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Law and Public Sphere: Spaces for Interaction and Flow Directions

1. Introduction

This paper presents the agenda of empirical research on the relationship between the public sphere and the law that was recently launched at the Brazilian Center of Law and Democracy (*Núcleo Direito Democracia* – NDD)¹ and at *Direito GV*.² We will first present the assumptions that guide our task in the empirical field, resulting in a particular way of seeing democracy and the relations between society and the state. Then, we will briefly present the main partial results of empirical research³ developed by this group in nine Brazilian state Courts of Appeal, on the anti-racism struggle in Brazil and its relationships to Brazilian institutions. Based on this data, we will make a preliminary analysis.

The research examines the decisions rendered by the Court of Appeals of the State of São Paulo that deal with racism, racial discrimi-

1 The Law and Democracy Nucleus is a research group of *Centro Brasileiro de Análise e Planejamento* (CEBRAP), a Brazilian interdisciplinary think tank dedicated to investigate theoretically and empirically the relations between Law and Democracy in the tradition of critical theory.

2 “Direito GV” is a Brazilian Law School that develops a Law & Development research agenda.

3 Other research studies, undertaken by NDD, raise and nurture the reflection we do here: one of them aimed to organize the legislation on gender in Brazil and seek out decisions on discrimination of women in the labor and electoral justices; and the other study compared three judicial review mechanisms, the Commission on Constitution and Justice, the Federal Supreme Court and presidential vetoes from selected themes (Rodriguez/Nobre 2010). Both were funded by the project “Pensando o Direito” (Thinking About Law) organized by the Office for Legislative Affairs of the Ministry of Justice of Brazil (SAL) and the United Nations Development Program (UNDP). Those interested can see the reports posted on the SAL website (<www.portal.mj.gov.br/data/Pages/MJ5C2A38D7PTBRIE.htm>). One of them has also been posted in the *Revista da Presidência da República* (Journal of the Presidency): Nobre/Rodriguez (2009).

mination and racial defamation.⁴ We will briefly present the results and then discuss some of the problems the project faced to outline a model for studying the interaction between law and public sphere.

To do that, the first part of this paper will identify some areas of interaction between the law and the public sphere, which we incorporate into our research. In the second part, we will reflect on the directions of the flow of arguments and demands within the public sphere especially within formal institutions with a view to outline these spaces of interaction. In the conclusion of the paper, we will point out the next steps of our empirical research.

2. Spaces for Interaction and Social Movements

A key objective of the research program on Law and Public Sphere is to show that formal institutions, especially law, are not only spaces dominated by technical rationality; that is, law is not an instrument to obtain unambiguous solutions for actual cases submitted to it. This is an area of deliberative dispute for the sense of legal standards and for the correct interpretation of the legal rules. The creation of laws does not put an end to the struggle for the creation of rights, which forms a new arena for debate for the solution of concrete cases.

For a technical and textual view of the law that goes along with the traditional concept of separation of powers, the interaction between the law and the public sphere lies outside of it: legal rules are the main source of law and function as an instrument of the legal will of the people. That is why the judges are seen as *la bouche de la loi*, responsible for subsuming specific cases to abstract rules to reach the correct solution for each case.⁵

For this design, at least in its ideal setting, the grounds for the decision of concrete cases are the rules of law based, in turn, on the will of the people expressed through the parliament. The basis of the decision, therefore, would not be problematic and would not be subject to dispute. Obviously, there may be disagreements among judges about what should be the appropriate legal rule to the case, but

4 There is no space in this paper to display all the results obtained, neither is it our main purpose in this paper. For a full description, see Machado/Püschel/Rodríguez (2009).

5 For a full exposition of these problems, see Rodríguez (2010).

everyone's goal is the same: finding the appropriate rule and subsuming the case to it.

This way of conceiving the operation of the law has lost ground in legal theory, at least since the second half of the twentieth century.⁶ This theoretical shift is linked to structural changes that have changed both the way of making laws and the action of the judiciary and the traditional configuration of the three branches of power. For example, standards became increasingly important as a legislative tool and as an instrument to solve conflicts among the interpretation of legal rules. There is no space here to describe in detail these changes (Rodriguez 2010). For our purposes, it must be said that, at least since the second half of the twentieth century, legal theory can hardly affirm the existence of a single legal-technical solution for each case.⁷

A consensus was gradually formed, ruling out to subsume as a potential model for the rationality of law and for the actions of judges (Alexy 1989), as it is clear that there is always more than one possible answer for each case. In fact, judges do not simply apply a general rule to a concrete case. The literature on the law has shown that judges take decisions that cannot be described as an act of mere application of a general rule or of subsuming a case to a general rule. For this reason, the theory of law starts to reflect on this space for the choice of judicial authority.

Doing that has consequences to the separation of powers. After all, the obligation to apply general rules created by the Parliament is due to the fact that these rules were created by the people through his representatives. If judges have the power to choose among different possible decisions to the same case and do not find a single decision that follow directly from the general rules, everything changes. Judges must explain why that decision was rendered rather than another; oth-

6 One could say this way of conceiving the law is formalist as opposed to non-formalist visions that do not value the autonomy of the law. Our conception of the law disagrees with the one we have just described, but does not devalue autonomy. That is why it would be more precise to say we stand for a "new formalism" and a new conception of the law's technique, as will be clarified later on in this article.

7 Our concern here is only the standpoint of theory. It would be necessary to rebuild the judicial practices historically, that is, judgments of courts, so as to have a clear picture of how the judges of each time used to think. There are very few studies of this kind in Brazil, for example, see Lopes (2010).

erwise a purely arbitrary decision would be characterized in opposition to the ideals of the rule of law. Obviously, this change in the legal rationality is also a change in the rationale of the separation of powers.

Indeed, many theoreticians of law hastened to say, *vis-à-vis* this state of affairs, that this choice would be, in fact, merely arbitrary, subjective, “political”, as Hans Kelsen put it (Kelsen 1967). Obviously, in light of an ideal of legal security that sought to find one answer for each case based on legal rules, those scholars were right. However, since the early twentieth century the theory of law began to investigate whether this ideal would work with an improper model of rationality to deal with law, thus designing an ideal of legal security impossible to achieve.

Such theorists have requested new models of rationality to tackle the indeterminacy of court action, but without considering it subjective or irrational. The question of the theory of law is then the following: If it is impossible to describe the court action as the identification of a single correct answer for each case, is it possible to consider it from another model of rationality? If yes, what would this model look like?

The paths chosen by theorists to carry out this task were various. The history of these attempts is intertwined with the history of the legal theory in the second half of the twentieth century. Some authors, such as Theodor Viehweg, were inspired by Aristotle’s *Topics* that sought another model of rationality (Viehweg 1979). Others, like Chaim Perelman, based their thoughts on Aristotle’s *Rhetoric* (Perelman 1999). In more recent times, we have witnessed the revival of Kantian practical reason in the work of Jürgen Habermas, Robert Alexy and Klaus Günther, in the form of a theory of argumentation (Alexy 1989; Günther 1993; Habermas 1996). In any case, their goal is to think of the activity of addressing concrete cases in rational terms, but according to another rationale.

This theoretical move is perceived by some authors as the recognition of the failure of law as a regulatory mechanism, a sign of its “de-differentiation” in relation to the spheres of morality, politics, economics, etc.⁸ After all, the autonomy of law would lie precisely in the ability to decide cases based on legal arguments, that is, on legal rules,

8 For this point, see Luhmann (1983).

from which it is possible to draw precise solutions to the case concerned.⁹

This alleged “loss of technicality” of legal decisions would be a threat to the ability of the law to regulate society and stabilize expectations. The law would lose its specificity by allowing judicial officers to decide on the basis of moral, ethical, religious norms. Of course, for those authors seeking other ways to think about the rationality of law, this movement would not necessarily result in “de-differentiation” or “de-technicization” of the law. What could happen would be a change in the patterns of the limits between the law and the other social spheres, that is, another legal technique would be emerging that would be appropriate for the characteristics of today’s society.

If you think of this second theoretical register, such a change in rationality can be seen even as a strengthening of the rule of law by strengthening democracy. Indeed, a legal language that is less technical, less specialized, or, put another way, less technocratic, could help ordinary citizens understand the legal debates, enabling court decisions to be discussed in the non-specialized public sphere. Besides this, such change may facilitate the participation of citizens in public debate that results in the making of final decisions. Legal language is then open to non-specialized considerations, setting the scene for a debate where there is easy access to the problems concerned.

For instance, in cases of high-voltage politics, the Brazilian Federal Supreme Court (STF) has convened public hearings¹⁰ of cases tried by the court. Moreover, the court has admitted, in a much more permissive way, that civil society organizations and individuals provide *amicus curiae*¹¹ to inform the court of any relevant arguments and information to the case at trial. Additionally, the justices of the Brazilian Federal Supreme Court have interacted with the press during the trial of cases to put forward their diverging points of view in the nightly news watched in Brazil on Globo channel. During

9 The key author here is Max Weber. For a more systematic description of the Weberian argument, see Trubek (1972).

10 The Federal Supreme Court can organize public hearings to get information it believes relevant to a case (see art. 9, §1º, Federal law 9.868 de 1999). Actually, the court has been using this possibility to hear civil society in controversial cases.

11 *Amicus curiae* is a procedural instrument that allow civil society to speak before the Federal Supreme Court (see art. 7º, §2º, Federal Law 9.868/99).

some of the Federal Supreme Court deliberations, justices were interviewed live on national television every day, before or after they made their votes public.

This is a research agenda to be explored, but either way, it seems clear that the Brazilian judiciary has opened itself to the public on various issues it examines. Indeed, this whole process could be interpreted, according to a more traditional view of the problem (Rodriguez 2010), as a violation of separation of powers in its most traditional sense and an advancement of the judiciary on the legislative branch of power.

Again, if we look at this process as a shift in the rationality of the law, we can say that there is a new model of a separation of powers in operation. In this model, the judiciary performs other duties according to another rationale and, therefore, its interaction with the public sphere then changes. Instead of merely applying the political will of the people expressed in the law, this power establishes its own and independent relationship with the public sphere (Kirchheimer 1961),¹² developing institutional spaces for this interaction to occur.¹³

The decision making process becomes, in this scenario, a space for interaction between the law and the public sphere. By losing its logic and deductive characteristics, the basis of decisions becomes problematic, therefore, liable to be disputed by the interested parties, whether those directly involved in the case or third parties indirectly involved in the decision. The fundamental legal issue that emerges is setting the terms of this dispute, namely the creation of a procedure and a proper rationale to deliver a well-justified and convincing decision for those directly concerned in the case and the participants of the public sphere.

A third important element is precisely the growing interaction between judges and the media, just mentioned above. A case in point is the judges' increased exposure to TV and newspapers and the strategic postponement of important decisions (or individual judges requesting to see records, thus deferring their decision) with a view to, for a

12 To be precise, Kirchheimer talks about "public opinion" and not "public sphere".

13 As mentioned in notes 10 and 11, the law authorizes the Federal Supreme Court to promote public hearings before his deliberation and decision of a case. The same court admits the presentation of *Amicus Curiae* by several NGOs and associations interested in the cases under the court's jurisdiction.

few weeks, the public's perception of the case on trial. But these are, as yet, impressionable perceptions, because this is a field that still lacks empirical research.

At this point, it is important to open a parenthesis. Individuals, groups and social movements can directly file lawsuits in order to produce certain results from the judiciary branch of power. This type of action is often called *strategic litigation*. The discussion about the flow of society's demands towards the judiciary should certainly take this phenomenon into account.

For the purpose of this paper, we will not go into further detail of this phenomenon in Brazil. But it is important to call attention to the phenomenon and the fact that Brazil has a peculiarity in this field. The demands that arise in society are not brought to the judiciary only by NGOs, lawyers working pro bono or legal assistance services.

Brazil has the Public Attorney's Office (MP), a state authority that has the power to file suits on behalf of society.¹⁴ Therefore, to obtain a complete picture of the problems that concern us, we must also study the interaction of the Public Attorney's Office with society. We will explore this point in more detail in the next section.

Let us get back to the main topic. All institutional mechanisms that promote the interaction between society and the judiciary are related, after all, to the characteristics of legal technique. Its goal is to inform the court about the possible grounds for choosing between the various possible legal solutions with regard to the same case.¹⁵

Such mechanisms, which may serve to enrich the debate on such fundamentals and, by consequence, on the possible answers to be given to individual cases, can increase the legitimacy of the justification

14 Of course this raises the questions: How and why the MP decides to sue someone? The public sphere should control this decision. But how?

15 The fear of advancing a non-legal rationality in the context of judicial decisions does not seem to remain solid, at least in the Federal Supreme Court. There is little influence of arguments not related to law in this court, according to a research conducted in 2010 (Rodríguez 2010). The core problem of the Federal Supreme Court seems to be the difficulty of forming a solid decision-making rationale: each judge develops a profile in order to deal with the sources of law and raises different grounds in the solution of the same case, which creates an argumentative chaos of technical arguments. See the research quoted and Vojvodic/Cardoso/Machado (2009).

to the solution adopted and the decision taken.¹⁶ By bringing more arguments into the judiciary, this contributes to reducing the risk of decision makers disclosing their justification of any socially relevant views and interests.¹⁷

Interestingly, in Brazil, some social movements have organized themselves to push their demands inside the courts, but some have not. For example, the judiciary's actions on issues like health and education are very intense, in contrast to the actions geared to the matters of gender and racism.

As we will see shortly, some social movements have organized their discourse and demands around the purpose of passing laws in parliament and requiring that the judiciary promote a textual, precise, dispute-free law enforcement. However, other social players have devised specific strategies to serve on the judiciary. Describing this picture, which remains unexplored by scholars of law and social sciences in Brazil, is one of the purposes of our research.

Below are some thoughts on what has happened in the field of combating racism in Brazil.

3. An Example of Research: the Crimes of Racism and Racial Discrimination

Two issues are very significant in the processes of passing laws against race discrimination in Brazil. On the one hand, it is possible to recognize that the symbolic role of the law is emphasized. It can be said that the black movement, a key player in the juridification of this issue, has focused demands to lawmakers around strategies intended to expand, harden or improve the criminalization of discrimi-

16 We put this statement in the conditional mode because I have no news of research on the legitimacy of the decisions of the judiciary before the public sphere.

17 Here we disagree with Ronald Dworkin and his theory of interpretation as integration, where the judge alone has the Herculean task of rebuilding the tradition for a well-justified response (see Dworkin 1988). Our vision of this problem involves a combination of *institutional constraints* and *hermeneutic models* able to bring into the judiciary as many voices as possible in order to get a well-justified solution. We would call this model of justice a *polyphonic* one. On the concept of *institutional constraints* and *hermeneutic models* (see Rodriguez 2011).

natory and prejudiced acts and, to a large extent, these demands were satisfied by the legislative branch of power.

A discussion of other forms of intervention and other fields of action within the law has just started to gain a greater importance, in particular by the participation of Brazil in the World Conference Against Racism sponsored by the UN in 2001 in Durban, which discussed affirmative measures both on the agenda of state authorities¹⁸ and in the legislative branch of power.¹⁹ This discussion has gained force ever since.

Furthermore, a set of diagnoses of insufficiency or ineffectiveness of criminal laws set in motion the valorization of other forms of intervention. When we look back to the sixty years of criminal legislation against racism and racist practices in Brazil, we see that the enactment of a new law was generally preceded and encouraged by criticisms to some previous law by those players working in the formal and/or informal public sphere. News statutes have been created in order to solve the efficiency problems of the older ones, but this process has not produced the expected outcomes when they are examined from the point of view of the social movements.

The first anti-racism statute, “Afonso Arinos Law”, was enacted in 1951.²⁰ It addressed discriminatory conduct as misdemeanors. The-

18 A case in point is the fact that several ministries have adopted a quota system for the promotion of employees; the establishment in May 2002 of the program “Programa de Ações Afirmativas” (Affirmative Actions Program), aimed at increasing the participation of black people, women and people with disabilities in leadership positions throughout the federal administration; the implementation of a quota system in some universities. Moreover, after the Federal Supreme Court declared the constitutionality of the principle of that affirmative action, even the judiciary branch of power adopted the requirement of a minimum percentage of black people employed in companies providing services to the courts.

19 The issue of that affirmative action was taken to Parliament with more emphasis on discussion of the law on social and racial quotas in federal and state universities (PL 73/1999, authored by Rep. Nice Lobão, with its various amendments and attachments, still pending in the House of Representatives) and the Statute of Racial Equality (Senate Bill – PLS 213/2003), a bill authored by Senator Paulo Paim (PT-RS), which was under debate in Congress since 1998 and was approved only in 2008. These projects focus on establishing a set of affirmative actions that involve “special programs and measures adopted by the State to correct racial inequalities and to promote equal opportunities” (PLS 213/2003).

20 Federal Statute 1390, July, 3, 1951. Named after the Congress representative that presented it, “Afonso Arinos Law” was the first Federal statute to explicitly prohibit racial discrimination in Brazil.

reafter, incisive demands were made to criminalize such acts, and as a response, racism was made a serious, “unbailable and indefensible crime” by the Brazilian Constitution of 1988.

The federal legislation promulgated after this constitution focused on regulating and defining punishable conducts – the main statute is Act 7716/1989, with the original text altered a couple of times by other statutes.

The inclusion of Article 20 into Act 7716/1989, through Act 9459/1997, which describes the practice, inducement or incitement to discrimination or prejudice, responds to the criticism that the previous law described the crimes in an overly detailed fashion and made it too difficult to enforce the law.

Article 2 of Law # 9.459/97 of 1997 is another law also added to the penal code and is a form of aggravated slander, with a sentence one to three years confinement plus a fine, “if the grievance derives from affronts to race, color, ethnicity, religion or origin”.²¹

This change was, as justified in the bill of law, intended to correct one of the points mentioned as the most problematic for the enforcement of the previous law: the fact that slander due to race and color continued to be considered by the courts as mere ordinary slanders, with much lighter punishments than those given out for in the “Caó Law”.²²

So, in this matter, in Brazil we have three types of crimes: i) acts involving the refusal to serve a person or deny access in any way to her based on race, skin color, ethnicity, religion or nationality; ii) a general description of the crime of racism, as “practicing, inducing or inciting discrimination or prejudice based on race, color, ethnicity, religion or nationality”; iii) an aggravated slander, “if the grievance derives from insults to race, color, ethnicity, religion or origin”.

It is worth noting that in the first two types of conduct the public prosecutor undertakes the criminal proceedings, while racial slander is undertaken by private individual initiative. This also meant being sued by a criminal private prosecution filed by the victim.

An exception to the general system of public prosecution, criminal private prosecutions offer practical difficulties with regard to their

21 Article 2 of Law # 9.459/97 of 1997.

22 Federal Statute n. 7.437, December 20, 1985.

processing, as these actions lie within several limits, including strict formal assumptions, statutory limitation period of six months for filing the lawsuit, payment of court costs, and requires an attorney. Moreover, one of the foundations of criticism also refers to the fact that submitting a crime to a criminal private prosecution also means, in our system, that the victim's interests in the prosecution is more important than the public interest, that is, it would have an undesirable symbolic effect, in addition to the problematic practical effects.

In addition, as we will see, once the distinction between racism and racial slander is not clear and indisputable, the fact that these two crimes are subject to different legal procedures has considerable consequences.

To develop further our understanding of the enforcement and ineffectiveness of laws against racism, we collected rulings made by nine Brazilian Courts of Appeals (from the following Brazilian federal States: Acre, Bahia, Mato Grosso do Sul, Paraíba, Pernambuco, Rio de Janeiro, Rondônia, Rio Grande do Sul and São Paulo) from 1998 to 2010.

A search for rulings of the above Courts of Appeal related to racism was carried out using the databases available at the Lawyers' Association of São Paulo (Associação dos Advogados de São Paulo – AASP) and at the websites of the Courts of Appeal with updates that run through September 2010. The search used the keywords “racism” (“racismo”); “higher degree slander” (“injúria qualificada”); “racial slander” (“injúria racial”); and “racial discrimination”, and came back with 2061 rulings. Manual searches discarded non-penal rulings, as well as cases which debated exclusively procedural or incidental matters, leaving 201 court decisions – this number therefore represents all cases of crimes related to racism, racial discrimination or racial offenses made public by the Brazilian Courts of Appeal researched.

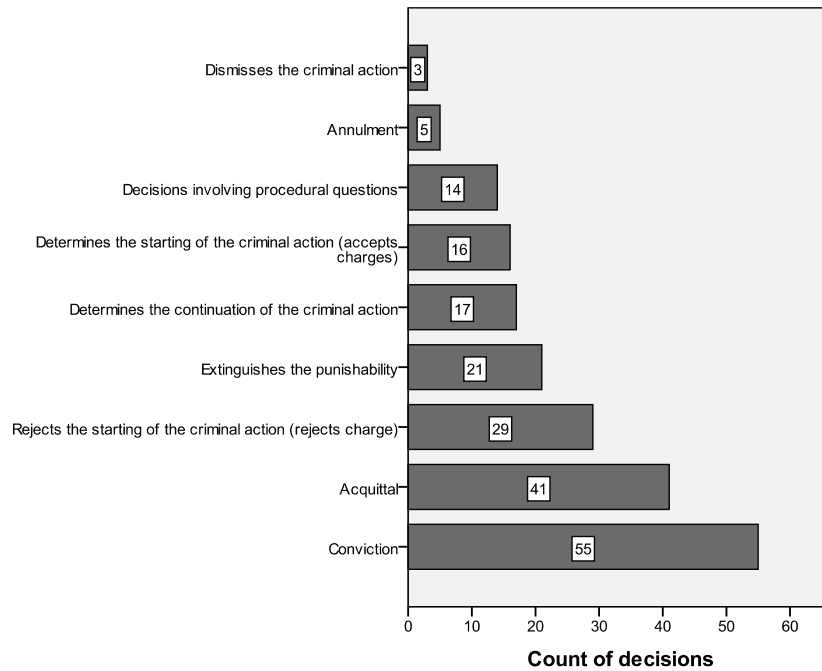
Of those decisions, there were: 118 criminal appeals; 43 criminal interlocutory appeals (“Recursos em sentido estrito”); 31 writs of habeas corpus; five criminal actions conducted directly by Court of Appeal (special jurisdictions); two appeals against liberatory decisions on Habeas Corpus; two atypical proceedings involving petitions to prosecute public officers and one prejudicial appeal arguing the non-impartiality of the judge (“Exceção de Suspeição”).

As can be seen in the graph below, most of these cases (118 in all) reached the court after the announcement of the judgment of merit (condemning or absolving) in the first instance. A significant number of cases though were tried in court before the judgment of merits – 29 after the judge’s initial ruling that accepted the charge and 43 after the judge’s initial ruling that rejected the complaint, thwarting the continuation of the case.

As for Courts of Appeal rulings, if we only take into consideration the decisions that analyzed the merits of the case – either an acquittal or conviction (118 in total) – it became evident that the court condemned more than it absolved: 55 convictions compared with 41 absolutions. When it came to decisions taken by the court when something was questioned before it ended in the first instance, the number of cases closed by the Appeal Court’s decision – based on rejection of charges, extinction of punish ability, dismissal or annulment of the case – compared with those that were determined to be tried are as follows: 58 decisions of the first kind compared with 33 of the second, which represents 34.3% of the decisions determining the untimely end of the criminal action compared to 26.1% determining its continuation, respectively. The significance of the first output is one important factor that plays a role in the general dissatisfaction about how the judiciary deals with criminal cases related to racism.

Taking into consideration all 201 cases (that is, convictions and absolutions, as well as decisions taken to proceed or annul cases), we notice a prevalence of cases in which a decision was taken to end a case prematurely (58 cases between rejections, extinction of punishability, dismissal or annulment of the case). And following this: 55 convictions; the 41 absolutions and the 33 procedural decisions to continue the case.

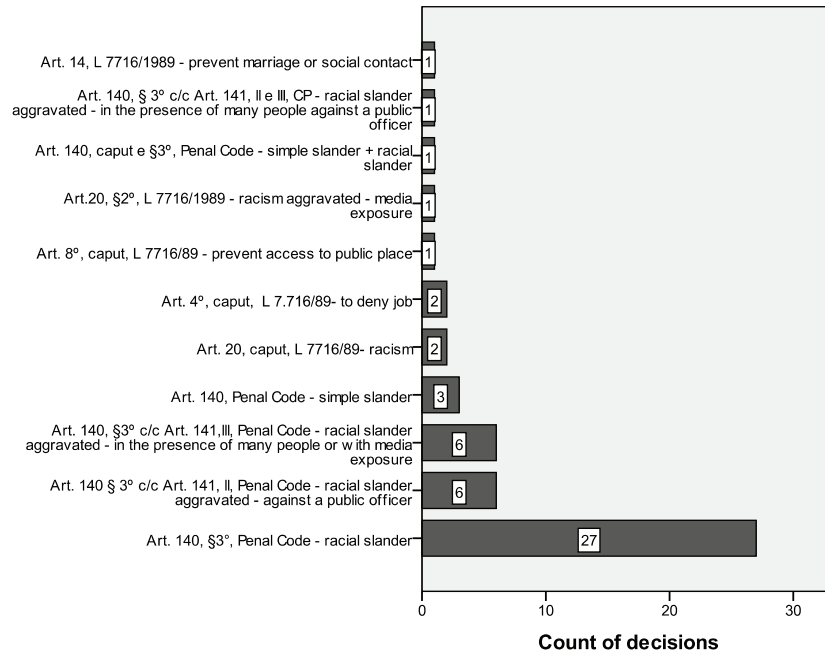
Graph 1: Decisions of Brazilian Courts of Appeal



Convictions were, as indicated in the graph, for the most part (49), for slander (plain slander or racial slander), with or without sentencing increases. We located only three convictions for the crime of racism in accordance with Article 20 of Law No. 7.716/89; one conviction based on the denial or obstruction of employment (Article 4 of the same law) one conviction, for preventing access of a public place (Article 8 of the same law); and one conviction for preventing marriage or social contact (Article 14).

It is remarkable that there are such low number of cases involving racism and situations of discrimination.

Graph 2: Charges of the convictions

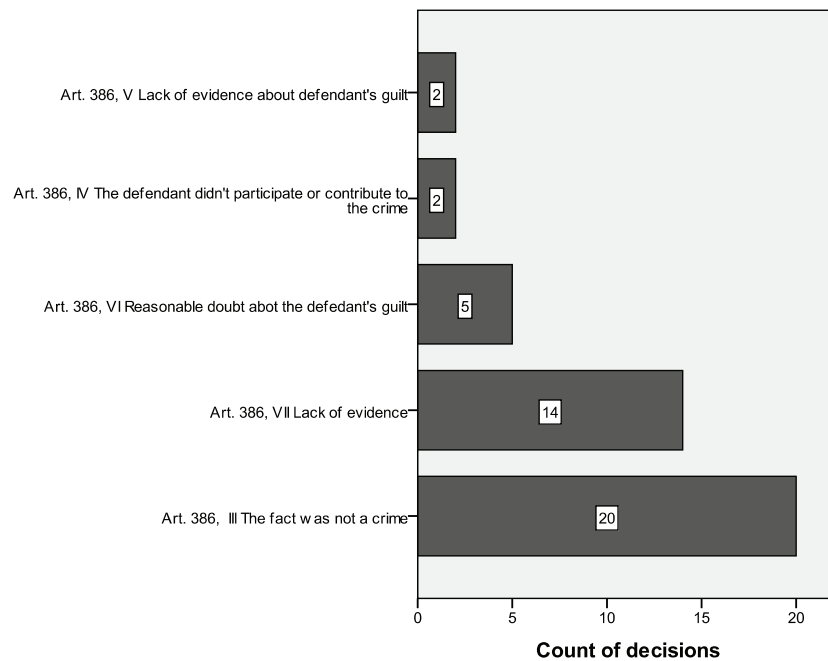


As for the sentences handed out, 10 of the 55 convictions amounted to one year in prison and a fine of ten days, which corresponds to the minimum sentence for high degree slander. In 24 cases, the sentence was fixed at 16 months, which corresponds to the minimum legal limit for high degree slander with a one third increase based on circumstances from Article 141 of the Penal Code (in the presence of many people or with media exposure or against public officer). The harshest sentence was three years of imprisonment, set by the courts in two cases. In many cases, penalties of imprisonment were replaced with community service. In two cases, the convictions were followed by an exoneration, as it took too long to persecute according to the legal limit of time (“extinção da pretensão executória da pena”).²³

23 They were calculated in our research together with the cases of convictions because we deem it relevant that the procedure came to an end and reached a legal conclusion that recognized the perpetrator’s responsibility and wrongdoing and just suspended the execution of the penalty.

The graph below (n.3) shows the number of absolutions. They were justified in half the cases (19 of 41) based on a lack of evidence. In 20 of the cases of absolution the judges analyzed the merits of the case and declared lack of a crime. Within this context, it is significant to the argument that the offender did not act with harmful intent, or in bad faith, even though it was clear in the offence that it involved a racial nature, and the second instance decision made by the court does not deny this.

Graph 3: Reasons for acquittals



These results allow for some conclusions. In the first place, they contradict the perception that no convictions were upheld at least in terms of the Courts of Appeal. Overall, the number of convictions reached approximately 27.3% (or 55 rulings), which is significant. Nevertheless, it is worth mentioning that the convictions were mostly for crimes of plain slander or racial slander. Racism or discrimination appeared only in eight cases of convictions. The definition of the

facts submitted to the judiciary, mostly related to verbal offenses with a racial slurs as racial slander and not as the crime of “racism” is criticized by victims and by actors of social movements.

What seems also troublesome and frustrating from the point of view of the judicial system is that many cases in which trials end before the judge could even declare a sentence: the 58 cases in which the court decided on an early closure of the case.

This number is not only superior to the cases in which the court proceeded with the case (33), but also represents the most common outcome of the cases tried by Courts of Appeal: it represents 27.9% of the total cases analyzed.

To understand these results, one must be sensitive to the inner workings of the country’s legal system, more specifically, the dynamic of the application of criminal and procedural rules. The main questions to be considered are linked to the problem of changing the classification of racial cases (racism/racial slander).

As we have mentioned, one of the most significant controversies found was the debate over the qualification of the facts of what defines racism or racial slander. In some cases, the court in its decisions reevaluated the previous legal definition of the crimes as racism, establishing that the case should be considered as either plain slander or racial slander. The change in the definition of what is racism or slander has the practical effect of dismissing cases for their lack of timeliness in filing the initial charge. This happens because of the different ways in which each case is processed: racism is tried through a public penal trial – that means, it is tried by the State Prosecutor (“Ministério Público”); while racial slander should be tried through private criminal action, that is, by the offended party who seeks a lawyer and has six months from the time she/he learns who the perpetrator of the offense is to file a charge.

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

For this reason it is very common to recognize a lack of timeliness as an output for these cases.

We must not presume that this is the desired result of judges when they call for the case to be reassessed. Especially since the classification of cases brought about by insults of a racial type, such as racial slander, is justifiable from a legal point of view. There are intrinsic elements to the system of legal argumentation that show that the court's classification of this type of conduct as racial slander, although these elements are far from being the only form of dogmatic interpretation that can be considered plausible. This analysis will not be developed in this text (see Machado/Püschel/Rodriguez 2009).

The dispute over how to interpret facts and apply the law by means of dogmatic debate is absolutely normal. To think of the application of statutes without considering the indeterminacy of legal norms and the room for dogmatic argumentation is a mistake. In these cases, the judge applying the law must be familiar with a whole range of categories (such as "racism", "racial discrimination", "racial slander", and principles of interpretation of criminal statutes), hence increasing the range of interpretations and the indetermination of norms.

The situation becomes problematic here – determining the premature termination of cases – because of the different procedural regimes involved in the dispute and the paradoxical procedural rules applied to the problem: namely, that the recognition of a new classification that subjects the case to new procedures harkening back to a preceding moment and end up suppressing rights. In other words, the offended party is required to have taken measures that were not necessary at the outset, due to a change in legal requirements, and under threat of seeing the case closed.

The rule that determines the six-month deadline from the moment the perpetrator's identity is made known is a decisive factor when one considers the problematic results found. The difficulty in upholding a solution that escapes the application of this penal procedure rule, which has no legally established exceptions, shows us that we are facing a systemic problem. This problem would be better resolved by means of a change in legislation, so the crime of racial injury could then be tried by means of a criminal procedure to be initiated by the public prosecutor. This situation has motivated the recent change in the legislation, with Law # 12.033/2009, which altered the prosecution regime for the racial slander – it must now be prosecuted by

the public prosecutor, after a formal authorization of the offended part (“ação penal pública mediante representação”).

This change will also help to avoid the procedural problems faced by privately sought penal cases such as, problems of access to justice, difficulties arising from briefing, and questions involving how to comply with the stricter rules involving the submission of a criminal action, all of which prompted the closure of many cases.

In addition, as we have already mentioned, most of the dismissals and acquittals were due to a lack of evidence. The Inter-American Commission on Human Rights in its report on human rights in Brazil (1997) specifically mentioned the relevance of this issue that was revealed by the data collected. It stated that

Law # 7.716 proved to be “difficult to enforce since it establishes mechanisms to facilitate proof that a crime has been committed. Moreover, by making it necessary to prove that discrimination was intended leads to situations in which the aggressor and the aggrieved must confront one another and the offense must be proved objectively”.²⁴

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

This matter is certainly worth looking into. We do not know, for example, if the difficulties over proof arise from badly briefed cases (which can be corrected through measures that improve the quality of legal services and the quality of police investigations and guidance), or the out-of-date doctrine (which sees in the category of “criminal intent” a need for proof of a psychological order and hence to vie for the prevalence of another mode of understanding the elements that comprise the notion of crime), or “excess demand” on the court’s behalf or some sort of predisposition to absolve (which should certainly be the object of democratic and critic control, but which can

²⁴ Inter-American Commission on Human Rights. Report on the Situation of Human Rights in Brazil, 1997 (<www.cidh.oas.org/countryrep/brazil-eng/index-brazil.htm> (04.02.2009).

only be confirmed through empirical analyses), or even the fact that most of the cases depend on personal evidence.

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

In fact, we did find rulings that describe racist attacks as “archaic slang, devoid of racist content” or “destitute of any pejorative meaning” or still the inexistence of the intent of depreciating the group – and this kind of reasoning when neither the event itself, nor the identity of the perpetrator were being questioned. It is only in the context of these cases that one can firmly state that the judge trying the case was insensitive to racial conflict. However, this happened on a smaller scale: in six cases of absolutions and in five cases of annulments of the case. These cases represent only 8.1% of cases.

With regard to the analysis of law enforcement, this research sought to investigate more closely the general claim that the judiciary is insensitive to racial issues when we look at the low number of convictions. It seems that an evaluation of the effectiveness or ineffectiveness of Brazilian laws against racism should not be summed up or connected primarily to the number of convictions, but to the dynamics of creating and enforcing the law. This led us, among other things, to investigate more closely the behavior of the judiciary when faced with cases of racism. Thus, we sought to further understand the decisions and their grounds beyond the concrete result only measured by the number of convictions.

The empirical study is still ongoing and the data collected has not yet been able to provide a snapshot of the Brazilian judiciary's attitude regarding this theme. However, the results already obtained seem relevant. Firstly, they relativize the idea that the law is not enforced. An analysis that affirms the “effectiveness” of the law from the number of convictions overlooks the specific issues found inside the legal system and fails to point out new pathways for further dis-

cussion on the use of legal instruments in the anti-discriminatory fight, nor does it consider its limitations and possibilities.

Moreover, the results mentioned above have made visible the presence of issues that have significantly influenced the unsatisfactory outcome of cases: the problem of disqualification and preemption, evidentiary stage, and the difficulties inherent in the processing of cases according to the regime of private prosecution.

In addition to the data itself, what is clear in this research is that it is not possible to explain the results without taking into consideration a number of factors that are questioned at the time of law enforcement, as well as paying close attention to the stumbling blocks of the legal system.

Clearly, those in charge of enforcing the law are required to deal with a variety of categories (“racism”, “racial defamation”, principles of criminal law enforcement), which increase the possibilities of interpretation, thus increasing the indeterminacy of legal rules. The more possibilities judges have to decide the concrete cases, the more outcomes they will come up with. As a statute created a new category, one can say the creation of this statute increased Law’s indeterminacy. In the cases analyzed, there was a divergence between the legal classification given to the fact – and the reclassification made by the court, which ultimately influenced the final problematic effect, is a justifiable way to decide this divergence.

Moreover, strictly technical-procedural issues should also be considered to understand the issue: the differences filing a criminal action and differences in processing schemes among those offenses yet to be criminalized is key to the problem of preemption or nullity, which is a cause of dismissal for most cases. This might not happen if we had at our hands two crimes against the public order. That is, at this point, one cannot overlook the paradoxical effect that the difference in regimes results in the discussion of classification of the case.

Furthermore, as for the lack of evidence, a criticism of the appropriateness or inappropriateness of that decision would only be possible from a qualitative analysis of the case, when one considers the principle of free findings of the judge.

Recognizing the specificities of legal reasoning and *modus operandi* of the criminal justice system does not mean giving up criticizing the practical results of that system. Instead, it makes it possible

to go beyond a pessimistic and generalizing conclusion that judges are racists or that our judiciary system is insensitive to the struggle for equality, in order for further research on the elements that contribute to the lack of responses considered unsatisfactory.

As for the relationships between social movements and the law, we advocate that understanding the dynamics and the logic of the legal system also helps to see the possibilities and limitations of each legal instrument in evaluating and deciding on legal strategies of action to be taken both before the parliament and in the courts.

4. Directions of Flow: Demands and Formal Institutions

As shown in the first part of this paper, the judiciary has developed its own spaces for interacting with society. This includes room for making decisions, whose foundations are in dispute, as well as the mechanisms intended to bring to the decision-making venues interests to the arguments of various origins. Having said this, one wonders how these arguments arrive in those spaces; that is, what is the direction of flow of arguments between the law and the public sphere.

When we consider the filing of a lawsuit by a group, association, political party, social movement, or any other politically active entity, the direction of movement seems to be from the public sphere to the legal system. These players compel the judiciary examine to their own arguments in deciding on the demands put on this branch of power. This would be ideally preceded and followed by turmoil in the public sphere, which would challenge formal institutions in several ways, including lawsuits.

One of the topics to be researched on this problem is whether or not there are strategies for litigation organized by social movements, interest groups, and other societal entities. It would be wise to look for entities created solely to file lawsuits and take actions before the legislative branch of power and the government at large on issues relating to a particular topic and how they do it: do they hire permanent attorneys, seek attorneys in the market, seal relationships with other entities composed of attorneys, have relationships with the Public Attorney's Office (MP)?

In all these cases, it is clear that the flow of demands would clearly be in the direction from the society to formal institutions, preceded

by a debate in the public sphere and the construction of a strategy involving the judiciary, since it is regarded as one of the more relevant political arenas.

However, one must also consider that this is not the only possible direction for the flow of demands put forward by society. For example, when we reflect on the Public Attorney's Office and individuals as initiators of lawsuits, we can see that the direction of flow can be different. The Public Attorney's Office, for instance, files suits independently, even if they are not linked to social movements or interest groups, i.e., not resulting from a current pressure from the public sphere.

Similarly, an individual may also bring about action despite being disconnected from any interest group whatsoever. In both cases, these actions may deal with topic or arguments that could mobilize the public sphere.

Here the direction of flow is, then, reversed: the encouragement comes from a formal institution and becomes relevant because it was discussed by and then disclosed for some reason by a media outlet or another tool of communication.²⁵ In all these cases, the judge, the individual and the Public Attorney's Office discuss relevant issues involving various societal entities and, precisely because of that, the interested parties discuss and try to influence the judicial decision to be rendered.

One can imagine, hypothetically, that the same thing can occur when a judge develops a given argument to justify his/her decision, and subsequently that argument awakens the public sphere, even in a case that is not inserted into a strategy of militancy. For example, in a recent case involving a football player labeled as gay by the media, the court issued its opinion on the relationship between homosexuality and football, which had wide repercussions and led several governmental organizations devoted to the cause of gays and lesbians to take action.²⁶

25 In many issues, the MP has conducted independent investigations to sue individuals, the state or private firms that have gained public interest afterwards.

26 The judge was punished by his declarations. See "TJ de São Paulo mantém punição de censura a juiz do caso Richarlyson", *Última Instância* (<www.ultimainstancia.uol.com.br>; 19.05.2011).

A relevant research topic could be further developed on how and why these individuals, judges or public attorneys have developed such arguments or put forward such demands. Drawing an ideological profile of individuals, understanding the circumstances under which they were inserted at that particular time, and understanding the internal policies of institutions and their relationships to society are all likely to shed light on this problem. As mentioned above, it may be possible that the actions filed or decisions taken by these players take advantage of a climate of unrest in the public or a latent issue which, when treated by a state authority, begins to mobilize opinions and grab the attention of the media.

In any case, what matters here is to raise the main issues and make clear that the flow of demands will not always be from the public sphere to the formal institutions; the opposite may occur by virtue of the filing of actions or the development of arguments by a judge, an individual, or the Public Attorney's Office.

5. Next Steps

Empirical investigations carried out by CEBRAP in a concerted effort with *Direito GV* began by examining the debates on cases of gender and racism within the judiciary, which has motivated theoretical reflections on the characteristics of jurisdictional rationality and separation of powers in Brazil. In one word, a glaringly obvious phenomenon is the conflict of interpretations that has imposed the need to rethink several points in legal theory. It can be said that the core issue is to deal with this conflict and explain its origin and dynamics.

This question can be thought of as the relationship between the judiciary and society. As already seen, this research is intended to reflect on the meaning of various institutional mechanisms designed to make the judiciary permeable to society and, on the other hand, to investigate how the demands are formed and how they come to the judiciary. After all, there may be demands addressed by other mechanisms of conflict resolution.

One goal of our research is to identify the flows of society's demands to the judiciary, but also being clear that the relationship between society and state in this case has its peculiarities. As al-

ready seen, there may be demands that arise from formal institutions, but are targeted to the public sphere, as they try to speak on behalf of specific social interests. For this reason, research on this point of the problem cannot work with a tight definition of state and society.

In fact, this problem also appears when we study the judiciary in isolation. After all, the mechanisms that are being created to relate to society are also redesigning the separation of powers in Brazil and, consequently, the boundaries between society and state.

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