselves in the minority among the Aztec-Mexica, who had achieved a certain degree of social complexity. (...) [F]ollowing the logic of *raza*, Spaniards believed that Indian blood was not blemished by infidel blood and, thus, was essentially a pure blood.’ Carrera 2003: 12.

²⁷ For instance, demarcations in New Spain (Mexico) included *mestizo* (50% European blood and 50% Native American blood), *castizo* (75% European blood and 25% Native blood), *mulato* (50% European blood and 50% African blood), *morisco* (75% European and 25% African), *albino* (87.5% European and 12.5% African), *lobo* (50% Native American, 46.88% European, and 3.12% African), *zambaigo* (75% Native American, 23.45% European, and 1.55% African), *albarazado* (43.75% Native American, 30.86% European, and 25.39% African), *barcino* (40.43% European, 21.87% Native American, and 37.7% African), *coyote* (50% European, 37.5% Native American, and 12.5% African), *chamizo* (22.6% European, 55.5% Native American, and 21.9% African), and *coyote mestizo* (36.3% European, 52.7% Native American, and 11% African). See Stephens 1999: 15, 16, 38, 92, 99, 158, 159, 298, 323, 344, 352 and 515.

²⁸ ‘The Spanish crown saw a need to control African presence in the Americas. Various laws were passed disqualifying Black Africans from military service, guilds, and certain quarters of Mexico City. One sumptuary law stated that Black Africans and mulattos could not wear gold, silk, lace, or pearls. More importantly, throughout the eighteenth century and into the nineteenth century, the Crown forbade Indian and Spanish nobles from marrying Black Africans and mixed-blooded persons.’ Carrera 2003: 13.

²⁹ During most of the colonial period, Portuguese law forbade marriage between whites and blacks or Indians and prohibited slaves, free blacks and Indians from voting, holding civil office, occupying certain positions in the church, wearing jewels or expensive clothes, bearing arms, and practicing non-Catholic religions. Many of these laws were rendered unenforceable by local conditions (for example, though the legal prohibition, informal unions between whites and blacks were socially accepted, principally because of the shortage of white women), but law mirrored the Crown’s intentions. Cf. Degler 1971: 213-220.

social positions according to complex racial hierarchies (even within a level there were different legal provisions). In a Foucauldian argumentation, the colonization of Latin America illustrates the normalizing power of law, as it naturalized the racial discourses surrounding the bodies and defined the social relations and stratifications as common knowledge, as general truth.

2.3 Transnational Articulations of Inequality Regimes

Sérgio Costa defines ‘inequality regime’ as a set of logics of stratification/redistribution classified as static (caste societies), dynamic (class societies) or combined (class with racial/ethnic/gender ascription); political, scientific, and popular discourses according to which individuals or groups interpret and construct their own positions and that of others in society; legal and institutional frameworks (e.g. apartheid law, multicultural or antidiscrimination laws); policies (e.g. racist migration policies, integration or compensatory policies); and models of conviviality (segregating or integrating convivial forms) in everyday life. (See Costa 2011: 16-17). Relevant here is the fact that none of these components is exclusively restricted to the state borders. Racial hierarchies and other logics of stratification are, by definition, transregional/transnational; ethno-racial discourses are globally shared (see e.g. the diffusion of scientific racism in the late nineteenth century); even domestic legal frameworks and public policies are usually part of (or influenced by) regional/global legal trends; and changes in conviviality are typically marked by processes of transregional/international migration. Although the concept of regime includes the multidimensional character of inequalities (legal, political, economic, etc.), in this paper, I focus on the legal component of the inequality regimes and particularly on the continuities/discontinuities after regime shifts.

As core component of the inequality regime, law may link to racial inequality in at least four types of articulations: 1) constitutive (law enables or promotes racial discrimination and regulates racial discourses); 2) prohibitive (law proscribes racial discrimination); 3) conservative (law has normalization and legitimation effects over the logics of racial stratification); and 4) corrective (law is used to reduce/counteract racial discrimination and to protect the victims). My interest here is restricted to constitutive and conservative articulations.

Two terminological clarifications are required at this point. First, the concept of ‘articulation’ aims to underline the contingent nature of the relations between law and ‘race;’ it suggests that law and ‘race’ can come together with diverse accounts to be part of a temporary unity that is called here ‘inequality regime.’ And second, the use of the concept of ‘regime’ to analyze transregional articulations between law and racial

inequality is not unplanned. Contrary to the traditional state-centric approach, which is built on a political unit of analysis, regime analysis defines a focus that is neither restricted to a spatial nor a political unit; it rather adopts a relational, interdependent view on the emergence, maintenance and transformation of inequalities. It assumes that national patterns of social exclusion are influenced by domestic legal frameworks, but such frameworks are usually consistent with other interrelated legal frameworks at different levels beyond the state (regional, transregional, global); such regimes are mutually dependent and may directly influence state behavior and exert a transnational disciplinary power oriented for normalizing differences.

Costa identifies four regimes of inequality that have historically encompassed Afro-descendants in Latin America. Extended to indigenous groups, such regimes can be named as follows: 1) caste regime (from colonial times until the nineteenth century); 2) racist nationalism (from abolition to approx. 1930); 3) mestizo nationalism (1930-1990s) and 4) compensatory regime (since 1990s), which he identifies with multiculturalism and post-Durban global anti-racism. These regimes are not separated containers of national history; although they reveal important discontinuities, there are several continuities and their contexts are transnationally interrelated: for instance, social hierarchies in post-colonial Latin America cannot be understood without consideration of the categorizations developed during the Iberian domination or the preservation of slavery in the Americas. Likewise, the legal developments are transnationally articulated: the constitutional adoption of the concept of citizenship and its extension to the 'castes' by the 1810s cannot be understood without consideration of the legal discrimination in Haiti and the United States, the Spanish attempts of legal inclusion in the Constitution of Cadiz or the English laws that prohibited the transatlantic slave trade. The following section will analyze some of these transnational articulations until the 1990s.

3. Inequality Regimes in Latin America from the 17th to the 20th century

As mentioned, a legal veil stimulated the intuition that Latin America escaped to the Janus-faced articulations of law and 'race.' But once the veil is pulled away, it is patently clear that the 'protective' legislation in favor of ethno-racial groups (the 'positive' side of Law) has been used to hide a reality of social exclusion and racial discrimination, following an inveterate tradition of noncompliance, epitomized well in the saying '*obedezco pero no cumpro*' (I honor but I do not comply with the law). The roots of this legal custom are precisely related with conceptions of 'race,' and go back to colonial times, when Iberian laws that tried to protect ethno-racial groups (see for instance,

the 1512 Laws of Burgos and the 1542 New Laws, which forbade the maltreatment of indigenous people, or the Royal Instruction of 1789, the first Spanish regulation designed to diminish cruelty against blacks) were systematically ignored and never truly enforced in the Americas.

3.1 Transregional Articulations of Law and 'Race' in the Caste Regime

From the first decades of conquest, the Spanish Crown enacted protective measures to impede annihilation of the Indians (which could jeopardize its imperial economic objectives, based on indigenous labor in mines and plantations). The 1512 Laws of Burgos included quite progressive measures that from a present-day point of view could be named as limited periods of work and rules of rest,³⁰ maternity leave,³¹ and occupational safety and health,³² and fined those *encomenderos* who violated such provisions (in the worst case, they could lose the Indians under their dominion). The 1542 New Laws even called for a gradual end of the *encomienda* system³³ and the immediate abolition of Indian slavery.³⁴ As one could expect, these norms received strong opposition from the *encomenderos*. In order to avoid (or in some cases, contain)

³⁰ Cf. 1512 Laws of Burgos. Law 13: 'Otro sí, ordenamos y mandamos que (...) cojan oro con los indios que las tales personas tuvieren encomendados cinco meses al año, y que cumplidos estos cinco meses huelguen los dichos indios cuarenta días (...).'

³¹ Cf. 1512 Laws of Burgos. Law 18: 'Otro sí, ordenamos y mandamos que a ninguna mujer preñada después que pasare de cuatro meses, no la envíen a las minas ni hacer montones sino que las tales personas que las tienen en encomienda las tengan en las estancias y se sirvan dellas en las cosas de comer y desherbar, y después que parieren críen a su hijo hasta que sea de tres años sin que en todo este tiempo le manden ir a las minas ni hacer montones ni otra cosa en que la criatura reciba perjuicio (...).'

³² Cf. 1512 Laws of Burgos. Law 15: 'Otro sí, porque el mantener de los indios está la mayor parte de su buen tratamiento y alimentación, ordenamos y mandamos que todas las personas que tuvieren indios, sean obligados de les dar a los que estuvieren en las estancias y de les tener continuo en ellas pan y ajos y aji abasto (...) y que a los indios que anduvieren en las minas, les den pan y aji y todo lo que hubieren menester, y les den una libre de carne cada día y que el día que no fuere de carne, les den pescado o sardinas u otras cosas con que sean bien mantenidos (...);' Law 20: 'Otro sí, ordenamos y mandamos que porque de aquí en adelante los dichos indios tengan con que mejor se poder vestir y ataviar que se dé a cada uno dellos por la persona que los tuviere en repartimiento un peso de oro por cada año, el cual sea obligado de se los dar en cosas de vestir y a vista y consentimiento del nuestro visitador (...);' Law 24: '(...) ordenamos que persona ni personas algunas no sean osadas de dar palo ni azote ni llamar perro ni otro nombre a ningún indio sino el suyo propio que tuviere, y que si el indio mereciere ser castigado, la tal persona que a cargo los tuviere los lleve a los visitadores que los castiguen (...).'

³³ Cf. 1542 New Laws. Article XXIX: 'Otro sí, hordenamos y mandamos que de aquí adelante ningún visorrey, gouernador, Abdiencia, descubridor ni otra persona alguna non puedan encomendar yndios por nueva prouisión ni por rrenunçiaçión ni donaçión, venta ni otra qualquiera forma, modo, ni por vacaçión ni herençia, sino que muriendo la persona que touiere los dichos yndios, sean puestos en nuestra rreal corona (...).'

³⁴ Cf. 1542 New Laws. Article XX: 'Yten, ordenamos y mandados que de aquí en adelante, por ninguna causa de guerra ni otra alguna, avnque sea so título de rreuelión ni por rrescate ni de otra manera, no se pueda hazer esclauo yndios alguno, y queremos que sean tratados como vasallos nuestros de la corona de Castilla, pues lo son.'

rebellions, several colonial authorities did not enforce this legislation, establishing a custom of formal (almost 'ceremonial') subordination to law while applying it selectively, according to the interests of the local elites. This custom also derived in the unequal application of law in correlation with the social status, which in turn created a widespread perception of law as an instrument that impose duties only for the poor while guaranteeing the property rights of the elites. As a matter of fact, the *encomienda* system was effectively abolished only 250 years later.

A similar picture of noncompliance arises from the 'protective' provisions in the legislation for African slaves, but with the aggravating circumstance of its delay. From the times of Louis XIV, France had already a codification to regulate the conditions of African slaves in the French colonies: the 1685 *Code Noir*.³⁵ Even within its harsh and inhuman regulations, it is possible to find a few provisions that, at least on the paper, restricted the power of the masters and operated as legal protection for slaves; for instance, marriages between Catholic slaves would be recognized (Article VIII); slaves must receive determined quantities of food (Article XXII) and clothing (Article XXV) even if they become sick or old (Article XXVII); and slave families (husband, wife and their young children) were not to be sold separately (Article XLVII). One hundred years later, strongly inspired by these and other provisions of the *Code Noir*, Spain finally developed a comprehensive and codified legislation for African slaves in its colonies: the *Real Cédula* of 1789 ('Instruction for the Education, Treatment and Occupations of the Slaves in all the Possessions of the Indies'). Although African slaves would receive according to this Spanish law a milder treatment in comparison with the French and other European colonial laws, protective measures were widely ignored on the ground.³⁶ The *Real Cédula* was greeted with firm opposition by slaveholders throughout the Hispanic colonies (in particular, Caracas, La Habana, Louisiana, Santo Domingo and Tocaima), who used their influence in the local *cabildos* to force a declaration of acknowledgement of the Royal Instruction but with suspension of its legal effects (see in detail: Lucena Salmoral 1996: 155-178).

³⁵ The original text is available at:
<http://gallica.bnf.fr/ark:/12148/bpt6k84479z/f82.image.r=Code+Noir.langFR>

³⁶ In this regard, a distinguished contemporary observer, Alexander von Humboldt, commented: 'The mildness of the Spanish legislation compared with the Black Code of the greater part of other nations that have possessions in either India, cannot be denied. But such is the state of the negroes, dispersed in places scarcely begun to be cultivated, that justice, far from efficaciously protecting them during their lives, cannot even punish acts of barbarity, that have caused their death. (...) The civil authority is powerless with respect to whatever constitutes domestic slavery; and nothing is more illusory than the effect so much vaunted of those laws, which prescribe the form of the whip, and the number of lashes which it is permitted to give at a time. (...) [G]reat crimes remain almost always unpunished; the spirit, that dictated the laws, is not that which presides over their execution. (...)' See Alexander von Humboldt, *Personal Narrative of Travels to the Equinoctial Regions of the New Continent during the Years 1799-1804*, vol. 3, chapter VIII, para. 154.
Available at: <http://www.avhumboldt.net/humboldt/publications/>

Another interesting feature of the relation between law and 'race' in Latin America in the caste regime should be mentioned: the legal means to purchase a 'higher' racial status. Fifteen years before the beginning of the independent movement, the Crown enacted the Royal Decree of '*Gracias al sacar*,' allowing certain individuals of the castes with mixed African and Spanish ancestry to purchase 'whiteness' to access to the social privileges of the white status.³⁷ This can be seen as a legal strategy for upward mobility in which the racial identity was negotiated, and exemplifies that law not only could naturalize race-based inequalities and make social hierarchies static; law could also create exemptions and allow vertical movements within an established racial hierarchy. While this reveals that law can create mechanisms of inclusion even in contexts of strict racial hierarchies, it also reinforces the racial patterns because it excludes those who remain in the lower racial levels.

Thus, four major articulations between law and 'race' in Latin America in the caste regime may be emphasized: 1) a widespread practice of noncompliance with protective provisions while formally honoring strict adherence to the letter of the law, hiding the real situation of ethno-racial groups under the appearance of legal protection; 2) the consequent tradition of unequal application of law according to the addressees of the norms, with strong correlation to racial hierarchies; 3) the legal normalization of transregional and domestic race-based inequalities; and 4) the legal inclusion/exclusion of ethno-racial groups, in line with the political interests of the elites. While the first and second effects relate to the application of law and have a more stable nature independently of the form of government, the third and fourth effects are more related with the design of law, and therefore should be expected to diminish after a regime shift based on republican and democratic procedures. The revolutionary rupture with Iberian rule in Latin America was founded on egalitarian constitutional ideals disseminated from the United States and France (the principle that all men are created free and equal and therefore, the community should become self-governing), but the mutually supporting interconnections between law and 'race' did not significantly change with independence. Rather, remarkable continuities can be observed for most part of the post-colonial history of Latin America.

³⁷ 'Individuals purchased *Gracias al Sacar* as racial exemptions to achieve practical gains. At times, petitioners sought to exempt themselves from their status for practical reasons -to enter the university, the priesthood, or a professional association. Individuals also petitioned so that persons from different social classes could marry (...). On other occasions, petitioners sought general exemptions so that they or their children would not carry the "shadow" of non-White heritage. A *blanco* even sought an exemption to dispel any accusation of non-Whiteness. Given the stringency of racially restrictive legislation (...), these exemptions offered real material and social benefits.'" (Lau 1996: 436-437).

3.2 From the Caste Regime to Racist Nationalism: Ruptures and Continuities in the Articulations of Law and Race after Independence

The Latin American independence movement was closely linked with a transregional chain of events, including the American and French revolutions, the Napoleonic Wars and the French invasion of Spain, which ultimately made the revolution possible. But all these events did not change the global inequality regime based on white supremacy; with the exception of Haiti, the rebellion was not planned as a rupture with the established racial stratification; it was rather a transition from an externally-driven to a nationally-driven racist regime. Indeed, the independence movement was dominated by the white creole elite, whose national project was based on decolonization while maintaining the social status quo.

In the awakening to independent life, one of the first steps in consolidating state power was the creation of a national identity through the proclamation of constitutions and the enactment of legislation. In these efforts of nation-building by law, their elites were influenced by European models, including the Napoleonic Code and public administration from France, liberal economic rules from Great Britain and military codes from Prussia. But European models were not capable of responding to the challenges of the principle of equality before the law under the conditions of post-colonial societies, especially due to the comparative differences in demographic terms. For European nationalism at the end of the eighteenth century, homogeneity was a prerequisite of nation, which was incompatible with the inherited caste divisions of colonial Latin America.³⁸ As Stavenhagen points out, the pro-independence elites based the national liberal project 'on their self-perception as a Western, Catholic, racially European people, from which Indians and Negroes were excluded. (...) Indians and blacks (...) were considered a burdensome obstacle to nation building' (Stavenhagen 2002: 25-26). Thus, the leaders of the independence movement considered that a long-term process of homogenization (in line with European ethnic identity and cultural forms) was required.

³⁸ 'Nationalism is an ideology or belief system in which the ethnicity and culture within a geographically defined territory is, or ought to be, congruent with its political boundaries. Latin American and Caribbean nationalism draws on the European nationalism that began to take its present form at the end of the eighteenth century. Nationalism of this kind involves a process that often identifies a homogeneous national type, sometimes referred to locally as a "race." In colonial Latin America, the process of homogenization occurred in a context in which ethnic differences were constructed and cultivated to divide and rule (...). [I]n the postcolonial era, local elites have ingeniously crafted discourses of national identity that, while departing somewhat from the colonial discourses they replace, nevertheless guarantee the ascendancy of Western and European ethnic identity and cultural forms, which are seen to be embodied in the elite.' (Yelvington 2005: 244).

In the meantime, the legal inclusion of the 'castes' was urgent to guarantee their support to the independence. For the regulations on nationality and citizenship (key concepts for legal inclusion in the French revolution), they looked at the only two colonies that by 1810 have achieved their independence in the Americas: the United States and Haiti.

The original US Constitution did not expressly prohibit racial discrimination; it did neither require the immediate abolition of slavery nor limit its cruelty providing any kind of rights for slaves.³⁹ Moreover, it left the issue of citizenship unresolved,⁴⁰ which granted the Congress major powers to define the racial composition of the United States via immigration and naturalization laws. Consequently, from the Naturalization Act of 1790 until 1954, federal naturalization statutes restricted US citizenship to free white persons, and from the 1880s to 1965 (when national origin quotas were dismantled) federal laws restricted immigration on the basis of 'race.' Thus, from its origin, the United States excluded non-whites from the community of equals in rights and the privileges of citizenship.⁴¹

On the other hand, the 1805 Haitian Constitution excluded most whites from the benefits of citizenship and owning land within the *Empire d'Haiti* (Article 12⁴²) and declared all citizens 'black' in Article 14, that reads as follows: 'All acceptance of color among the children of one and the same family, of whom the chief magistrate is the father, being necessarily to cease, the Haytians shall hence forward be known only by the generic appellation of Blacks.' Slavery was banned during the Haitian revolution, reinstated in 1802 and finally abolished in 1804. The question of citizenship for blacks was in the core of the slave rebellion, as white plantation owners refused to comply with the decision adopted in 1791 by revolutionary Paris granting citizenship to free blacks. The brutal exploitation of slaves during the French rule was avenged: white slaveholders

³⁹ For instance, the US Constitution could have provided that slaves had the right to marry, or that slave families could not be broken up, or that slaves could purchase their freedom. See Higginbotham, *Race Law*, p. 101.

⁴⁰ Only after the Fourteenth Amendment in 1868 were all blacks born in the United States considered citizens, and only after the Civil Rights Act of 1964, race-based distinctions in the enjoyment of rights were abolished; prior to this amendment, the US Supreme Court construed the expression 'we, the people' in the Preamble of the Constitution as excluding blacks from US citizenship. See e.g.: U.S. Supreme Court, *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁴¹ 'What citizenship meant in the pre-Civil War period is revealed in Supreme Court Justice Bushrod Washington's 1823 enumeration of the rights that were implied in the privileges and immunities clause. Basic among them were "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the good of the whole". A long list of more specific rights ensued, including 'the benefit of the writ to habeas corpus' and equality under the law (...)' (Fredrickson 2005: 27).

⁴² 1805 Haitian Constitution. Article 12: 'No white man of whatever nation he may be, shall put his foot on this territory with the title of master or proprietor, neither shall he in future acquire any property therein.'

and colonial officials were killed or forced into exile (*cf.* Dubois 2005). This new order implied a striking challenge to racial relations throughout the Americas because both royalists and creoles feared that the successful slave rebellion in Haiti would inspire similar revolts in their territories.

The US and Haitian constitutions were *foreign* laws with indirect influence in Latin America; other two regulations with *transnational* effects that directly influenced the subsequent regulation on 'race' and citizenship in the incipient states shall be also mentioned: 1) the Slave Trade Act of 1807, a British law that prohibited British vessels engaging in the slave trade, which was determinant for the progressive prohibition of slave trade in Europe and the Americas; and 2) the 1812 Constitution of Cadiz, where the concepts of national sovereignty and citizenship were extensively discussed among *peninsulares* and representatives of overseas Spanish dominions (most of them *criollos*); in particular, the legal inclusion of indigenous and blacks (which also implied considerations on the prohibition of slave trade and the abolition of slavery). The Constitution of Cadiz stated that '[t]he Spanish nation is the re-union of all the Spaniards of both hemispheres' (Article 1) and that '[s]overeignty belongs to the nation' (Article 3); it also incorporated a wide range of individuals into the concept of Spanish nationals, including former slaves (Article 5) but it distinguished 'nationals' from those who are considered 'citizens' and, therefore, holders of the right to elect and be elected. Accordingly, '[t]hose who, by both lines, are of Spanish parents, of either hemisphere, and have resided ten years in any village in the Spanish dominions, are citizens' (Article 18) and '[o]nly those who are citizens can obtain municipal employments; and elect for them, in the cases pointed out by law' (Article 23). That means, *criollos* would maintain their political privileges *vis-à-vis* indigenous and blacks, as citizenship was restricted to them and to those *peninsulares* living in the Americas; but free blacks would have a better legal status under the Spanish Constitution, from *súbditos* of the King to nationals of Spain. The adoption of the concepts of national sovereignty and citizenship in the context of independence movements had a strategic significance to gain support for the Spanish Crown among different sectors in the overseas population.

Based on the double influence of the U.S. and Haitian experiences, and internationally restricted by the legal responses of Great Britain and Spain to the shifting patterns of power in Europe and the Americas, during the first decades after independence, Latin American countries felt into a certain legal Gatopardism when regulating 'race' and citizenship: everything was changed so that everything stayed the same. Abolition of slavery was not immediate (in spite of British and Haitian pressure⁴³), but from the

⁴³ The Haitian revolution had significant historical connections with the events in the New Granada and Venezuela. Simón Bolívar eluded capture and fled to Haiti in 1815, when Royalist forces apparently defeated the independent movement. The Haitian government provided him financial and military

beginning of the independence process, the principle of freedom of wombs (in which children born to slaves were considered free citizens) circulated in South America and was adopted progressively in the nascent legal systems;⁴⁴ however, in several cases, its effective application was delayed or subsequently restricted (following the ‘*obedezco-pero-no-cumpro*’ tradition). Due to the successful opposition of slaveholders and other economic elites, slavery was legally abolished only by the mid-nineteenth century in most independent Latin American countries, but in some of them there were very early steps. For instance, in Mexico, where the abolition was proclaimed by Father Hidalgo on December 6, 1810 (few months after the *Grito de Dolores*) and reiterated in Decree of January 29, 1813 by José María Morelos;⁴⁵ in the 1812 Constitution of Cartagena de Indias, where slave trade was banned (cf. Title XIII, Article 2); in the United Provinces in 1813, where it was declared that slaves who by any means enter the nation shall be free by the mere fact of entering the territory of the republic; or in Venezuela, where slave trade was banned by decree of the Supreme Junta of Caracas on August 14, 1810 and the first Federal Constitution (of December 21, 1811) established the equality before the law of all citizens, without distinction of origin (Article 154), including expressly free mulattos (Article 203⁴⁶). Nevertheless, the intentions behind these steps were quite similar throughout the region: *criollos* wanted to gain the military support of the ‘castes’ for the independence (or to reduce the royalist slave recruiting) and to avoid a Haitian-type rebellion. Consequently, legal inclusion through nationality, citizenship (including in some cases the right to vote), and the promises of freedom were usually conditioned

support, with the condition that Bolívar would take immediate steps to abolish slavery. On 2 June 1816, during his first expedition from Haiti to Venezuelan coasts, he proclaimed the liberation of those slaves that join the independentist cause (‘he venido a decretar (...) la libertad absoluta de los esclavos que han gemido bajo el yugo español en los tres siglos pasados (...).[T]enemos que imponer a los nuevos Ciudadanos las condiciones siguientes: Art. 1. Todo hombre robusto, desde la edad de catorce hasta los sesenta años, se presentará en la parroquia de su distrito a alistarse en las banderas de Venezuela’); once in Angostura in 1819, he promoted an abolitionist legislation that eventually derived in the *Ley de manumisión* of 1821, which postponed the full abolition of slavery; subsequent legislation providing for manumission was not fully enforced due to conflicts with influential pro-slavery groups.

⁴⁴ Cf. e.g. the Law of Wombs of Chile (1811), Argentina (1813), Colombia (1814 in Antioquia and in 1821 as Law of the Great Colombia, i.e. present-day Ecuador, Colombia, Venezuela and Panama), Peru (1821) and Uruguay (1825). See in detail: Andrews 2004: 55-84.

⁴⁵ The decree stated: ‘Que quede abolida la hermosísima jerigonza de calidades de indio, mulato, o mestizo, tente en el aire, etcétera, y sólo se distinga la regional nombrándolos a todos generalmente americanos. (...) [A] consecuencia de ser libre toda la América, no debe haber esclavos y los amos que los tengan los deben dar por libres, sin exigirles dinero por su libertad; y ninguno en adelante podrá venderse por esclavo, ni persona alguna podrá hacer esta compra so pena de ser castigado severamente.’

⁴⁶ Constitution of the Federal Constitution of Venezuela. Article 203: ‘Del mismo modo quedan revocadas y anuladas en todas sus partes, las leyes antiguas que imponían degradación civil a una parte de la población libre de Venezuela, conocida hasta ahora bajo la denominación de pardos: éstos quedan en posesión de su estimación natural y civil y restituidos a los imprescriptibles derechos que le corresponden como a los demás ciudadanos.’

to the participation in the wars on the side of the *criollos* (cf. Blanchard 2008). This early openness to the ‘castes’ changed rapidly once independence was achieved.

But beyond the question of the intentionality, what is remarkable here is that the regional adoption of the principle of citizenship and equal application of law without racial distinctions, parallel to the progressive abolition of slavery, represented a radical rupture with the caste regime that should allow a generalized upward mobility, not only for the reduced members of disadvantaged groups that could use the independence wars to push for concessions from the contending parties, but for all members of the new political communities. The constitutions and legislations of the new republics were based on the principle of formal equality and political inclusion of indigenous and blacks and thus did not follow the discriminatory legal paths of the United States or Haiti, but this difference basically served to give the appearance of inclusion without any deliberate legal or policy intervention to counteract race-based social stratifications (which can be named as ‘passive indifference’). In the absence of special measures in favor of disadvantaged groups, this legal veil instead covered the persistence of structural discrimination. The preservation of slavery in the United States and its pressure in the region could possibly contribute to keep the racial status quo.⁴⁷ Moreover, as analyzed in the following part, ethno-racial groups were kept out (or left out) through other legal measures that reinforced race-based hierarchies (‘active indifference’ or ‘invisibilization’) until the end of the twentieth century.

3.3 From Racist Nationalism to Mestizo Nationalism: Legal Attempts of Blanqueamiento and Invisibilization

Exploitative European colonialism, founded extensively upon conceptions of ‘race’ and racial hierarchies, degenerated into racism as the *Weltanschauung* of global imperialism by the second half of the nineteenth century. As Hannah Arendt has convincingly argued, racism emerged by that time in all Western countries as the ideology of imperialistic policies; it absorbed and revived all the old patterns of race opinions and progressively gained the assent of public opinion as a full-fledged ideology (i.e. as a system ‘based upon a single opinion that proved strong enough to attract and persuade a majority of people and broad enough to lead them through the various experiences and situations of an average modern life,’ cf. Arendt 1973: 158-184). White supremacy even received the recognition of the scientific discourse; in Foucauldian terms, this ‘truth’ was linked in a circular relation with the powers that produced and sustained it.

⁴⁷ See e.g. the Instructions of John C. Calhoun (US Secretary of State) to Henry A. Wise (US Minister to Brazil), May 25, 1844 and the Instructions of James Buchanan (US Secretary of State) to John Appleton (US Charge of Affaires in Bolivia), June 1, 1848. Available at: http://www.archive.org/stream/diplomaticcorres003690mbp/diplomaticcorres003690mbp_djvu.txt

In Latin America, the global diffusion of scientific racism consolidated racist nationalism. Legal attempts to 'ascend' in the global racial hierarchy stimulating white immigration were common throughout the region (as in other parts of the world⁴⁸), with particular emphasis by the end of the nineteenth century. Equality and inclusion in the state presupposed homogenization –in the most ideal case, according to Western European racial patterns-. Thus, several Latin American states adopted legislation for the promotion of immigration of 'desirable races' (especially white agricultural colonists) and discouraging (or even banning) immigration from certain nations or regions. Here, the transregional influence of the United States is manifest. With the Chinese Exclusion Laws (1882-1943), the United States inaugurated a diffusion process of anti-Chinese legislation throughout the hemisphere, with particular influence in Cuba, Mexico and Central America. In 1902, U.S. Chinese Exclusion Laws served as a model for Cuban exclusion of Chinese workers after U.S. occupation of the island (such restrictions were only removed in 1942); Chinese were declared as 'undesirable' or 'pernicious' aliens in El Salvador (1897 and 1944) and the 1933 Migration Law banned immigration from China, Mongolia and Malaysia; Chinese (plus African, Arabian and Turk) 'races' were not allowed to enter in Costa Rica (Immigration Law of 1887) alleging the risk of 'biological degeneration,' and through Article 5 of Decree N° 59 of July 1896, the President was empowered 'to reject immigration of races that in his opinion are harmful for the country.' Similarly, Article 33 of the 1917 Mexican Constitution empowered the president to compel any foreigner whose remaining he may deem undesirable (*inconveniente*) to abandon the national territory immediately and without previous legal action; this was only one of several legal instruments used for deportations and expulsions of Chinese residents especially in the 1930s (*cf.* Yankelevich 2004: 726-728). Analyzing immigration norms from 1850 to 2000, Cook-Martín and Fitzgerald found that at least nineteen of the twenty-two independent countries of the hemisphere by the late 1930s discriminated against Chinese immigrants; discrimination against people of African origin or black immigrants was slightly less common (observed in thirteen of the twenty-two countries), but peaked at the same time (*cf.* Cook-Martín/FitzGerald 2010: 15).

From the second half of the nineteenth century to the World War II, provisions that restricted African and/or Asian immigration and encouraged immigration of 'desirable races' were common in Latin America. For instance, the 1845 Law of Selective Immigration of Chile; the 1890 Immigration Law of Uruguay (which banned immigration of Asians, Africans and 'those individuals usually known as Hungarians or Bohemians'); the 1930 Migration Law in Mexico, which stated that it was of public interest the

⁴⁸ E.g. the 1901 Immigration Restriction Act of Australia, which banned migration of non-Europeans as part of the racist policy for a 'White Australia.' See in detail: Piquet 2006: 129-133.

individual or collective immigration of healthy foreigners ‘belonging to races that for their conditions are easily assimilable to our [social] environment, with benefit for the specie and the economic conditions of the country;’ or Article 23 of the 1941 Constitution of Panama (which denied entrance to Panama to immigrants ‘of the black race whose native language is not Spanish, of the yellow race and the races originating in India, Asia Minor and North Africa’). Legal discrimination against non-nationals construed an externally-oriented inequality regime in the region, but it indeed reinforced the logics of racial stratification at the domestic level as it was built on the assumptions of white supremacy and the transitory nature of the relations with ‘undesirable races’: their numbers would comparatively decline vis-à-vis white population through immigration or they would become extinct through more direct policies like mass land expropriations, armed subjugation and ‘ethnic cleaning’.⁴⁹ In cases of numeric preponderance of ethno-racial groups, statutes for the continuity of forced labor were enacted.⁵⁰ All of this was consistent with the international regime after World War I, which testified the Western reluctance to recognize the unlawfulness of the global racial stratification due to the effects of a binding proscription of racial discrimination in its colonies or even within its own segregation systems (for instance, the failed attempt of Japan to include in 1919 a ‘racial equality clause’ in the League of Nations Charter, which was approved by most delegates but vetoed by the British Empire and the United States⁵¹).

Since the 1930s, due to meager success in attracting white immigrants, some Latin American countries began to reorient their racial discourse: homogenization would be achieved through intermarriage with the Catholic and European-oriented ‘white’ population. This derived in the rhetoric of homogeneity through *mestizaje*,⁵² a regional

⁴⁹ E.g., the ‘Conquest of the Desert’ in Argentina (1870s) legally supported on Article 4 of the Law 215 of 1867 (‘En el caso que todas ó algunas de las tribus se resistan al sometimiento pacífico de la autoridad nacional, se organizará contra ellas una expedición general hasta someterlas y arrojarlas al Sud de los Ríos Negro y Neuquen’) and Law 947 of 1878 on distribution of conquered land.

⁵⁰ For instance, in conjunction with mass land expropriation against indigenous communities, Guatemala implemented diverse forced labor laws that remained in effect until 1945, including the Decree 126 of 1874 (stating that all male citizens must provide free labor to build roads), the 1877 Reglamento de Jornaleros (regulating forced work in coffee plantations) and the 1934 Vagrancy Law (that forced landless peasants to work at least 150 days per year on plantations). This legislation supposedly applied to all, but in practice, only the indigenous population was forced to provide free labor.

⁵¹ The Government of Japan Amendment proposed for Article 21 of the League of Nations Charter reads as follows: ‘The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord as soon as possible to all alien nationals of states, members of the League, equal and just treatment in every respect making no distinction, either in law or in fact, on account of their race or nationality.’ This was the first intent to set forth racial equality as a general principle in international law. However, the clause was conceived as a mechanism through which Japan could receive equal status with the Powers rather than a way of recognizing the equality of all nations. See in detail Shimazu 1998.

⁵² The political discourse of *mestizaje* must be distinguished from the lived experience of *mestizaje* from below. See Wade 2005.

trend that was also associated with certain idealization of the indio (indigenism, particularly strong in Mexico, Guatemala and the Andean region) and the mulatto (e.g. Gilberto Freyre's 1933 book *Casa-Grande & Senzala* in Brazil). Though it implied criticism against the exploitation of ethno-racial groups and some vindication of their cultural rights and political institutions, nevertheless the *mestizaje* ideology was a product of the rise of the mestizo middle classes to power, and used ultimately by these new mestizo elite to its own benefit, forcibly 'modernizing' those subjects that were considered primitive/backward; therefore, mestizo nationalism did not imply a rupture with the legacy of ethnic prejudices and invisibilization of ethno-racial groups because it was mainly concerned with assimilation into the white-oriented 'national' culture and a paternalist inclusion to formal citizenship (e.g. by educating them in Spanish) and to the civil life (e.g. through guardianship legislation, which implied that they were equated to persons incapable of taking autonomous decisions, like a child or a person with mental diseases or physical handicaps).

A major change in the global inequality regime occurred when the status quo of European domination was broken with the Second World War. Great powers that followed an imperialist project extensively based on white supremacy were finally willing to acknowledge the unlawfulness of racial discrimination and introduced anti-racism as one of the major purposes of the emergent international human rights system in Article 1(3) of the United Nations Charter in 1945.⁵³ However, the veil of *mestizaje* was so successful that even the nascent human rights system believed the myth of 'racial democracy,' and the region (particularly Brazil) was highlighted as a positive example for race relations (*cf.* Maio 2001). This had also transnational effects: for instance, Portuguese politicians co-opted Freyre's thesis of 'lusotropicalism' to support Portugal's continued colonial presence in Africa until 1975 (*cf.* Bender 1978: 3-9 and 19-22).

The post-1945 anti-racist international agenda was focused on the consequences of the Holocaust in Europe and the Middle East, the persistence of institutionalized discrimination in the United States and South Africa and the changing power relations derived from the decolonization of Asia and Africa (*cf.* Lauren 1988; Füredi 1998). In the meantime, Latin America could maintain its intentional ethno-racial invisibilization and the assimilation project, although with diverse adaptations during the authoritarian wave of the Cold War. During these dictatorships, precarious legal protections were restricted, and in several cases ethno-racial groups were subjected to persecution and

⁵³ Charter of the United Nations. Article 1. The Purposes of the United Nations are: (...) 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; (...).

annihilation (e.g. the extermination of at least two hundred thousand indigenous in Guatemala from 1981 to 1983). The international community tended to be indifferent to these actions because the international anti-racist regime was conditioned to the strategic interests of the USSR and the US, not only in Latin America, but elsewhere in the world (e.g. in Indonesia, Cambodia, Vietnam, Angola, Turkey or Iraq).

Once the authoritarian regimes were overthrown, some countries proclaimed new constitutions that established general state obligations to protect ethnic groups.⁵⁴ However, these provisions maintained the paternalist approach vis-à-vis ethno-racial groups (focused on protection rather than autonomy); moreover, even if the said provisions represented a progress as rhetoric recognition of ethno-racial groups, it did not recognize the very multicultural make-up of society as a whole.

Thus, prior to the 1990s, Latin American countries espoused a doctrine of racial harmony at the same time that they established a regime that meant to serve as the legal means of implementing a process of racial and cultural assimilation. As result of this whitening project (enclaves of it can be found even in current constitutions⁵⁵), ethno-racial groups were made invisible in the national statistics and consequently also in the public policies, which reinforced the colonial legacy of structural discrimination. Other veiled forms for their exclusion were common (e.g. restricting civil rights by property or income requirements; restricting funding for rural educational systems or designing curricula of cultural assimilation, etc.).

4. Conclusion

As a technology of power, law was essential to the European colonial project in Latin America: it naturalized multiple forms of racial discrimination and provided legitimacy of exploitation and disciplined labor. A legal transnational approach is therefore crucial for unraveling the historical articulations of law and 'race' and the entanglements of

⁵⁴ For instance, Article 107 of the 1978 Ecuadorian Constitution (obligation to establish public defenders to protect indigenous communities), Article 34 of the 1979 Peruvian Constitution (obligation to preserve and stimulate cultural manifestations of native groups); Article 346 of the 1982 Honduran Constitution (obligation to enact measures to protect the rights and interests of indigenous communities); Articles 66-70 of the 1985 Guatemalan Constitution (obligations to protect ethnic groups and their lands, to provide state lands to the indigenous communities, and to protect them in work operations that involve the transfer of workers outside of their communities); and Articles 210(§2), 215(§1) and 231-232 of the 1988 Brazilian Constitution (guarantee of the use of native languages in Portuguese-based elementary education and the obligations to protect manifestations of 'popular, Indian, and Afro-Brazilian cultures;' to demarcate, protect and ensure respect for the lands 'traditionally occupied by Indians;' to protect 'Indian groups' against occupation or displacement from their lands; and to provide public defense to 'Indians, their communities and organizations').

⁵⁵ For instance, Article 25 of the Constitution of Argentina states: 'The Federal Government shall foster European immigration (...).'

power and racial discourses that have sustained inequality regimes in the region. This approach elucidates the chronological and epistemic correspondence between different legal projects of racial stratification (e.g. colonization, slavery, nationalism, imperialism) in different world areas. While racial discourse in law is discontinuous in the transition from one regional regime to another (which implies different configurations of knowledge producing shifts in racial perceptions, descriptions, and classifications), there are several continuities in functional terms (due to the unchanged global discourses of white supremacy until 1945). Such persistence of constitutive and conservative articulations of law and 'race' for normalization of difference and invisibilization of ethno-racial groups at the national level needs to be read in conjunction with regional, transregional and global regimes of inequality operating at the same time.

The legal transnational approach proposed here was built on three elements: 1) the characterization of 'race' as a transregional inequality; 2) the introduction of regime-thinking in order to emphasize the centrality of law for the configuration of racial inequalities and to depict transnational interconnectedness between domestic, foreign and international norms as factors conditioning social hierarchies over a long period of time; and 3) the consideration that, though regime shifts, regional inequality regimes may present continuities that depend of transregional and global conditions (global stratifications, transnational discourses on 'race'/ethnicity, international legal frameworks, etc.).

I identified four major articulations between law and 'race' in Latin America in the caste regime and argued that they have persisted: from the general noncompliance with the law and its unequal application according to the addressees of the norms, to the legal naturalization of race-based inequalities and the legal exclusion/invisibilization of ethno-racial groups. The promising egalitarian rules introduced during the independence wars were challenged by conservative forces that gave continuity to the global exclusionary order based on white supremacy; in this way, the region also followed the global trend imposed by scientific racism in the second half of the nineteenth century and established severe restrictions on migration, which in turn reinforced the logics of racial stratification at the domestic level; and it also successfully covered racial discrimination under the legal veil of formal equality and the racial veil of *mestizaje* during most part of the twentieth century, while adhering rhetorically to the new rules of international anti-discrimination law.

An uncritical posture vis-à-vis law may obscure the domestic, regional, and global power structures at work and the negative impact of law in terms of ethno-racial inequalities. As current domestic and global inequalities had their origins in colonial

racial structures sustained, covered or tolerated by law, and the post-colonial state continues to be confronted with this legacy, it may be reasonable to make these links explicit and keep them in mind if we do not want to limit our ability to design policies that change these arrangements and to reform regulations that are not coherent with the objective of reducing ethnic and racial inequalities. If we really concede enough weight to such objective, we should move away from simplistic legalist assumptions and bring to light the historical nature of current racial inequalities, the interrelated global inequalities, and the interconnected role that law played and continues playing in the whole process.

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Contact

desiguALdades.net
Freie Universität Berlin
Boltzmannstr. 1
D-14195 Berlin, Germany

Tel: +49 30 838 53069
www.desiguALdades.net
e-mail: contacto@desiguALdades.net

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