Protocol for Judging with a Racial Perspective

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PROTOCOL FOR JUDGING WITH A RACIAL PERSPECTIVE

2024

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(CNJ Ordinance No. 73/2024)

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PROTOCOL FOR JUDGING WITH A RACIAL PERSPECTIVE 2024

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Foreword

With a strong sense of historical responsibility, the National Council of Justice presents this Protocol for Judging with a Racial Perspective to Brazilian society, which is now mandatory throughout the Brazilian Judiciary.

Following one of its primary constitutional mandates, the Council has, in recent years, produced key documents aimed at guiding the Judiciary in the realization of fundamental rights, such as the Protocol for Judging with a Gender Perspective, which has already yielded positive impacts on judicial practices throughout the country.

This Protocol was developed by the Working Group established under CNJ Ordinance No. 73 of February 23, 2024, and reflects the contributions of judges from different segments of the Judiciary, along with several experts in racial issues.

Over the course of several months, dozens of meetings were held, permeated by open dialogue and the exchange of experiences, culminating in this document.

As with any human endeavor, this protocol does not claim perfection but rather aims to contribute to the ongoing improvement of judicial institutions in their pursuit of decisions that reflect material equality and uphold the dignity of every human being.

From our beloved Bahia state, a land marked by the diversity of "all saints, charms, and axés," I draw upon the powerful influences of Mother Africa, inspired by the hope that, from this point forward, we will witness a Judiciary that is increasingly engaged in confronting structural racism and all forms of discrimination.

Finally, let us recall the words of Nelson Mandela, who wisely reminded us *"No one is born hating another person because of the color of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love." (From the autobiography "Long Walk to Freedom," 1994)*.

Advisor João Paulo Schoucair
Working Group Coordinator

Introduction

This protocol is an initiative of the National Council of Justice (CNJ), developed with contributions from judges and other subject-matter experts. It is grounded on the understanding that, to strengthen the democratic rule of law, the Judiciary must actively confront the reproduction of racism in all its dimensions, considering its intersection with issues of gender, sexuality, age, disability, religious belief, and origin.

This progress is the result of a historical process rooted in all of Brazil's political-constitutional cycles, gaining momentum with the enactment of the 1988 Constitution. This milestone was shaped by the powerful mobilization of Black movements and Black women, who played a central role in forging a path toward re-democratization to protect all forms of life within our territory.

With the internalization of the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance in January 2022, a new constitutional framework was established for addressing racism and promoting racial, sexual, and social equity in Brazil. This framework not only reinforces existing anti-racist legal instruments at the federal and subnational levels, but also directly influences the interpretation and application of the entire Brazilian legal system. It expands the possibilities for promoting rights and strengthens mechanisms for holding individuals and institutions accountable for engaging in any of the forms of racial violence defined by the Convention.

Jurisdictional action plays a crucial role in implementing a new constitutional paradigm for combating racism. Thus, the protocol aims to: a) promote access to justice, improving how individuals under jurisdiction, especially those whose lived experiences differ from those of the judges presiding over their cases; b) encourage the Judiciary to reflect on personal biases and expand the space for qualified listening to the circumstances presented by those seeking justice; c) ensure equal consideration of all accounts presented in a case, giving each report the same weight and relevance in shaping the factual understanding; d) optimize the provision of justice, including through the use of multidisciplinary teams when necessary to guarantee a safe and reliable environment for the participation of parties and witnesses; e) foster judicial awareness of the material and symbolic conditions that affect the facts and conflicts under analysis, which can significantly affect how motivations, silences and the influence of institutional hierarchies are interpreted; f) expand the normative parameters of judicial decisions, drawing on both domestic and international legal instruments to promote racial equity; g) increase the commitment to clear and inclusive communication, ensuring that all parties understand the effects of each stage of the judicial process; h) expand the perspective of judges, grounding their decisions in constitutional principles that emphasize the State's duty to guarantee rights and apply effective mechanisms to eradicate all forms of rights violations.

The Protocol for Judging with a Racial Perspective is a strategic measure that directly contributes to achieving the goals of the United Nations 2030 Agenda, especially Sustainable Development Goal (SDG) 16, which aims to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels."

Ensuring that all people, regardless of race, have full access to justice and receive equitable treatment is an indispensable condition for achieving sustainable development that respects the rich diversity of Brazilian society. By integrating an intersectional approach that considers racial inequalities in judicial decisions, the protocol strengthens the justice system's ability to combat racism. It is also aligned with SDG 18, a voluntary commitment to ethnic-racial equity assumed by the Brazilian State within the scope of the 2030 Agenda.

Therefore, this is not merely a document to guide the judgment of cases involving Black individuals or communities as parties or witnesses – it also has the potential to foster a broader shift in the Brazilian Judiciary's approach to applying the law with an awareness of the racial dynamics that shape Brazilian society. This movement reflects a firm commitment to building a free, just, and inclusive society, which embraces intercultural dialogue and upholds respect for all people.

PART I

Fundamental Principles

Part I - FUNDAMENTAL PRINCIPLES

2.1 Introduction

Racism is a complex social and political phenomenon with deep historical roots, present in many societies worldwide. Although modern biological sciences have demonstrated that there is no genetic basis for dividing humanity into races, the concept of race endures as a social construct and continues to profoundly shape human relations. Historically, the notion of race was used to justify social stratification and subjugation of racialized groups through enslavement and even extermination. In the Brazilian context, racism played a foundational role in shaping society. In general terms, it was sponsored by the State itself, which acted as a guarantor of the socioeconomic system of slavery – a system rooted in racist logic that extended into other domains of social life.

Therefore, adopting a racial perspective within the Judiciary is not merely a moral or political recommendation. On the contrary, it is the responsibility of the Brazilian State to actively work towards reversing and eradicating structural inequalities, especially racial ones. Along these lines, the current framework of Brazilian constitutionality reinforces this obligation and imposes on the State the duty to mitigate and, ultimately, suppress the effects of racism and racial discrimination in society. In this sense, the racial perspective constitutes a true *constitutional mandate*, grounded in *legal norms* – principles and rules enshrined in the original text of the Federal Constitution and in human rights conventions that hold constitutional status within the Brazilian legal system.

Since the enactment of the 1988 Constitution, the fight against racism and all forms of discrimination has been expressly recognized as both a principle and a fundamental objective of the Brazilian Republic. In this sense, several constitutional provisions made clear the incompatibility of discriminatory norms and practices with the constitutional order. These include the protection of **human dignity** as a foundational principle (Art. 1, III, CF/1988)[1], **the principle of equality, and the prohibition of discrimination** (Art. 5, *caput*[2], and Art. 3, IV, CF/1988)[3], and the express repudiation of terrorism and racism (Art. 4, VIII, CF/1988)[4]. The original constituent assembly went further by establishing a

1 "Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: [...] III – the dignity of the human person.

2 "Art. 5 All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security, and property, on the following terms: [...]."

3 "Art. 3 The fundamental objectives of the Federative Republic of Brazil are: [...] IV to promote the well-being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination."

4 "Art. 4 The international relations of the Federative Republic of Brazil are governed by the following principles: [...] VIII repudiation of terrorism and racism."

constitutional duty to punish all forms of discrimination (Art. 5, XLI, CF/1988)[5] and **criminalizing racism** (Art. 5, XLII, CF/1988)[6]. These provisions laid a strong foundation for infra-constitutional legislation that has, over the past decades, reinforced the responsibility of both the State and society in combating racism. Notable examples of such legislation include the Caó Law (Law No. 7,716/1989), the Racial Equality Statute (Law No. 12,288/2010), the Quotas Law for Higher Education (Law No. 12,711/2012), and the Affirmative Action Law for the Federal Public Service (Law No. 12,990/2014).

The Brazilian legal system was significantly strengthened by incorporating two important international human rights conventions into its constitutional framework. These instruments expanded and deepened the scope of anti-discrimination constitutional law in Brazil, establishing specific obligations for the State to combat various forms of discrimination, with specific emphasis on racism. They reinforce the constitutional commitment to equality by outlining concrete actions the State must undertake to eradicate discriminatory practices.

The first international treaty to promote this change was the **International Convention on the Rights of Persons with Disabilities** (CRPD), incorporated into Brazilian law through Decree No. 6,949/2009. The CRPD made a crucial contribution to national anti-discrimination law by explicitly recognizing race as a factor that aggravates the discrimination experienced by persons with disabilities (Preamble, p, CRPD)[7] and by introducing, also for the first time, the concepts of direct and indirect discrimination into the Brazilian legal system (Art. 2, CRPD)[8]. Anticipating tools later adopted in the fight against racism, the Convention imposed on the State the duty to promote the rights of vulnerable groups. This includes implementing public policies that guarantee inclusion and equal opportunities, as well as recognizing specific rights, such as the right to reasonable adaptation or accommodation.

In 2022, Brazil's constitutional regulatory framework was further strengthened by the enactment of the **Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance** (ICERD). In addition to recognizing the commitment of the Member States of the Organization of American States (OAS) to the eradication of racism, the Convention establishes essential rules and principles for the promotion of racial equality.

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5 "Art. 5 [...] : XLI the law shall punish any discrimination which may attempt against fundamental rights and liberties."

6 "Art. 5 [...] : XLII the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law."

7 "*Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, color, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status."

8 "'Discrimination based on disability' means any distinction, exclusion or restriction based on disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

Firstly, **Articles 2**[9] and **3**[10] of the **ICERD** establish subjective human rights to protect against racism and affirm the equal recognition of human rights and fundamental freedoms enshrined in both national and international legislation. Secondly **Articles 4** to **15** of the Convention set forth a comprehensive set of measures that signatory States are required to adopt to effectively combat racism and racial discrimination. These provisions address legal, institutional, educational, social, awareness-raising, remedial and monitoring aspects necessary for advancing equality and fostering respect for diversity.

At both the international and constitutional levels, special policies and affirmative actions are enshrined as fundamental instruments to guarantee the full enjoyment of rights and freedoms by historically marginalized racial groups. This commitment is expressly set out in Articles 5 and 6 of the Convention. Additionally, Article 8 categorically prohibits all forms of racial discrimination, whether direct or indirect, regardless of their nature.

Specifically for the purposes of this protocol, Article 9 of the ICERD establishes the duty of the State Parties to ensure that their political and legal systems adequately reflect the diversity of society and respond to the legitimate needs of all segments of the population – notably, marginalized racial groups.

Building on this normative framework, it is possible to identify the fundamental principles that guide the adoption of a racial perspective within the justice system. The following sections therefore focus on three key principles essential to combating racism and racial discrimination: **human dignity**, **equality**, and the **prohibition of discrimination**.

2.2 Principle of Human Dignity

Since the end of World War II, the principle of human dignity has served as an axiological foundation, i.e., the core of legal values of contemporary constitutionalism. Brazilian constitutional law has embraced this principle concerning rights: **to equal intrinsic worth of every person, autonomy, equal value within the community, recognition, and the existential minimum**[11].

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9 Art. 2, ICERD "Every human being is equal under the law and has a right to equal protection against racism, racial discrimination, and related forms of intolerance in any sphere of life, public or private."

10 Art. 3, ICERD "Every human being has the right to the equal recognition, enjoyment, exercise, and protection, at both the individual and collective levels, of all human rights and fundamental freedoms enshrined in their domestic law and international law applicable to the States Parties."

11 BARROSO, Luiz Roberto. A dignidade da humana no direito constitucional contemporânea: a construção de um conceito jurídico à luz da jurisprudência mundial, [s.l.]: Editora Fórum, 2012. BARCELLOS, Ana Paula De. A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana, 3. ed. [s.l.]: Renovar, 2011. SARLET, Ingo Wolfgang. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídicoconstitucional necessária e possível, Revista Brasileira de Direito Constitucional, n 9, p. 361–388, 2007. SARMENTO, Daniel. Dignity of the Human Person in the Brazilian Constitutional Order: content, trajectories, and methodology, Public Competition for Full Professor, Forum, Belo Horizonte, 2016.

The **right to intrinsic value** requires that human beings be considered as ends in themselves, not as means to serve the ends of others. Unlike objects, which have a price, human beings possess dignity[12]. In this context, racism manifests, among other forms, through the dehumanization of Black people. IIn societies marked by racial discrimination, it is therefore common to witness the denial of this intrinsic value when applied to racialized individuals.

Two contemporary examples of this phenomenon include labor under conditions analogous to slavery, which represents an extreme violation of human dignity that reduces individuals to the status of property and disproportionately affects Black people[13]. Another example is the unequal treatment of Black individuals within the penal system, which reveals disparities in how human value is assessed and how fundamental principles such as due process and the presumption of innocence are applied. Deprivation of liberty in such cases often occurs predominantly through pretrial detention, even in the absence of sufficient material evidence[14].

Human dignity encompasses the right to autonomy in both the private and public spheres. This means that every individual has the right to make existential decisions about their own life and to participate in collective decisions that shape the future of society. However, fundamental freedoms, such as freedom of movement, are routinely curtailed, both by state agents and private actors, who often view Black individuals as suspicious, untrustworthy, or dangerous[15].

In turn, the **right to recognition**, i.e., **to equal value within the community**, holds that all people are entitled to equal consideration and respect, both by the State and, in the realm of private relations, by others. Racism, however, constitutes the antithesis of this principle. It denies full humanity to specific groups considered unworthy of such respect. As a result, social, cultural, and

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12 KANT, Immanuel. Crítica da Razão Pura, [s.l.]: Editora Vozes, 2021.

13 In 2023, the Ministry of Labor and Employment reported that 80% of people rescued from slave-like labor in the previous year self-declared as Black (BRASIL. Ministério do Trabalho e Emprego. Inspeção do Trabalho resgatou 2.575 trabalhadores de trabalho análogo ao de escravo no ano passado. Available at https://www.gov.br/trabalho-e-emprego/pt-br/noticias-e-conteudo/2023/janeiro/ inspecao-do-trabalho-resgatou-2-575-trabalhadores-de-trabalho-analogo-ao-de-escravo-no-ano-passado. Accessed on June 20, 2024).

14 According to data from the 2023 Brazilian Public Security Yearbook, 68.2% of people deprived of liberty are Black (FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA. 17º Anuário Brasileiro de Segurança Pública. São Paulo: Fórum Brasileiro de Segurança Pública, 2023. Available at https://forumseguranca.org.br/wp-content/uploads/2023/07/anuario-2023.pdf. Accessed on June 20, 2024.). In the same year, 30% of the Brazilian prison population was made up of pre-trial detainees (BRASIL. Ministério da Justiça e Segurança Pública. SENAPPEN lança Levantamento de Informações Penitenciárias referentes ao primeiro semestre de 2023. Available at https://www.gov.br/senappen/pt-br/assuntos/noticias/senappen-lanca-levantamento-de-informacoes-penitenciarias-referentes-ao-primeiro-semestre-de-2023/relipen. Accessed on June 20, 2024).

15 ANUNCIAÇÃO, Diana; TRAD, Leny Alves Bonfim; FERREIRA, Tiago. “Mão na cabeça!”: abordagem policial, racismo e violência estrutural entre jovens negros de três capitais do Nordeste. Saúde e Sociedade, São Paulo, v. 29, n 1, e190271, 2020. Available at https://www.scielo.br/j/sausoc/a/ctHxJZn497TXL- JBhpSB8GRn/?format=html. Accessed on June 20, 2024.

religious expressions associated with Black communities are often stigmatized and, in some cases, fail to receive adequate legal protection.

Finally, the **right to the existential minimum** relates to access to the basic conditions necessary for a dignified life, such as food, housing, and healthcare. Racism and racial discrimination, however, continue to impose structural barriers that obstruct access to these essential rights.

> **Atenção:** the denial of dignity is deeply intertwined with the discriminatory reality imposed on Black individuals and communities due to their racial identity. It is therefore essential to consider the various manifestations of the principle of equality, especially its corresponding principle: the prohibition of discrimination.

2.3 Principle of Equality

Since its initial formulation during the liberal revolutions and the emergence of contemporary constitutionalism, the principle of equality, as a *principle of isonomy*, has undergone profound transformations. Currently, Brazilian law conceives the principle of equality based on three main dimensions[16]: formal equality, material equality, and, more recently, equality as recognition.

The principle of **formal equality**, a foundational element of the very concept of the Rule of Law, requires that all individuals be treated according to the same set of rules and principles. In this sense, it demands the establishment of uniform legal regimes for individuals, prohibiting differential treatment based on family background, social status, or economic conditions. Formal equality, therefore, seeks to dismantle institutionalized caste systems, relying on two basic formulations: equality before the law and equality in the law[17].

Equality before the law prohibits the consideration of individuals' particular circumstances, requiring that they be treated as abstract legal subjects. All individuals, regardless of their social, personal, or family conditions, must receive the same legal treatment, without distinction. *Equality in the law*, in

16 BARROSO, Luís Roberto; OSORIO, Aline. "Sabe com quem está falando?": Notas sobre o princípio da igualdade no Brasil contemporâneo, Revista Direito e Práxis, v. 7, n 13, 2016. GOMES, Joaquim B. Barbosa. Ação afirmativa & princípio constitucional da igualdade: o direito como instrumento de transformação social: a experiências dos EUA, Rio de Janeiro: Renovar, 2001. SARMENTO, D. A Igualdade Étnico-Racial no Direito Constitucional Brasileiro: Discriminação "De Facto", "Teoria do Impacto Desproporcional e Ação Afirmativa, in: Livres e iguais: estudos de direito constitucional, [s.l.]: Lumen Juris, 2006, p. 139–166. CORBO, Wallace. Discriminação indireta: Conceito, fundamentos e uma proposta de enfrentamento à luz da Constituição de 1988, 2. ed. Rio de Janeiro, RJ: Editora Lumen Juris, 2024.

17 MELLO, Celso Antônio Bandeira de. O conteúdo jurídico do princípio da igualdade, São Paulo: Malheiros, 2003.

turn, holds the Legislative, the Executive, and the Judiciary branches must adopt appropriate criteria for classifying individuals when drafting normative rules. A legal system grounded in formal equality ensures a rational distribution of rights and prerogatives in accordance with the purposes of the law, with no individual standing above or beyond the reach of legal norms.

Material equality, in turn, contrasts with the premises of formal equality by recognizing disparities in access to essential resources among various social groups. These disparities impose structural limitations and perpetuate social inequalities that undermine the supposed formal equality guaranteed by law. Therefore, the principle of material equality does not merely aim to ensure identical legal treatment for all. On the contrary, it recognizes that unequal social conditions demand differentiated treatment to promote equal and universal access to life's essential goods for historically and structurally marginalized groups. Material equality is based on a distributive logic, calling for public policies and legal instruments that actively work to reduce inequalities among groups.

Lastly, **equality as recognition** highlights the persistence of symbolic and cultural inequality, even among groups subject to the same legal norms (formal equality) and with equal access to resources (material equality). This dimension of equality seeks to ensure that groups whose rights have been restricted or denied – whether through racism, prejudice, stereotyping or exclusionary worldviews – are guaranteed full access to fundamental rights and protections under the responsibility of the State, along with social recognition and respect they are due. Together, formal equality, material equality, and equality as recognition offer a comprehensive framework for building a truly inclusive society.

In a society marked by racism, all three dimensions of equality are systematically violated. Formal equality, which advocates equal treatment before the law, is undermined in Brazil when laws are applied differently to Black people and white individuals, resulting in what is known as *de facto* discrimination[18]. Faced with the same legal provision, individuals of different racial backgrounds experience divergent outcomes. One clear example can be found in the enforcement of drug laws: research indicates that identical conduct is interpreted differently depending on the race of the accused[19]. While white individuals are more likely to be classified as users and benefit from the decriminalization provisions of drug legislation, Black people are often classified as drug traffickers and subject to significantly harsher criminal penalties[20].

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18 SARMENTO, Daniel. A Igualdade Étnico-Racial no Direito Constitucional Brasileiro: Discriminação "De Facto", "Teoria do Impacto Desproporcional e Ação Afirmativa, in: Livres e iguais: estudos de direito constitucional, [s.l.]: Lumen Juris, 2006, p. 139–166.

19 IPEA (Instituto de Pesquisa Econômica Aplicada). Perfil do processado e produção de provas nas ações criminais por tráfico de drogas: relatório analítico nacional dos tribunais estaduais de justiça comum. Brasília, DF: Ipea, 2023.

20 Justice Alexandre de Moraes referenced such data in the judgment of Extraordinary Appeal No. 635,659/SP, cf. BRASIL, Supreme Federal Court. Vote of Justice Alexandre de Moraes in the judgment

Material equality, a fundamental principle aimed at ensuring fair conditions and opportunities for all citizens, is also profoundly violated along racial lines in Brazil. Data from the Brazilian Institute of Geography and Statistics (IBGE) reveal that, regardless of social categories, including gender, age, or geographic location, Black people have less access to basic goods such as healthcare, education, income, employment, and housing when compared to white people[21].

Lastly, in the realm of equality as recognition, racism fosters ongoing patterns of disrespect towards Black individuals. In everyday life, this often manifests in discriminatory and segregationist practices, such as prohibiting Black people from using a building's main entrance or elevator. In more severe cases, it results in criminal offenses, including racial slurs and the crime of racism itself. In response to persistent racial inequality, the Brazilian constitutional system has increasingly embraced the idea of racial equity, which seeks to promote material equality and equality as recognition for historically marginalized racial groups.

> **Atenção:** The idea of racial equity is based on the premise that the pursuit of equality cannot succeed if the law - and those who interpret and apply it - fail to recognize that race has been a driving force in generating and perpetuating multiple forms of inequality that need to be addressed and overcome.

2.4 Principle of Prohibition of Discrimination

From a racial equity perspective, the imperative of human dignity and the pursuit of full equality are deeply related to a fundamental principle of the Republic, as set forth in Article 3, Section IV of the Federal Constitution: the prohibition of discrimination. Since its enactment, the 1988 Constitution has established a duty to sanction all forms of discrimination, according to Article 5, Section XLI. Regarding racial discrimination, the constitutional text was even more emphatic, expressly criminalizing racism (Art. 5, XLII, FC/1988) and classifying it as imprescriptible and not subject to bail.

More recently, the constitutional concept of discrimination has been further developed through the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2009 and the incorporation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) into

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of Extraordinary Appeal No. 635,659/SP. August 2, 2023. Available at https://static.poder360.com.br/2023/08/voto-alexandre-de-moraes-julgamento-drogas-stf-2-ago-2023.pdf. Accessed on June 20, 2024.

21 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE) Desigualdades sociais por cor ou raça no Brasil. Available at https://biblioteca.ibge.gov.br/visualizacao/livros/liv101972_informativo.pdf. Accessed on June 20, 2024.

the Brazilian constitutional framework. In this sense, Article 1 of the ICERD states that discrimination:

> [...] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

In this sense, the ICERD helps to make explicit the various forms of racial discrimination prohibited under the Brazilian constitutional system. Because of formal equality, so-called direct discrimination is explicitly prohibited. This occurs when normative acts or social or institutional practices explicitly adopt racial criteria to restrict, limit, or exclude the rights of Black people in comparison with white people.

In addition, the Brazilian constitutional framework, which includes the conventions mentioned above, also prohibits what is known as **indirect discrimination**. This form of discrimination arises when a rule, practice, or policy uses seemingly neutral criteria that, once applied to reality, produce disproportionate adverse effects on the rights of Black individuals (Art. 1.2, ICERD). Whereas direct discrimination denies access to rights based on race, indirect discrimination operates through ostensible neutral elements, such as level of education, place of residence or personal history, which, in practice, serve to restrict the rights of Black people.

The Brazilian constitutional system also prohibits both **intentional** and **unintentional forms of discrimination**[22]. Contemporary anti-discrimination law recognizes that individuals and institutions may engage in discriminatory practices regardless of whether there is intent to discriminate. In any case, these practices must be addressed and remedied by agents of the justice system. Intent may only be relevant insofar as it can give rise to specific civil or criminal liability, when applicable.

Furthermore, the Brazilian constitutional system prohibits discrimination on two significant levels. I**ndividual discrimination** is prohibited by the 1988 Constitution when practiced by identifiable or non-identifiable individuals against other individuals or groups. Crimes of racism, for instance, are typically individualizable offenses. However, in the context of legal enforcement, the implementation of public policies, and the operation of private institutions, discrimination often does not stem from isolated acts, but rather from the "normal" functioning of institutions structured around rules and procedures. In this sense, so-called **institutional discrimination** is also prohibited, which occurs

22 CORBO, Wallace. A construção de um direito antidiscriminatório no Brasil: conceitos fundamentais de um novo e central ramo do Direito, in: MELO, Marco Aurélio Bezerra De; SCHREIBER, Anderson (Orgs.). Direito E Transformação Social, Indaiatuba, SP: Editora Foco, 2023.

when the operations of public or private institutions result in the restriction or exclusion of fundamental rights of vulnerable groups[23].

Finally, the principle of non-discrimination also encompasses so-called multiple or aggravated discrimination, also established by the ICERD (Art. 1.3). This occurs when individuals experience restrictions on their rights due to membership in more than one marginalized group, producing intersecting and compounding discriminatory effects. Examples include Black women, Black persons with disabilities, and Black LGBTQIA+ individuals. Addressing these intersectional forms of discrimination requires the application of a range of legal instruments provided for in both the constitutional framework and infra-constitutional legislation.

> **Atenção:** One of the most important mechanisms for combating racial discrimination in its various forms is the **constitutionally adequate** interpretation of the laws and norms that govern the operation of public and private institutions.

Justice system actors committed to advancing social equity must adopt a hermeneutical approach that considers how their own actions, practices, and interpretations may negatively affect Black individuals[24]. This reflection becomes especially relevant when considering that well-intentioned agents may occasionally engage in discriminatory conduct. Therefore, the continual assessment of the potentially discriminatory effects of one's actions is a meaningful way to mitigate discrimination within institutional settings.

It is equally important to establish mechanisms within the justice system to address and remedy discriminatory acts, practices, and realities. The first such mechanism is the recognition that d**iscriminatory acts must be declared null and void**, with corresponding civil and, where applicable, criminal liability imposed on those responsible[25]. This measure serves as a strong discouragement against discriminatory conduct and affirms the justice system's commitment to the principle of equality.

Furthermore, in cases involving discrimination, especially indirect discrimination, judicial and administrative interpreters may need to adopt

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23 CORBO, Discriminação indireta; MOREIRA, Adilson José. Tratado de direito antidiscriminatório, São Paulo, SP, Brasil: Contracorrente, 2020.

24 BARTLETT, Katharine T. Feminist Legal Methods, Harvard Law Review, v. 103, n 4, p. 829–888, 1990. CORBO, Wallace. Fazendo as Perguntas Certas: Os Excluídos, o Direito e a Promoção de Reconhecimento., Revista Publicum, v. 2, n 5, 2017.

25 CORBO, Wallace, O direito à adaptação razoável e a teoria da discriminação indireta: uma proposta metodológica, RFDRevista da Faculdade de Direito da UERJ, n 34, p. 201–239, 2018.

accommodation or reasonable adaptation mechanisms[26], as provided for in the constitutional framework. For example, to avoid the practice of so-called religious racism, i.e., discrimination based on religion intertwined with racial identity, public agents must adopt inclusive measures that ensure the participation and respect of racially marginalized religious groups in the context of universal policies.

Therefore, it is essential to promote inclusion and respect for diversity by addressing specific forms of discrimination, such as religious racism, and implementing policies that ensure the inclusion and respect of racially discriminated religious groups in the context of universal policies. This strategy recognizes the intersectionality of discriminatory practices and aims to foster a more inclusive and equitable environment for all.

Finally, one of the primary mechanisms adopted in our constitutional framework to combat all forms of discrimination is the implementation of special **measures, special policies**, or **affirmative actions**[27]. These public or private initiatives are designed to reverse or redress racial inequalities identified in specific social contexts by promoting the rights of racially vulnerable groups.

> **To better understand:** affirmative action policies adopt race as a criterion but invert its historically negative connotation into a positive one. Thus, belonging to a historically marginalized racial group becomes a condition for enjoying certain rights and reparative measures.

As provided for in Article 1.5 of the ICERD, such measures "shall not be deemed racial discrimination" since their objective is to "ensure...equal enjoyment or exercise of human rights and fundamental freedoms" of groups marginalized based on their race. Just as a medicine cannot be mistaken for a "reverse disease," the remedy for discrimination cannot itself be regarded as a form of discrimination.

In this sense, dignity and equality serve as guiding objectives, racial equity as a foundational premise, and the prohibition of discrimination as an operative norm – all interconnected to advance a more racially just and egalitarian society, as determined by the 1988 Constitution.

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26 MARTEL, Letícia de Campos Velho; VIEIRA, Marcela. Adaptação Razoável: O Novo Conceito sob as Lentes de uma Gramática Constitucional Inclusiva, SUR Revista Internacional de Direitos Humanos, v. 8, n 14, p 89–113, 2011; CORBO, Wallace, O direito à adaptação razoável e a teoria da discriminação indireta: uma proposta metodológica, RFDRevista da Faculdade de Direito da UERJ, n 34, p. 201–239, 2018.

27 GOMES, Joaquim B Barbosa. Ação afirmativa & princípio constitucional da igualdade. IKAWA, Daniela. Direito às Ações Afirmativas em Universidades Brasileiras, in: SARMENTO, Daniel; PIOVESAN, Flavia; IKAWA, Daniela (Orgs.). Igualdade, diferença e direitos humanos, Rio de Janeiro: Lumen Juris, 2008, p. 365–411.

PART II

Concepts

Part II - CONCEPTS

As a first step, adjudicating with a racial perspective requires clarifying key concepts that explain how racism operates. These concepts should equip judges with the tools to consciously adopt strategies that prevent the justice system reproducing or perpetuating stereotypes and discriminatory practices. Instead, the goal is to actively work toward dismantling such biases, particularly those affecting racially marginalized groups, such as the Black population. This section will address these foundational concepts in detail.

3.1 Race

As is well known, the notion of segregating human beings by race is a political and historical construct rooted in ideology[28]. Race is a sociological category of relational and historical nature, arising from a "project of universalization," the annihilation of ethnic groups, and the expansion of capitalism inherent to European colonialism[29]. In this context, the "racialization of society" emerged as a mechanism to justify (and naturalize) the exploitation and domination of colonized peoples, who were dehumanized and reduced to "object-people, commodity-people, and currency-people"[30].

The term "racialization" refers to the process of constructing and differentiating the individuals by attributing meanings and ascribing lesser value to *phenotypic traits* (used as primary markers) alongside the criminalization and subordination of the religious, cultural, linguistic, artistic, and territorial expressions associated with these groups, "so that the domination of one group over another can be legitimized"[31].

> **To learn more:** phenotype refers to the set of observable characteristics of a person, determined by the interaction between their genetic makeup (genotype) and environmental factors. These characteristics include, for example, skin and eye color, the shape of the nose and lip, and hair color and texture.

28 Ideology can be defined as a systematic set of ideas and representations – arising from socioeconomic relations – that seeks to explain natural and human phenomena and provide rules of action. For Marilena Chauí, ideology translates as "a historical, social, and political set of ideas" that, in societies divided into classes (and castes), "conceals reality [to] ensure and maintain economic exploitation, social inequality, and political domination." In: CHAUÍ, Marilena. O que é ideologia. 2. Ed. São Paulo: Brasiliense, 2008, p. 7.

29 MBEMBE, Achille. Crítica da razão negra. Translation by Sebastião Nascimento. São Paulo: n-1 edições, 2018.

30 MBEMBE, Achille. Crítica da razão negra. Translation by Sebastião Nascimento. 3. ed. São Paulo: N-1, 2019. p. 11-14.

31 MOREIRA, Adilson. Racismo recreativo. São Paulo: Sueli Carneiro; Pólen, 2019. p. 41.

With the emergence of this historical-colonial technology that shaped the development of the modern world – driven by the Eurocentric perception of the other – phenotypic traits, particularly skin tone, became central to defining status and value among individuals in the Brazilian context. This framework positioned the European (white) figure as the universal standard of humanity (the so-called "universal man"), in direct contrast to African peoples (Blacks), who were cast as the primary other[32].

> **Atenção:** in this scenario, the term "race" appears as a socially constructed identity, instrumentalized to legitimize domination projects based on the hierarchical classification of groups with distinct phenotypic traits[33].

Race – understood as a social position – "does not fundamentally designate biological traits, but the differentiations of status resulting from the attribution of meanings given to them"[34]. Through the adoption of the fictitious notion of innate superiority, the so-called "white" race came to be seen as collectively superior to the "Black" and "Yellow" races, based on physical characteristics such as skin color and skull shape. This supposed superiority extended to assumptions about beauty, intelligence, and honesty, thereby justifying the domination and subjugation of other racial groups - especially the Black people – who were regarded as inferior and more readily subjected to enslavement and oppression[35].

Although the biological concept of race has been scientifically discredited, race continues to operate socially as a real factor of disadvantage. Racial minorities are often denied access to various opportunities solely based on their racial identity. Public and private agents frequently associate the physical characteristics of Black individuals with moral inferiority and social dangerousness, reinforcing stereotypes and perpetuating exclusion across different social settings[36].

Through the political struggle of the Black movement, the concept of race was reinterpreted by contemporary sociology as a nominalist concept, i.e., one that refers to a socially effective reality, even if it lacks any biological foundation.[37]. From the late 20th century onward, the term race was reclaimed

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32 BENTO, Cida. O pacto da branquitude. 1. ed. São Paulo: Companhia das Letras, 2022. p. 28-29.

33 MOREIRA, Adilson. Op. cit.

34 MOREIRA, Adilson José; ALMEIDA, Philippe Oliveira de; CORBO, Wallace. Manual de educação jurídica antirracista: direito, justiça e transformação social. São Paulo: Contracorrente, 2022. p. 110.

35 MUNANGA, Kabengele. Uma abordagem conceitual das noções de raça, racismo, identidade e etnia. Programa de educação sobre o negro na sociedade brasileira. Niterói: EDUFF, 2004. Available at https:// edisciplinas.usp.br/pluginfile.php/4275201/mod_resource/content/1/Uma-abordagem-conceitual-das-nocoes-de-raca-racismo-dentidade-e-etnia.pdf. Accessed on April 10, 2024.

36 MOREIRA; ALMEIDA; CORBO, Op. cit.

37 GUIMARÃES, Antonio Sérgio Alfredo. Raça, cor, cor de pele e etnia. Cadernos de Campo, São Paulo, n 20, p. 266-267, 2011.

as a social classifier, "no longer as a motto of imperialism or colonialism," but "as a political strategy to include, not to exclude; to demand and not to subject"[38].

3.2 Ethnicity

While the concept of race stems from the idea of morphological and biological differences among human beings, the term "ethnicity" – derived from the Greek *ethnos* – has a sociocultural, historical, and psychological approach[39]. It refers to a group of individuals who share common origins, language, traditions, customs, religion, and/or worldview[40]. In this sense, "a population group said to be of the 'white,' 'Black,' or 'Yellow' race may contain, within its midst, several ethnicities[41]," as seen among Indigenous Peoples in Brazil and among populations of different African nations.

For social scientists and political activists, "the notion of race has visible strategic advantages over that of ethnicity," as it refers to "a history of oppression, dehumanization, and disgrace to which conquered peoples were subjected"[42]. However, the term "ethnic-racial" is widely used in Brazil, combining the concept of ethnicity with that of race to reflect both the cultural dimension (traditions, religion, ancestry) and the dimension of racialized power relations based on the phenotypic characteristics of a social group[43].

3.3 Person of color, Brown, or Black?

According to the 2022 IBGE census, approximately 92.1 million people identified as Brown (equivalent to 45.3% of the population), 88.2 million (43.5%) as White, 20.6 million (10.2%) as Black, 1.7 million (0.8%) as Indigenous, and 850.1 thousand (0.4%) as Yellow[44].

As a result of the political advocacy of the *Movimento Negro Unificado* (MNU – Unified Black Movement) and supported by the analytical consensus

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38 Ibid.

39 MUNANGA, op. cit.

40 Worldview refers to how a person or group sees and interprets the world based on a series of beliefs, values, and principles.

41 MUNANGA, op. cit.

42 GUIMARÃES, op. cit.

43 LIMA, Maria Batista. Identidade étnico/racial no Brasil: uma reflexão teórico-metodológica. Revista Fórum Identidades, Ano 2, Volume 3, jan-jun de 2008, p. 33-46.

44 IBGE – INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. Censo Demográfico Brasileiro de 2022: identificação étnico-racial da população, por sexo e idade. Rio de Janeiro: IBGE, 2022. Available at https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/38719censo-2022-pela-primeira-vez-desde-1991-a-maior-parte-da-populacao-do-brasil-se-declara-parda. Accessed on April 10, 2024.

among IBGE researchers, it was established that the categories “Black” and “Brown” are grouped under the term “person of color” representing Afro-descendants[45], i.e., those “ read by society as racialized individuals and who experience (or have experienced) racism throughout their lives due to phenotypic traits of African origin”[46]. This convention emerged from the racial debate that gained prominence in the 1970s,

> [...] based on the observation that the educational and socioeconomic indices of light-skinned Black people – identified as Brown – were very similar to those of dark-skinned people and that, therefore, they shared the same legacy of precariousness and social vulnerability[47].

From this perspective, the Racial Equality Statute defines people of color as “the group of people who self-declare as Black or Brown, according to the color or race criterion used by the Brazilian Institute of Geography and Statistics (IBGE), or who adopt a similar self-definition.”[48] The same definition is adopted in Article 2 of Law No. 12,990 /2014[49].

The Brown category – referring to individuals of Black ancestry – does not, therefore, include Indigenous peoples, who hold a distinct legal status. Within the scope of the National Council of Justice (CNJ), Indigenous peoples are afforded specific protections under Resolutions No. 287/2019[50], 453/2022[51],

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45 The production of sociologists Carlos Hasenbalg and Nelson do Valle Silva, together with the political activism and academic output of Lélia Gonzáles, Abdias do Nascimento, and Beatriz do Nascimento “constituted a technology of resistance to the census and political whitening of the country,” which constructed “a rigorously scientific historical reason for the equivalence of the categories Black and Brown as a Black population.” In: GOMES, Gabriel Pinheiro de Siqueira. **Pretos e pardos, uni-vos**: o desafio de(o) ser negro no Brasil do Século XXI. Revista Desenvolvimento e Civilização, v. 2, n 1, janeiro 2021-julho 2021, p. 80-106.

46 BRASIL. Senado Federal. Comitê Permanente pela Promoção da Igualdade de Gênero e Raça. **Manual quesito cor/raça e etnia do Senado Federal**. Available at https://www2.senado.leg.br/bdsf/bitstream/ handle/id/642501/Manual_quesito_cor_raca_etnia_SF.pdf. Accessed on June 19, 2024.

47 LAGO, Mara Coelho de Souza; MONTIBELER, Débora Pinheiro da Silva; MIGUEL, Raquel de Barros Pinto. **Pardismo, colorismo e a “Mulher Brasileira”**: produção da identidade racial de mulheres negras de pele clara. Revista Estudos Feministas, Florianópolis, v. 31, n 2, e83015, 2023.

48 BRASIL. **Law No. 12,288 of July 20, 2010**. Institutes the Racial Equality Statute; amends Laws No. 7,716 of January 5, 1989, 9,029 of April 13, 1995, 7,347 of July 24, 1985, and 10,778 of November 24, 2003.

49 BRASIL. **Law No. 12,990, of June 9, 2014**. Reserves for people of color 20% (twenty percent) of the vacancies offered in public examinations for filling permanent positions and public employment within the scope of the federal public administration, autonomous agencies, public foundations, public companies, and mixed-capital companies controlled by the Union.

50 BRASIL. Conselho Nacional de Justiça (CNJ). Resolution No. 287 of June 25, 2019. Establishes procedures for treating Indigenous people accused, defendants, convicted, or deprived of liberty and provides guidelines to ensure the rights of this population within the criminal scope of the Judiciary. Available at https://atos.cnj.jus.br/atos/detalhar/2959. Accessed on June 18, 2024.

51 BRASIL. Conselho Nacional de Justiça (CNJ). Resolution No. 453 of April 22, 2022. Institutes the National Forum of the Judiciary for monitoring and effectiveness of demands related to Indigenous Peoples (FONEPI) to prepare studies and propose measures to improve the judicial system on this subject. Available at https://atos.cnj.jus.br/atos/detalhar/4504. Accessed on June 18, 2024.

454/2022[52], 512/2023[53], and 524/2023[54], among others.

3.4 Ethnic-racial identity

From a non-essentialist perspective[55], identity is understood as a dynamic and dialectical process between the individual and society. The construction of "self" takes place through the marking of differences in relation to other identities, shaped by symbolic representations[56] and systems of social exclusion that rely on classification mechanisms to give meaning to (and organize) social relations[57].

Ethnic-racial identity can be defined as "a feeling of belonging to a racial or ethnic group, resulting from social, cultural and political construction." In other words, it is "shaped by life history (socialization/education) and by the awareness acquired in response to racial or ethnic social prescriptions, racist or not, within a given culture"[58].

In Brazil, the symbolic representations that define the boundaries between ethnic-racial identities have been historically structured from a Eurocentric perspective, rooted in colonial relations of domination. These relations established

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52 BRASIL. Conselho Nacional de Justiça (CNJ). Resolution No. 454 of April 22, 2022. Establishes guidelines and procedures to effectively guarantee Indigenous people's right of access to the Judiciary. Available at https://atos.cnj.jus.br/atos/detalhar/4514. Accessed on June 18, 2024.

53 BRASIL Conselho Nacional de Justiça (CNJ). Resolution No. 512 of June 30, 2023. Provides for the reservation for Indigenous people, within the scope of the Judiciary, of at least 3% (three percent) of the vacancies offered in public examinations for filling effective positions and entry into the Judiciary. Available at https://atos.cnj.jus.br/atos/detalhar/5174. Accessed on June 18, 2024.

54 BRASIL. Conselho Nacional de Justiça (CNJ). Resolution No. 524, of September 27, 2023. Establishes procedures for the treatment of Indigenous adolescents and young people in the event of apprehension, representation in the process of investigating an infraction or compliance with a socio-educational measure, and provides guidelines to ensure the rights of this population within the scope of the Juvenile and Youth Justice or courts that exercise such jurisdiction. Available at https://atos.cnj.jus.br/atos/detalhar/5275. Accessed on June 18, 2024.

55 A tension between the essentialist and non-essentialist perspectives marks the discussion on identity. According to the essentialist perspective, the affirmation of identity would result from a crystalline, authentic, and immutable set of characteristics with two aspects: biological/natural and historical/cultural. In turn, the non-essentialist perspective conceives identity as a mutable social construction, focused on differences and common or shared characteristics, whose meanings undergo modification over time. In: WOODWARD, Kathryn. Identidade e diferença: uma introdução teórica e conceitual. Available at https://edisciplinas.usp.br/pluginfile.php/4284077/ mod_resource/content/1/capítulo%20I%20-%20 Woodward%20-%20IDENTIDADE-E-DIFERENCA-UMA-INTRODUCAO-TEORICA-E-CONCEITUAL.pdf. Accessed on August 9, 2024.

56 "Representation, understood as a cultural process, establishes individual and collective identities, and the symbolic systems on which it is based provide possible answers to the questions: Who am I? What could I be? Who do I want to be? Discourses and systems of representation construct the places from which individuals can position themselves and from which they can speak. [...] All practices of signification that produce meanings involve power relations, including the power to define who is included and who is excluded. [...] Symbolic systems provide new ways of making sense of the experience of social divisions and inequalities and how some groups are excluded and stigmatized." Ibid, p. 9.

57 Ibid.

58 OLIVEIRA, Fátima. Ser negro no Brasil: alcances e limites. Available at https://doi.org/10.1590/S0103-40142004000100006. Accessed on August 13, 2024.

the white, Christian man as the universal ideal of humanity. According to this perspective, which positioned Europe as the civilizing center of the world:

> White represents goodness and Black, evil; White is beauty and Black, ugliness; White is humanity, reason and development; and Black, nature and backwardness; White is the subject and Black, a mere "object among other objects" (FANON, 2008, p. 103)[59].

3.5 Hetero-identification

Hetero-identification – or hetero-attribution – is one of the methods used to determine an individual's membership in a particular racial group[60]. In this approach, a third party (or authorized commission) identifies the ethnic-racial group to which the person is perceived to belong.

In addition to hetero-identification, two other methods are commonly used: self-identification (or self-declaration), in which the individual identifies the ethnic-racial group to which they consider themselves part of; and biological identification, which is based on genetic ancestry. The IBGE classification system relies on both self-identification and hetero-identification methods simultaneously.

In the context of using ethnic-racial criteria for admission to higher education, the Federal Supreme Court (STF) has held that it is constitutionally permissible to adopt hetero-identification following a candidate's self-identification, provided it is based on Afro-descendant phenotypic traits, rather than on ancestry[61].

The following grounds justify this practice:

> [...] (a) the objectives of positive public policies are to combat discrimination and increase equal opportunities, considering the social reality experienced by the Black population (Black and Brown); (b) for these purposes, the ethnic-racial identity that matters is linked to social race, since it is in this sphere that being in the world implies prejudice and discrimination for individuals and groups, which fully corresponds to the

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59 FAUSTINO, Deivison Mendes. Frantz Fanon, a Branquitude e a Racialização: aportes introdutórios a uma agenda de pesquisa. In: Branquitude: estudos sobre a identidade branca no Brasil/ Tânia Mara Pedroso Müller e Lourenço Cardoso. 1. ed. Curitiba: Appris, 2017, p. 130.

60 OSORIO, Rafael Guerreiro. O sistema classificatório de "cor ou raça" do IBGE: texto para discussão. Instituto de Pesquisa Econômica Aplicada (Ipea), nov. 2003, p. 7-17. Available at https://www.ibge.gov. br/confest_e_confege/pesquisa_trabalhos/arquivosPDF/M255_02.pdf. Accessed on June 19, 2023.

61 BRASIL. Supremo Tribunal Federal. Claim of Non-Compliance with Fundamental Precept No. 186/DF. Rapporteur: Justice Ricardo Lewandowski. Judged on April 16, 2012. Available at https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22ADPF%20186%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true. Accessed on June 19, 2024.

> objectives of affirmative actions; and (c) phenotypic aspects are decisive for the work [of hetero-identification], due to the effect they have on the subordinating racialization of Black and Brown individuals and the role they play in the constitution of racism[62].

3.6 Racism

Article 1.4 of the Inter-American 'Convention against Racism, Racial Discrimination, and Related Forms of Intolerance' provides that:

> Racism consists of any theory, doctrine, ideology, or set of ideas that assert a causal link between the phenotypic or genotypic characteristics of individuals or groups and their intellectual, cultural, and personality traits, including the false concept of racial superiority. Racism leads to racial inequalities and to the idea that discriminatory relations between groups are morally and scientifically justified. All the theories, doctrines, ideologies, and sets of racist ideas described in this article are scientifically false, morally reprehensible, socially unjust, and contrary to the basic principles of international law; they therefore seriously undermine international peace and security and, as such, receive the condemnation of the States Parties[63].

Racism is also understood as a systematic form of discrimination based on race, expressed through conscious or unconscious practices that result in advantages or disadvantages for individuals, depending on the racial group to which they belong[64]. It operates as both a cultural narrative and a social practice, functioning as a psychological and cultural mechanism through which members of the dominant racial group systematically deny the shared humanity of others to maintain their privileged status across various aspects of life[65].

3.7 Racial prejudice

Racism reflects a process through which conditions of subordination and privilege – unequally distributed among racial groups – are continuously reproduced across political, economic, and everyday social spheres.

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62 RIOS, Roger Raupp. Pretos e pardos nas ações afirmativas: desafios e respostas da autodeclaração e da heteroidentificação. In: Heteroidentificação e Cotas Raciais: dúvidas, metodologias e procedimentos. DIAS, Gleidson Renato Martins; TAVARES Jr., Paulo Roberto Faber (Org.). 1. ed. Canoas-RS: IFRS Campus Canoas, 2018, p. 216-251.

63 BRASIL. Decree No. 10,932 of January 10, 2022. Promulgates the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, signed by the Federative Republic of Brazil in Guatemala on June 5, 2013. Available at https://www.planalto.gov.br/ccivil_03/_ Ato2019-2022/2022/Decreto/D10932.htm. Accessed on June 20, 2024.

64 COLLINS, Patricia Hill. Pensamento feminista negro: conhecimento, consciência e a política do empoderamento. Translation by Jamille Pinheiro Dias. São Paulo: Boitempo Editorial, 2019.

65 MOREIRA, Adilson José; ALMEIDA, Philippe Oliveira de; CORBO, Wallace. Manual de educação jurídica antirracista: direito, justiça e transformação social. São Paulo: Contracorrente, 2022, p. 114-115.

Attention: racial prejudice refers to a judgment based on stereotypes[66] attributed to individuals belonging to a specific racialized group, which may or may not result in discriminatory practices.

3.8 Racial discrimination

Racism goes beyond isolated acts of "racial discrimination," which refers to the differential treatment to individuals based on their membership in racially identified groups. Racial discrimination presupposes the existence of power, i.e., the actual capacity to use force or influence to impose advantages or disadvantages based on race[67].

In turn, Article 1.1 of the Inter-American Convention against Racism (ICERD) defines racial discrimination as:

> [...] any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties[68].

Racial discrimination can be categorized as either direct or indirect. Direct racial discrimination occurs when legal norms or social and institutional practices explicitly use racial criteria to restrict, limit, or exclude the rights of individuals or groups. Indirect racial discrimination, also known as discrimination by law or discrimination due to adverse or disproportionate impact, arises when there is no explicit intent to discriminate. It typically involves ignoring the specific circumstances of minority groups (*de facto* discrimination) or applying supposedly "race-neutral rules" (colorblindness) that fail to account for significant social disparities. Such practices ultimately perpetuate historical inequalities, undermining equal participation and the full enjoyment of rights[69].

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66 "Stereotypes are means by which social beliefs about racial groups circulate and shape the perception of racial minorities, even the perception of those who have no contact with them." In: MOREIRA, Adilson José; ALMEIDA, Philippe Oliveira de; CORBO, Wallace. Manual de educação jurídica antirracista: direito, justiça e transformação. São Paulo: Contracorrente, 2022, p. 115.

67 MOORE, Carlos. Racismo e Sociedade: novas bases epistemológicas para entender o racismo. Belo Horizonte: Mazza Edições, 2007.

68 BRASIL. Decree No. 10,932 of January 10, 2022. Promulgates the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, signed by the Federative Republic of Brazil in Guatemala on June 5, 2013. Available at https://www.planalto.gov.br/ccivil_03/_ Ato2019-2022/2022/Decreto/D10932.htm. Accessed on June 20, 2024.

69 MOREIRA, Adilson. O que é discriminação? Belo Horizonte: Letramento: Casa do Direito: Justificando, 2017.

Attention: in cases of direct discrimination, access to rights is explicitly denied because of race. In indirect discrimination, however, race is not openly cited; instead, seemingly neutral criteria – such as education, place of residence, or personal history – are applied. Yet these criteria often result in disproportionate harm to historically marginalized or socially vulnerable groups, reinforcing or exacerbating existing inequalities.

There is also an important distinction between positive and negative discrimination. Negative discrimination harms individuals or groups based on prohibited criteria. Positive discrimination applies differential treatment to historically marginalized groups to mitigate these disadvantages[70].

Did you know? Affirmative action policies are examples of positive discrimination.

The Inter-American Convention against Racism also addressed the concept of **multiple** or **aggravated discrimination**, which occurs when an individual is subjected to discrimination based simultaneously on more than one ground – such as race, color, national or ethnic origin, and sex. This form of discrimination, whether by intent or effect, undermines the recognition, enjoyment, or exercise, on an equal basis, of one or more human rights and fundamental freedoms in any sphere of public or private life[71]. This is often the case for Black women, Black LGBTQIA+ individuals, and Black persons with disabilities. Multiple discrimination can be analyzed from both a quantitative perspective (the accumulation of various discriminatory grounds) and a qualitative perspective ("in which the intersection of these factors produces a distinct and specific form of discrimination, not reducible to the mere sum of its parts")[72].

From the quantitative perspective of multiple discrimination, two concepts are often discussed: **additive discrimination** and **compound discrimination**. Additive discrimination occurs when a person experiences discrimination based on multiple prohibited grounds at different moments. For example, a woman with a disability may face gender discrimination (such as barriers to professional

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70 GOMES, Joaquim Barbosa. A recepção do instituto da ação afirmativa pelo Direito Constitucional brasileiro. Revista de Informação Legislativa, Brasília, v. 38, n 151, p. 129-152, jul./set. 2001.

71 BRASIL. Decree No. 10,932 of January 10, 2022. Promulgates the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, signed by the Federative Republic of Brazil in Guatemala on June 5, 2013. Available at https://www.planalto.gov.br/ccivil_03/_ Ato2019-2022/2022/Decreto/D10932.htm. Accessed on June 20, 2024.

72 RIOS, Roger Raupp; SILVA, Rodrigo da. Discriminação múltipla e discriminação interseccional: aportes do feminismo negro e do direito da antidiscriminação. Revista Brasileira de Ciência Política, n 16, Brasília, jan-abr de 2015, p. 11-37. Available at https://www.scielo.br/j/rbcpol/a/xKt5hWwZFChwrbtfZxTGXK- f/?format=pdf. Accessed on June 20, 2024.

advancement) and, separately, discrimination based on disability (such as inaccessible architecture)[73]. Compound discrimination arises when several prohibited grounds operate simultaneously in the same context, such as when job opportunities are restricted to men or immigrants, excluding immigrant women[74].

From the qualitative perspective, **intersectional discrimination** emerges. This occurs when two or more discriminatory factors combine to intensify the subordination and disadvantage experienced by an individual, creating a unique form of social vulnerability that challenges conventional legal frameworks[75]. An example is the case of Black women, who face specific stigmas not experienced by men of the same ethnic-racial group.

> **To learn more**: multiple discrimination is closely related to the concept of **intersectionality**, formulated by Kimberlé Crenshaw76. This framework highlights how different systems of oppression (such as racism, sexism, and classism) interact and overlap, creating unique experiences of inequality. Crenshaw, a leading voice in Black legal feminism, explores how these intersecting forms of discrimination particularly affect Black women, hindering their full access to rights.

3.9 Structural racism

The structural conception of racism does not view it as a social pathology or institutional dysfunction, but as a phenomenon rooted in the very structure of society. In other words, it stems from the "normal" way in which economic, political, legal, and even family relations are constituted and function, including the processes through which individual subjectivities are shaped[77].

From this perspective, racism is a political and historical process of attributing meaning to certain bodies based on phenotypic and cultural markers. This process creates social conditions that allow racially identified groups to be systematically discriminated against, either directly or indirectly, and serves to naturalize and legitimize the political, economic, and legal inequalities built over time[78].

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73 Ibid.

74 Ibid.

75 Ibid.

76 CRENSHAW, Kimberlé. Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Anti-racist Politics. University of Chicago Legal Forum, 1989, p. 139-167.

77 GONZALEZ, Lélia. Racismo e sexismo na cultura brasileira. In: GONZALEZ, Lélia. Por um feminismo afro-latino-americano: ensaios, intervenções e diálogos. Organização de Flávia Rios e Márcia Lima. Rio de Janeiro: Zahar, 2020. p. 75-93

78 FANON, Frantz. Pele negra, máscaras brancas. Translation by Renato da Silveira. Salvador: EDUFBA, 2008.

As a political and historical process, racism functions as an ideology (anchored in concrete social practices) that shapes both the conscious and unconscious mind. It guides individuals' subjectivities through racialized frameworks, constantly reinforced by the media, the cultural industry, and the education system[79].

According to Mário Theodoro, racism operates across both micro and macro levels. It manifests in everyday life and interpersonal relationships, through discrimination and prejudice in workplaces, schools, and public spaces[80]. These behaviors are fueled by broader structural dynamics, such as the social construction of whiteness (which reinforces the myth of white superiority) and the use of biopower[81] and necropolitics[82] by the State and institutions to control the Afro-descendant population. This control is exercised through the denial of strategic public policies and the violent, repressive actions of security forces[83].

The persistence of racism as a dominant ideology – enforced through the "whiteness pact"[84], the biopower that oppresses, and the necropolitics that kills – directly contributes to maintaining a deeply unequal society. In this system, Black men and women are largely relegated to "precarious conditions, in an unacceptable yet naturalized state of degradation marked by a lack of opportunities, poverty, and misery"[85].

According to Dennis de Oliveira, structural racism, from a historical-critical perspective, has been embedded in Brazil's formation since the colonial period

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79 Ibid.

80 THEODORO, Mário. A sociedade desigual: racismo e branquitude na formação do Brasil. 1. ed. Rio de Janeiro: Zahar, 2022.

81 The concept of biopower was developed by the French philosopher Michel Foucault, referring to the "devices" and technologies of exercising power that, on the one hand, discipline bodies – which is done through training and surveillance to make them economically active and politically docile – and, on the other, regulate the biological life of the population, to prolong it. In the context of the exercise of biopower, racism appears as a means of introducing, in the domain of biological life, that power has taken charge of: (i) a divide between who should live and who should die; and (ii) the idea that "the death of the other, the death of the bad race, of the inferior race (or of the degenerate, or the abnormal), is what will make life in general healthier; healthier and purer" (FOUCAULT, Michel. Em defesa da sociedade. São Paulo: Martins Fontes, 2010. p. 295-305).

82 Necropolitics – a term coined by the Cameroonian philosopher, political theorist, and historian Achille Mbembe – emerges as a contextualization of biopower and concerns the use of political and social power, notably by the State, to determine, through actions or omissions, who can live and who must die, who is "disposable" and who is not. Necropolitics encompasses forms of social existence in which certain groups of people are subjected to living conditions that confer the status of "living dead." The "killable" body is one that is always at risk of death due to the primordial defining parameter of race. (MBEMBE, Achille. Necropolítica. São Paulo: N-1, 2018).

83 THEODORO, Op. cit.

84 According to Cida Bento, the narcissistic pact of whiteness consists of the unspoken agreement of complicity between white people that aims to maintain their privileges in a racialized society in which inequalities are justified based on the idea of merit. This pact "is an alliance that expels, represses, and hides that which is intolerable to be borne and remembered by the collective": the legacy of slavery and its positive impacts on white people. BENTO, Cida. O pacto da branquitude. 1. ed. São Paulo: Companhia das Letras, 2022. p. 17-25.

85 THEODORO, Op.cit., p. 21.

and the establishment of the slave system. It was through this system that the logic of racial domination and the exploitation of the Black population became naturalized and institutionalized. Furthermore, racism is intrinsically linked to the maintenance of the capitalist system since the exploitation of Black labor was, and continues to be, essential to the accumulation of wealth within an economic structure designed to uphold the functions and privileges of particular groups[86].

> **For reflection**: racism goes beyond individual behavior or institutional rules; it is deeply rooted in both the symbolic and material fabric of society. Thus, overcoming it requires more than just re-educating individuals or reformulating norms – it demands a comprehensive and transformative social change[87].

3.10 Institutional racism

Racism is not limited to individual behaviors; it also stems from the operation of "institutions"[88] whose practices, even when not explicitly discriminatory, produce disadvantages and privileges based on race[89]. Institutional or systemic racism allows privileged racial groups to appropriate the positive outcomes of wealth generation, while at the same time contributes to the fragmentation and unequal distribution of these outcomes within society[90].

> **Attention**: as Werneck suggests[91], institutional racism serves as a means of operationalizing patriarchal and heteronormative racism. It influences both public institutions – such as state actions and policies – and private institutions, reinforcing racial hierarchies. It operates as an active mechanism that generates and legitimizes exclusionary practices in governance and social responsibility. In essence, institutional racism subordinates the law and democratic principles to the logic of racism, rendering them insufficient or precarious for racialized individuals who are subjected to this systemic subordination.

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86 OLIVEIRA, Dennis de Racismo estrutural: uma perspectiva histórico-crítica / Dennis de Oliveira. -1. ed.-São Paulo: Editora Dandara, 2021.

87 Projeto letramento racial: como forma de combate ao racismo / Universidade Federal do Pará, Instituto de Ciências Jurídicas, Projeto Letramento Racial. Belém: ICJ/UFPA, 2023, p. 21

88 WIEVIORKA, Michel. O racismo, uma introdução. São Paulo: Perspectiva, 2007.

89 CARMICHAEL, Stokely; HAMILTON, Charles. Black power: The politics of liberation in America. New York: Vintage, 1967.

90 GROSFOGUEL, Ramón. A estrutura do conhecimento nas universidades ocidentalizadas: racismo/sexismo epistêmico e os quatro genocídios/epistemicídios do longo século XVI. Sociedade e Estado, v. 31, n 1, p. 25-49, 2016.

91 WERNECK, Jurema. Racismo institucional: uma abordagem conceitual. Geledés Instituto da Mulher Negra e Cfemea – Centro Feminista de Estudos e Assessoria, 2013.

Power is a central element in racial relations within the context of institutional racism. Control over the political and economic organization of society is maintained through the adoption of selective mechanisms – such as languages, procedures, required documentation, physical distance, financial costs, social etiquette, and behavioral expectations – that establish discriminatory parameters to maintain the hegemony of the dominant racial group[92].

As Patricia Hill Collins argues, this process causes the cultural, aesthetic, and power practices of the dominant racial group to become the societal norm, often perceived as the standard of "civilization". In this sense, the predominance of white men in both public and private institutions reflect not only the existence of structural rules and norms that hinder the advancement of Black people and women, but also the lack of critical engagement with racial and gender inequalities. The term "hegemony" is fitting, as the dominant group is not without opposition and therefore must rely both on institutional control and the construction of consensus to legitimize its authority[93].

3.11 Recreational racism

Recreational racism, as defined by Adilson Moreira, refers to "the use of humor as an expression and cover-up of racial hostility", serving to perpetuate unequal racial relations[94]. It is a strategy designed to ensure that respectability (or social esteem) remains an exclusive privilege of the dominant racial group, thereby reinforcing the ideology of white supremacy. Recreational racism should be understood as a "form of racism that manifests itself in the reproduction of negative stereotypes about non-white people, introduced into apparently harmless and humorous narratives in a veiled manner, primarily through jokes and other forms of humor[95].

This is not merely a matter of individual behavior; it constitutes a broader cultural policy, particularly evident in the media. It is a practice that disseminates damaging stereotypes about racial minorities, reinforcing perceptions about the roles that different groups should occupy in society, their supposed characteristics, the limits of their participation in the political sphere, the value they are deemed to possess, and the material opportunities they are allowed to access[96].

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92 BONILLA-SILVA, Eduardo. Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America. 5th ed. Lanham: Rowman & Littlefield Publishers, 2017.

93 COLLINS, Patricia Hill. Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment. 2nd ed. New York: Routledge, 2000.

94 MOREIRA, Adilson. Racismo Recreativo. São Paulo: Pólen, 2019, p. 148.

95 Ibid.

96 Ibid.

Did you know? Throughout history, several forms of humor have operated as instruments of marginalization against the Black population. These productions often relied on dehumanizing representations, comparing Black people to animals or attributing to them moral, intellectual, and aesthetic inferiority, as well as "a degraded sexuality, an inability to live in an organized society, and a constitutive indolence"97.

3.12 Cultural racism

Grounded in the "exaltation of Westernness" and the rejection (and systematic persecution) of Africanness and Indigenousness, cultural racism functions as a mechanism embedded in the social imagination, operating through language, art, religion, and philosophy. It consists of the depreciation and debasement of values, beliefs, myths, and rites associated with subaltern racialized groups, legitimizing, in the eyes of both the oppressed and oppressors, structures of exclusion and social plundering[98].

As a result, "ancestral knowledge, religious rituals, forms of artistic expression, traditional costumes, diets and even ways of moving and communicating" are demeaned, stigmatized, and repressed. This process is not merely the product of individual prejudice – it stems from an institutionalized system of oppression. Examples include the historical criminalization of *capoeira* and *samba*, as well as the ongoing stigmatization of hip-hop, funk, and religions of African origin[99].

3.13 Religious racism

Religious racism refers to a set of violent ideas and practices that systematically manifest discrimination and hatred toward certain religions, their followers, and the sacred territories, traditions, and cultures associated with them.

In the Brazilian context, religious racism is primarily expressed through organized and systematic attempts to repress and eradicate "Black-African ways of living and existing, particularly those rooted in Traditional Communities of *Terreiro*" – also known as Religions of African Origin –, "such as *Umbanda, Candomblé, Xambá, Nagô-Egbá, Batuque, Tambor de Mina, Jurema*, and related

97 Ibid.

98 MOREIRA, Adilson José; ALMEIDA, Philippe Oliveira de; CORBO, Wallace. Manual de educação jurídica antirracista: direito, justiça e transformação social. São Paulo: Contracorrente, 2022, p. 134-142.

99 Ibid.

traditions"[100]. This concept goes beyond the notion of religious intolerance, as it is not restricted to aggression against individual believers. Rather, it targets and condemns an entire way of existing – one that stems from ancestral Black knowledge and diverges from hegemonic beliefs[101].

In this sense, religious racism affects not only the practitioners of non-Western religions, but also their origins, practices, beliefs, and rituals. It entails the denial of an otherness that does not conform to dominant standards. These cultural and religious expressions are tolerated only to the extent that they are deemed as inferior to the dominant culture, thereby reinforcing a hierarchy that subordinates them[102].

For example, the criminalization of religious and cultural practices persists, including the continuous use of criminal law – particularly Art. 284 of the Penal Code - which is often applied with the intent of targeting practices associated with religions of African origin or cultural expressions of traditional peoples and communities, such as faith healers. Thus, the interpretation of actions described as "practicing healing, using gestures, words or any means" must be approached with caution to avoid reinforcing mechanisms of religious and cultural racism:

> [...] In fact, many of the practices captured by this provision are rooted in the body of traditional health knowledge practiced by traditional peoples and communities. Acts such as blessing and applying traditional methods for healing or restoring health are cultural rights and form part of the traditional knowledge developed, safeguarded, and transmitted by these communities – knowledge that was historically suppressed through colonial processes[103].

3.14 Environmental racism

Environmental racism can be understood as a dimension of Structural Racism, evident in socio-spatial segregation and in the disproportionate burden of negative socio-environmental impacts and/or predatory economic objectives on territories inhabited by racially marginalized and historically invisible populations[104]. The concept emerged in the 1980s, in the context of the U.S. civil

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100 NOGUEIRA, Sidnei. Intolerância religiosa. São Paulo: Sueli Carneiro; Polén, 2020, p. 88 e 138.

101 Ibid.

102 Ibid., p. 89-91.

103 SANTOS, Daniel Trindade dos Santos, MOREIRA, Eliane Cristina Pinto; GOMES, Marcus Alan de Melo. A. M.;. Controle do Conhecimento Tradicional: a criminalização do curandeirismo no Brasil e sua incongruência com a salvaguarda e e gestão do patrimônio imaterial Brasiliero. In: Inês Virgínis P. Soares/ yussef D.s. Campos/raul A.o. Lanari. (Org.). PATRIMÔNIO IMATERIAL E POLÍTICAS PÚBLICAS NO BRASIL: TRAJETÓRIAS E DESAFIOS. 1ed.Belo Horizonte: Letramento, 2021, v. 1, p. 230-250.

104 NASCIMENTO, Karina Leonardo do; AZEVEDO, Sérgio Luiz Malta de; ALMEIDA, Maria do Socorro Pereira de. As múltiplas faces do racismo ambiental no Brasil: uma revisão sistemática. Revista Observatório de La Economia Latinoamericana. Curitiba, v. 21, n .6, p. 5.072-5.089.

rights movement, particularly following protests against the dumping of toxic waste in Warren County, North Carolina – the state's county with the highest percentage of Black residents at the time[105].

Henr Acserald *et al*. report that the Environmental Justice Movement in the United States arose from a "creative articulation between social, territorial, environmental and civil rights struggles" that gained momentum in the 1980s. This movement was, above all, a reaction to selective pollution, which mainly affected poor and predominantly Black communities in peripheral neighborhoods, forcing them to endure harmful levels of environmental degradation. It was in this context - where environmental inequality became part of the broader environmental agenda - that Benjamin Chavis coined the term "environmental racism"[106].

In the Brazilian context, environmental racism deeply affects quilombola communities, Indigenous peoples, and other traditional and marginalized populations living on the outskirts of urban centers. This occurs both when their territories are "valued" and targeted by capital for extractive activities, such as legal and illegal mining, agribusiness, and construction of dams and hydroelectric plants, and when they are "devalued" and transformed into sacrifice zones, used for waste disposal, pollution[107], or neglected in the provision of essential sanitation services.

Environmental racism extends beyond the spatial dimension of housing. It should not be understood solely in terms of physical spaces or the groups residing within them. Polluting activities and socio-environmental disasters often harm natural resources that are central to collective work, cultural practices, leisure, sports, and sacred ritual - activities shared by communities that are frequently not even recognized as impacted. This reinforces a racism of absence, where certain populations are systematically overlooked. A clear example can be observed in environmental licensing procedures that ignore or downplay the effects of development projects on peripheral communities, which are predominantly composed of non-white people.

3.15 Whiteness

"Whiteness" is a form of identity historically constructed through colonialism, particularly by Western European powers whose global dominance allowed their economic system, religious values, political institutions, and

105 For more information on the origin of the concept of environmental racism, see https://www.opeu.org.br/2024/03/04/o-que-e-racismo-ambiental-uma-analise-da-injustica-climatica-nos-eua-parte-i/. Accessed on August 16, 2024.

106 ACSERALD, Henri. O que é Justiça Ambiental. Rio de Janeiro: Garamond, 2009, p. 19 – 20.

107 NASCIMENTO, Op. cit.

cultural traditions to be imposed as universal norms[108].

It refers to the ethnic-racial belonging attributed to individuals racialized as white, which is a social and ideological construct designed to secure symbolic and material privileges through an unequal distribution of political, economic, and social power[109].

As Cida Bento points out, white people occupy the dominant position within racial hierarchies, and traits such as cultural superiority, beauty, morality, and success are associated with whiteness. At the same time, other racial groups are perceived as inferior and deviant. It is in this framework that the idea of blackness emerges, constructed through the attribution of negative characteristics to African traits and reinforced by political, scientific, and cultural narratives aimed at legitimizing the exploitation of Black people. Racism plays a central role in this process, helping to create and sustain a social imaginary that hierarchizes white and Black populations[110].

> **For reflection**: Cida Bento describes the existence of a **narcissistic pact of whiteness**, that is, an unspoken pact of complicity among white people aimed at preserving their privileges in a racially stratified society. This pact helps justify inequality through the ideology of merit, and represents "an alliance that expels, represses, hides what is intolerable to be supported and remembered by the collective": **the legacy of slavery and the benefits it conferred upon white people**[111].

In this scenario, the concrete effects of centuries of white supremacy – embedded in both public and private institutions - are enjoyed by new generations of white people, often perceived as rightful achievements rather than legacies of structural privileges. According to Cida Bento, these advantages are accepted without question, as if white individuals had "nothing to do with the anti-humanitarian acts committed during the period of slavery, which corresponds to four-fifths of the country's history, or with those that persists today"[112].

3.16 Cognitive biases

Cognitive biases are systematic distortions of rational thinking that arise from unconscious mental shortcuts and automatisms, known as heuristics. As

108 BENTO, Cida. O pacto da branquitude. 1. ed. São Paulo: Companhia das Letras, 2022.

109 SILVA, Priscila Elisabete da. O conceito de branquitude: reflexões para o campo de estudo. In: Branquitude: estudos sobre a identidade branca no Brasil/ Tânia Mara Pedroso Müller e Lourenço Cardoso. 1. ed. Curitiba: Appris, 2017, p. 27-28.

110 MOREIRA, Adilson. Racismo Recreativo. São Paulo: Pólen, 2019, p. 42-43.

111 BENTO, Cida. O pacto da branquitude. 1. ed. São Paulo: Companhia das Letras, 2022.

112 Ibid, p. 17-25.

studied in social psychology and cognitive science, these biases influence our beliefs and, consequently, our decision-making process[113].

In the judicial sphere, cognitive biases can lead to systematic errors in decision-making, resulting in judgments shaped by the judge's subjectivity and a distorted interpretation of legal arguments and evidence.[114] These effects may be further intensified by solipsistic behavior, i.e., a self-centered stance adopted by judges[115].

3.17 Racial awareness

Racial awareness transcends mere ethnic-racial identification; it involves recognizing the need to collectively confront the systemic effects of historical discrimination between Black and white populations[116]. This includes acknowledging the predominance of white individuals in positions of power and accepting the shared responsibility to dismantle the structural racial system that persists in Brazilian society[117]. It is not limited to acts of denunciation – it demands concrete anti-racist stances and practices.

Adilson Moreira argues that "racial awareness can be classified as an expression of civic awareness" rooted in the exercise of citizenship. This implies the existence of a society in which all groups enjoy equal social esteem and equitable access to material opportunities – essential conditions for the realization of justice and democracy[118].

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113 NUNES, Dierle; LUD, Natanael; PEDRON, Flávio Quinaud. Desconfiando da imparcialidade dos sujeitos processuais: um estudo sobre os vieses cognitivos, a mitigação de seus efeitos e o *deabiasing*. 2. ed. Salvador: Editora JusPodivm, 2020.

114 **Confirmation bias** is the "tendency of an observer to seek or interpret information in a way that confirms one's own preconceptions." **Lock-in effect bias** is the "tendency to adhere to a previous choice even if it was made without full knowledge of the issue, due to feeling pressured by time or workload." ***Status quo* bias** is the "tendency to maintain a reference situation because one understands that changing the *status quo* would require spending time and energy." **Anchoring and adjustment bias** is the "tendency to rely too heavily or 'anchor' on a past reference or piece of information when making decisions." **Loss aversion bias** involves people's aversion to losing something they already have. **Blind spot bias** is the "tendency to see oneself as less biased than others or to identify more cognitive biases in others than in oneself." **Stereotype bias** is identified when it is expected that "a member of a group will have certain characteristics, according to a certain pattern," without having actual information about this individual". In: NUNES, Op. cit., p. 64-67.

115 Ibid.

116 MOREIRA, Adilson. Consciência racial como consciência cívica. Available at https://www.geledes. org.br/consciencia-racial-como-consciencia-civica/. Accessed on August 17, 2024.

117 RIBEIRO, Djamila. Pequeno manual antirracista. 1. ed. São Paulo: Companhia das Letras, 2019, p. 35.

118 MOREIRA, Adilson. Consciência racial como consciência cívica. Available at https://www.geledes.org.br/consciencia-racial-como-consciencia-civica/. Accessed on August 17, 2024.

3.18 Racial justice

In Brazil, social inequalities, an expression of the broader social issue, are intrinsically related to the multiple manifestations of racism. Beyond acknowledging the racial bias that shaped the country's formation and the persistent distortions that remain, it is essential to understand that Brazil's social structure was not only built on racist foundations and theories that restricted the social mobility of the Black population but also actively supported European immigrants and their descendants through numerous state-sponsored initiatives. This dual process helps explain the enduring social gaps that persist to this day.

Racial relations in a country that underwent the gradual, state-backed ideological construction of the so-called "myth of racial democracy" are complex and demand serious attention. Denying the existence of racism under the alleged argument that it is impossible to define who belongs to a specific race represents a serious threat to the progress made by racialized populations, especially the Black population, in the fight for equality.

This is because, in everyday life and especially within institutions, racial markers are both visible and operative. They function as limiting factors and, in many cases, determine who has access to rights - and, ultimately, who lives and who dies. Racism is, therefore, an injustice that is often amplified: sometimes through denial, reflected in the historical failure of the Brazilian State to adopt reparative measures and the refusal of certain social segments to recognize its existence; sometimes through institutionalized practices that deepen patterns of discrimination.

In this context, as stated by Ednilson Couto,

> [...] Racial Justice encompasses the set of institutionally adopted actions aimed at ensuring rights for historically racialized groups, through the implementation of policies that address social, economic, and legal inequalities rooted in racial, cultural, or ethnic elements. Its purpose is to promote a positive agenda for reducing rights violations and promoting effective political participation[119].

Racial Justice, therefore, requires the State to acknowledge and act to establish and sustain measures that reverse existing inequalities and, crucially, prevent future setbacks. Achieving this demands that racial issues be treated as a central concern in all actions adopted.

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119 COUTO, Ednilson. A justiça racial e alternativas penais no Brasil: a aplicação desigual dos mecanismos de responsabilização alternativos à prisão in RBEP Revista Brasileira de Execução Penal / Ministério da Justiça e Segurança Pública, Secretária Nacional de Políticas Penais – v. 5, n 1 (Jan./Jun.2024). Brasília: Ministério da Justiça e Segurança Pública, 2022, p. 23. Accessed on September 19, 2024.

To learn more: in November 2022, CNJ launched the National Judiciary Pact for Racial Equality, which involves the implementation of programs, projects, and initiatives across all branches and levels of the Judiciary to combat and correct racial inequalities. It promotes affirmative, compensatory and reparatory measures, to eliminate structural racism within the Brazilian Judiciary.

3.19 Quilombos

A quilombo is a traditional territory that embodies a form of social organization, and ethnic-racial and political resistance, "maintained or incorporated [by Black communities] in the arduous struggle to maintain their personal and historical identity"[120],[121].

According to Article 68 of the Act of Transitional Constitutional Provisions (ADCT) of the 1988 Federal Constitution, quilombola communities occupying their lands are guaranteed definitive ownership, and the State must issue them the corresponding land titles[122].

The constitutional right was further regulated by Decree No. 4887/2003, which outlines the procedures for identifying, recognizing, delimiting, and titling of quilombola territories. The constitutionality of this decree was upheld by the STF on August 2, 2018, in its ruling on ADI No. 3239/DF, reaffirming the legal foundation for guaranteeing quilombola land rights in line with the Federal Constitution.

Quilombola territories are generally marked by social, philosophical, economic, and ecological practices centered on the collective and specific use of the land[123]. Their recognition strengthens Brazil's constitutional commitment to building a free, just, and solidary society and to reducing social inequalities (Art. 3, I and III, of the FC/1988).

Art. 13 of ILO Convention No. 169, a treaty with supra-legal status in Brazil, reinforces this perception by requiring governments to respect the special importance of Indigenous and tribal peoples' relationships with their lands or

120 NASCIMENTO, Beatriz. O conceito de quilombo e a resistência cultural negra. In: RATTS, Alex. Eu sou atlântica: sobre a trajetória de vida de Beatriz Nascimento. Instituto Kuanza, São Paulo, 2006, p. 117-125.

121 BRASIL. Instituto Nacional de Colonização e Reforma Agrária – INCRA. Regularização de território quilombola: perguntas e respostas. Coordenação Geral de Regularização de Territórios Quilombolas – DFQ. Brasília, 2017, p. 4. Available at https://www.gov.br/incra/pt-br/assuntos/governanca-fundiaria/perguntas_respostas.pdf. Accessed on June 20, 2024.

122 BRASIL. Act of Transitional Constitutional Provisions. Available at https://www2.camara.leg.br/legin/fed/conadc/1988/constituicao.adct-1988-5-outubro-1988-322234-normaatualizada-pl.pdf. Accessed on June 20, 2024.

123 Cf. WAGNER, Alfredo Wagner Berno de. Quilombos e as novas etnias. Manaus: UadEA Edições, 2011.

territories, particularly in connection with their cultures and spiritual values and to adopt specific measures to guarantee these rights (Art. 14).

In this context, territory should be understood as encompassing more than just the physical space of residence. It includes the multiple dimensions of these groups' ties to the land - cultural, economic, and spiritual – where their ways of life are exercised and their uses, customs, and traditions flourish[124].

3.20 Quilombola Communities

It is important to note that although the term "remnant of quilombo" is used in Art. 68 of the ADCT, it is no longer considered the most appropriate way to refer to these social groups, to which the Federal Constitution grants special protection. Despite the term's reference to remnants – suggesting something of the past – the constitutional provision clearly applies to communities in their present and future existence.

This interpretation was affirmed by the STF in the landmark judgment of ADI 3239, which recognized that the Constitution seeks to protect all Black communities historically associated with the term *quilombo*, based on its linguistic and socio-historical significance. The expression "remnant", therefore, becomes imprecise, as it can convey the mistaken idea that these communities are "residues," "remnants," or what "was left." In truth, these groups actively sustain and renew their cultural, social, and economic practices, adapting them to contemporary challenges and creating new forms of sociocultural resistance. Therefore, the expression "quilombola community" is preferred. It emphasizes the continuity, historicity, social distinctiveness, and autonomy of these groups, which are also recognized as rights-bearing subjects under ILO Convention No. 169.

The STF's ruling in of ADI 3239 also underscored not only the recognition of quilombola communities as rights-holders under ILO Convention No. 169, but the necessity of aligning domestic legal interpretation with international human rights standards and mechanisms. In particular, the Court drew upon the jurisprudence of the Inter-American Court of Human Rights, specifically in the cases *Moiwana vs. Suriname* (2005) and *Saramaka vs. Suriname* (2007), reinforcing the commitment and duty of States to adopt measures ensuring territorial rights for traditional Afro-descendant communities.

As Alfredo Wagner Berno de Almeida recalls, quilombola peoples are fully aware of their position within society and actively demand ethnic rights and the ability to define themselves before institutional powers. They organize through collective movements grounded in concrete struggles[125].

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124 See in this sense: Moiwana Case; Caso de las Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) Vs. Colombia. Sentencia de 20/11/2013.

125 WAGNER, Op. cit.

Almeida also notes the dynamic nature of the concept of quilombo, which must be interpreted in contrast to colonial processes. Understanding the historical formation of the concept is essential to fully grasp the contemporary demands for rights. According to the author:

> In addition to being a historical theme, the quilombo represents an instrument through which the political-representative expression necessary for the constitution, recognition, and affirmation of differences intrinsic to an ethnic group - and closely tied to the recognition of territorial rights - is organized. The quilombo category, redefining both politically and legally, thus marks a new chapter in the ethnic affirmation and political mobilization of peasant segments, particularly in relation to the so-called Black lands or territories identified by the Black movement as "rural Black communities"[126].

Decree No. 4887/2003, in its Article 2, defines quilombola communities as "ethnic-racial groups, according to criteria of self-attribution, with their own historical trajectory, marked by specific territorial relations and presumed Black ancestry linked to resistance against historical oppression"[127].

The constitutionality of the self-attribution criterion has already been upheld by the STF (ADI 3239), as it is a method recognized by contemporary anthropology and essential to identifying the intended beneficiaries of Art. 68 of the ADCT. Accordingly, elements such as ancestry and ties to a historical condition of oppression are essential to understanding this process of identity affirmation.

According to the website of the National Institute for Colonization and Agrarian Reform (INCRA) – the federal agency responsible for granting titles to quilombola territories – "quilombola communities are ethnic groups predominantly composed of a Black population – rural or urban – that self-identifies based on specific relationships with land, kinship, territory, ancestry, traditions, and cultural practices"[128].

While quilombola communities have longstanding demands related to territorial rights, it is equally important to recognize that many other challenges affecting the assertion of their rights have been brought before the justice system must be addressed from an anti-racist perspective.

Access to essential resources such as water, sanitation, and university admissions remains a critical issue, with individuals from quilombola communities

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126 ALMEIDA, Alfredo Wagner Berno de *Quilombolas e novas etnias*. Manaus: UEA Edições, 2011.

127 BRASIL. Decree No. 4,887 of November 20, 2003. Available at https://www.planalto.gov.br/ccivil_03/decreto/2003/D4887.htm. Accessed on June 20, 2024.

128 Available at https://www.gov.br/incra/pt-br/assuntos/governanca-fundiaria/quilombolas. Accessed on June 20, 2024.

facing significant barriers. One area requiring special attention is the right to access Rural Education, which goes beyond the basic right to attend school. It constitutes a public policy guaranteed by current legislation and was reinforced by Decree No. 7352/2010, which established guidelines for rural education, including quilombola communities as beneficiaries.

Recognizing the need for specific public policies for these communities, it is worth highlighting the enactment of Decree No. 11786 of 2023, which establishes the National Policy for Quilombola Territorial and Environmental Management (PNGTA). This policy aims to ensure that territorial and environmental management is developed by quilombola communities themselves and seeks to promote the integrated implementation of public policies, among other objectives.

In this context, it is essential to highlight the National Policy for Equity, Education for Ethnic-Racial Relations, and Quilombola School Education (PNEERQ), which aims, among other objectives, to combat racism and ethnic-racial inequalities in educational settings. Also noteworthy is Resolution CNE/CEB No. 8 of November 20, 2012, which establishes the National Curricular Guidelines for Quilombola School Education within Basic Education.

PART III

A step-by-step guide for Judges

Part III – A STEP-BY-STEP GUIDE FOR JUDGES

Having addressed the main concepts, the central issues related to racial equity, and the challenges that may arise in applying the law, we now turn to the step-by-step process of judicial decision-making from a racial perspective, with a focus on the experiences of Black individuals.

Before outlining this process in detail, it is important to briefly reflect on what it means to judge from this perspective.

As highlighted in the Protocol for Judging with a Gender Perspective[129], judicial activity is inherently complex. It involves numerous steps, including engaging with the parties, identifying the facts relevant to the case, determining the applicable rules and principles, and interpreting the law to reach a fair and equitable outcome.

Judges reading this protocol are already well-versed in the various interpretative methods that inform legal reasoning. However, these methods often operate at a level of abstraction that can inadvertently reinforce existing inequalities – especially in societies like Brazil, where structural racism remains deeply entrenched.

It is in this context that we propose a judicial approach rooted in a racial perspective, one that calls for interpretations of the law grounded in the lived realities of the Afro-descendant population. The aim is to identify and dismantle the structural inequalities affecting this group.

> **For reflection**: as with judicial decision-making from a gender perspective, it is not uncommon to hear criticism that judging from an intercultural viewpoint introduces bias. However, the true bias lies in ignoring structural inequalities, not in critically and consciously addressing them.

In this section, we examine how a racial perspective can be applied at each stage of conflict resolution and suggest ways to guide decision-making grounded in principles of equality and racial awareness.

This guide aims to serve as a practical tool for judges, supporting more transparent, legitimate, well-reasoned, and respectful judicial conduct toward the Afro-descendant population.

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129 Protocol for Judging with a Gender Perspective, adopted by Resolution No. 492/2023 of the National Council of Justice. Available at https://www.cnj.jus.br/wp-content/uploads/2021/10/protocolo-para-julgamento-com-perspectiva-de-genero-cnj-24-03-2022.pdf.

The idea is to offer a practical and sensitive approach that ensures that all aspects of the trial process are conducted with due attention to factors that may disproportionately affect Black individuals, particularly those related to racial vulnerability.

The following key areas will be addressed: engagement with the parties, the granting of special protective measures, evidentiary proceedings, assessment of evidence, identification of applicable legal norms and precedents, and the interpretation and application of the law. Each of these stages highlights the importance of considering individual circumstances and recognizing that race can profoundly influence one's experience with the justice system.

4.1 Bringing the parties together

Introduction

Bringing the parties together in a legal proceeding is not merely a procedural step; it is a crucial moment for the justice system to demonstrate its understanding of and respect for the diverse realities individuals bring before the Judiciary.

For Black individuals, these realities are often shaped by a history of exclusion, prejudice, and discrimination that may not be immediately visible but profoundly affect how they engage with the legal system.

The questions and considerations outlined below are informed by this perspective, aiming to ensure that Black women, elders, incarcerated individuals, victims, children, and adolescents are treated with the justice and dignity they are entitled to.

4.1.1 Black women

Black women carry with them a history of oppression and resistance that shapes their lives in complex ways. When a Black woman meets the justice system, it is crucial to recognize the layers of inequality she may face, which go beyond gender to include race, social class, sexuality, religion, and other aspects of her identity, often in an intersectional manner.

Questions and Considerations:

a) Does this Black woman face specific challenges arising from the intersection of her race and gender? How do these challenges affect her standing within the Judiciary?

b) Has she had access to essential resources, such as legal representation and social support? Are there barriers she faces that other women might not encounter?

c) Is there a history of violence or intersectional discrimination that may have shaped her experiences and should be considered in judicial decision-making?

d) Are her physical and emotional safety being adequately addressed? Are additional protective measures necessary?

e) Are there cultural or linguistic barriers that must be overcome to ensure her full and fair participation in the legal process?

f) Does she serve as a caregiver for parents, children, or others? Have these responsibilities been considered when scheduling hearings or determining the duration and timing of legal procedures?

4.1.2 Black elders

The experience of aging as a Black person in an unequal society brings with it a specific set of challenges. In addition to the typical difficulties associated with old age, elderly Black people often carry the burden of a lifetime of compounded racial discrimination, an experience that must not be ignored or reinforced when they turn to the Judiciary.

These accumulated injustices often result in lasting impacts on their physical and mental health, as well as how institutions, including the Judiciary, treat them. Many Black older adults have endured precarious or informal labor conditions and have been denied opportunities to fully develop their skills. They may have also experienced heightened vulnerability in accessing education, housing, and other fundamental rights.

Questions and Considerations:

a) Is this Black older adult being treated in a way that respects their dignity? Are they subject to neglect or discrimination that exacerbates their vulnerability?

b) Do they have an adequate support network, or are they isolated and without access to essential services?

c) How are their physical and mental health conditions being considered throughout the legal process?

d) Are there economic factors that increase their vulnerability? What steps can be taken to ensure these factors are fairly addressed?

e) Does the person fully understand the legal process and their rights? Are additional measures needed to ensure that they are adequately informed and empowered to actively participate in shaping the most appropriate response to their situation?

4.1.3 Liberty-deprived Black individuals

The Black prison population faces a particularly harsh reality, often shaped by systemic discrimination and inhumane conditions of deprivation. For many Black individuals, imprisonment is not merely a deprivation of liberty but also of a continuation of exposure to a justice system that may be disproportionately punitive due to race.

In this context, it is imperative that the Judiciary remain vigilant to ensure that racism does not exacerbate the hardships already inherent to incarceration.

Questions and Considerations:

a) Is there evidence that racism influenced any stage of the investigation, from the initial police approach to the sentencing phase?

b) Has racial bias affected the production or consideration of evidence, the assessment of testimony, or the sentencing?

c) Have there been any reports of torture during legal proceedings, and were such reports properly investigated, and accountability ensured?

d) If any of the above circumstances are identified, all available legal measures should be taken to bring an end to the imprisonment.

e) If release or sentence mitigation is not possible, has an assessment been made of whether racism is influencing this person's treatment and experience in the prison system?

f) Do the conditions of detention respect the person's human dignity, or are they being held in degrading environments that endanger their health and safety? Are appropriate health services provided in line with their needs?

g) Does the person have adequate access to legal counsel, and is their defense being conducted with impartiality and competence?

h) If there is a support network in place for visits, are appropriate measures being taken to facilitate ongoing contact? Are there social welfare policies that could assist the family in mitigating the financial impact of incarceration?

i) Is there a risk of abuse by other inmates or prison authorities? What preventive measures are being taken to address this?

j) Is the individual's return to society being planned in a manner consistent with social justice principles, or are discriminatory stereotypes undermining their prospects and reducing them to the behavior that led to their incarceration?

k) Does this Black person have equitable access to opportunities for education, sentence reduction (earned time), work, or other reintegration initiatives, as compared to white individuals?

4.1.4 Black victims

While being a victim of a crime or infraction is already a traumatic experience, for Black individuals, the justice system's response can often aggravate this trauma[130]. It is not uncommon for Black victims of violence to be initially treated with suspicion, as if they were the perpetrators. Their lives may go under scrutiny, while those responsible for the violation escape proper accountability and investigation.

Black victims frequently encounter distrust, inadequate support, and systemic barriers to accessing the protection they are entitled to. The justice system must be prepared to respond to these needs with a sense of urgency and fairness.

Questions and Considerations:

a) Is this victim being encouraged to come forward? Are they being treated in accordance with the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34)?

b) Is this Black victim receiving the protection and support they need, or are there gaps in the system that leave them vulnerable? Is there a safe and attentive environment where they can share their version of events without interruption or disbelief?

c) Is the victim being forced to share physical space (courtroom, hallways, etc.) with the perpetrator and their witnesses?

130 For more information, see https://www.tjdft.jus.br/informacoes/programas-projetos-e-acoes/pro-vida/dicas-de-saude/pilulas-de-saude/racismo-e-saude-emocional-como-o-trauma-afeta-as-vitimas

d) Are there ongoing threats to the victim's safety that require urgent and effective action?

e) What immediate protective measures can be implemented to prevent further harm?

f) Does the victim have access to the necessary services for recovery and protection? Are there barriers that prevent access to these resources?

g) Does the victim fully understand the judicial process and the options available? Are they being treated with the respect and consideration they deserve?

4.1.5 Black children and adolescents

Black children and adolescents often grow up in contexts shaped by racial inequalities and limited opportunities. When they meet the justice system, it is essential that they receive special care and understanding, in line with the Statute of the Child and Adolescent (ECA) and the UN Convention on the Rights of the Child.

Both the ECA and the UN Convention emphasize the full protection of rights, ensuring that children's needs are met and that they are safeguarded from all forms of abuse, discrimination, and violence. Addressing racism and its related harms must be a priority, ensuring fair treatment in line with the principles of comprehensive protection and human rights.

Questions and Considerations:

a) Is this Black child or adolescent protected from abuse and neglect, particularly those risks linked to racial vulnerability?

b) Are their developmental needs addressed with an awareness of the racial inequalities they may face?

c) Do they have access to quality education and adequate healthcare, considering the structural barriers they may encounter?

d) Is this child or adolescent exposed to environments of violence that must be addressed to ensure their safety and development?

e) Does the child or adolescent understand the judicial process and feel safe to express their concerns? What additional forms of support can be offered?

4.1.6 Black juvenile offenders

Black juvenile offenders occupy a particularly vulnerable position, where racial discrimination may shape the treatment they receive and limit the opportunities available to them within the socio-educational system. The justice system must ensure these young people access to their fundamental rights – including health, education, identification documents, and family and community life – so they can reintegrate into society with dignity and fairness.

Questions and Considerations:

a) Is this Black adolescent receiving fair treatment, with proper safeguards to prevent racial discrimination from influencing their case?

b) Are they being treated as adolescents, as people in a process of development and growth, or are they being reduced to the alleged offense and treated as adults?

c) Are there non-custodial alternatives to internment that might be more effective for their socio-educational development, especially when considering their life history and the barriers they face?

d) Do they have access to quality education, vocational training, and psychological support that address the specific challenges faced by young Black individuals?

e) Have socioeconomic and environmental factors contributed to their involvement with the justice system? How can the Judiciary work to mitigate these factors and reduce the risk of future delinquency?

f) Is the adolescent's family involved in and supported throughout the socio-educational process, helping to ensure a stable support network during their commitment?

g) What measures are in place to support their reintegration into the community and to foster opportunities for personal growth and the development of their full potential?

4.2 Granting protection orders

Introduction

Granting protection orders is a critical responsibility of the Judiciary, especially when it involves safeguarding Black individuals who may be exposed to heightened vulnerability.

This responsibility demands a careful analysis not only of the immediate risks involved but also of the structural inequalities that may contribute to those risks. These include factors related to specific interpersonal dynamics of the case (family, community, or social relationships) as well as broader systemic conditions experienced by Black individuals (economic hardship, a history of racial violence, social vulnerability, and the presence of environments that enable the persistence of racist behaviors).

We propose an approach to ensure that protective measures are implemented fairly and effectively, recognizing the complexities of racial experiences.

Questions and Considerations:

a) Does the case call for immediate protective measures (e.g., removal or restraint of the aggressor, protection against racial violence, access to social protection measures)?

b) Are the parties involved at risk of death or of suffering violations of their physical, psychological, or moral integrity due to their race?

c) Is there any power imbalance or racial dynamic between the parties involved that may heighten the vulnerability of the Black individual?

d) Are there contextual factors - such as socioeconomic hardship, histories of racial discrimination, or cultural aspects (e.g., normalization of violence against Black people) – that contribute to the risk?

e) Should extra-judicial measures be considered, such as referrals or support services for Black victims (e.g., psychological assistance, access to fundamental rights, protection in quilombola communities)?

f) What does it mean to protect the Black person in this specific case, considering the particularities of their racial vulnerability?

g) Are the autonomy and dignity of the Black person being respected and guaranteed throughout the legal process?

h) Are the standard protective measures applied in similar cases adequate to address the racial dimension of vulnerability in this situation?

4.3 Procedural investigation

At this stage, we begin with the premise that procedural investigation is essential in cases involving individuals marked by structural inequalities. It plays a key role in identifying and understanding the facts and in determining whether the relationships in question are shaped by racial dynamics that may influence judicial decision-making.

It is essential that judges recognize which elements might compromise impartiality and fairness in analysis of the case and that they remain attentive to the lived experiences and social contexts of the victims.

Throughout the evidentiary stage, efforts must be made to develop an accurate understanding of the circumstances faced by individuals from racially subordinated groups, acknowledging that these experiences are shaped by a historical process of dehumanization of Black people.

The key questions at this stage include:

a) Is the procedural investigation reproducing racialized institutional violence? Are there seemingly neutral procedures that, in practice, create specific barriers due to the racial vulnerability of the parties – especially when intersected with gender, sexuality, socioeconomic status, disability, age, religion, or national origin?

b) Is Black identity being perceived as a negative factor within the context under analysis?

c) Is the investigation fostering an environment conducive to the production of high-quality evidence?

Sub-questions include, for example:

d) Do the questions posed during the hearing allow for the identification of the contexts and situations of disadvantage in which individuals involved live, to assess how these factors may influence the specific case?

e) Are the questions reinforcing racial stereotypes? (e.g., Do they use skin color generically to identify someone as a suspect? Do they question aesthetic elements such as hair texture, hairstyle, and clothing as indicators of character or behavior? Do they inquire whether the person or their community usually has conflicts with authorities or displays aggression when angry? Do they associate skin color with presumed intellectual ability, profession, or social class? Is the individual's place of residence used to imply criminal conduct, worsen their legal situation, suggest involvement in illicit activity, or discredit their testimony?)

f) Are the questions in any way disqualifying the testimony of the person providing evidence? (e.g., asking whether the incident was truly a case of racism or just a misunderstanding between those involved?)

g) Could the questions lead to re-victimization? (e.g., suggesting that the person may have misinterpreted the actions of others as racist due to their own insecurities)

h) Does the environment enable witnesses to speak freely and comfortably, without embarrassment and intimidation? (e.g., is the jury composed solely of white individuals? Is language that disregards cultural nuances or incorporates racial stereotypes being used?).

i) Is the witness being interrupted or pressured in a way that prevents them from articulating their thoughts? Are questions posed in an aggressive or intimidating tone? Are the witness's integrity and honesty being unduly challenged?

j) Do the questions demonstrate respect for, and recognition of, the memories, traditions, values, and religiosity of Black individuals?

4.3.1 Expert evidence

Expert evidence must be produced with due attention to the structural inequalities that may affect the case. It is essential that experts, social workers, police officers, and other professionals involved are adequately trained to recognize and counteract these biases.

At the same time, judges must remain vigilant in assessing whether the conduct adopted during the production of expert evidence is influenced by discriminatory behavior. Beyond identifying elements shaped by intersectional processes of oppression, particularly those involving race, an active and critical approach is required in the interpretation of technical reports. This includes acknowledging that science and law may be permeated by racial prejudice.

When not carefully examined and contextualized, technical, scientific, or social reports may reproduce racial stereotypes. These documents can either assign undue weight to aspects rooted in structural racial inequalities or overlook key factors that are only perceptible through an analysis attuned to racial dynamics.

For example:

a) Assessments that fail to consider the impact of environmental racism on Black communities or that interpret public health data without considering that socioeconomic and racial factors can distort reality.

b) Reports that disregard the cumulative impact of racial and gender discrimination on rates of domestic violence or on access to support services may inadvertently reinforce cycles of violence and contribute to the perpetuation of injustice.

For these reasons, it is essential that expert reports be assessed through a lens that recognizes and integrates the complexities introduced by racial inequality, in alignment with the intersections of race, gender, sexuality, class, age, disability, religious orientation, and national origin. This will ensure a fairer and more effective analysis of the realities faced by Black individuals.

4.4 Assessment of evidence and identification of facts

The first step in analyzing evidence produced during the evidentiary stage is to question whether additional evidence could have been gathered. The goal is to assess whether the racial vulnerability of the person involved created obstacles to the production of evidence or imposed an undue burden on them.

This line of questioning is equally important when witnesses face barriers (formal or informal) to testifying. This may occur, for example, when individuals live in high-risk areas or are victims of state violence and fear retaliation. In a judicial approach attentive to racial vulnerabilities, such circumstances are critical to evaluating the probative value of the evidence presented.

It is necessary to consider why a party's arguments may be supported by more or less extensive evidence, and whether any gaps are attributable to the personal, social, or territorial conditions of Black individuals.

Another critical issue concerns the expectations placed on the consistency and coherence of witness testimonies. Racist practices are inherently traumatic

and can profoundly affect victims. Individuals subjected to racism may suffer from stress, low self-esteem, feelings of inferiority, depression, phobias, and anxiety, among other symptoms[131], circumstances that must be considered when evaluating their statements.

Furthermore, reports of racist incidents often emerge only after the individual has endured multiple episodes of discrimination, prejudice, and violence. These are practices frequently normalized in the everyday lives of Black people, who – under a historical process of coloniality – have been subjectivized through notions of racial dehumanization and subordination. As a result, it is common for awareness of such violence to be delayed, which in turn affects the timing and manner of reporting.

Therefore, it is necessary to contextualize the testimony and recognize that the individual may have reached a breaking point after a long history of racial violence – often endured in silence.

It may seem redundant, but the issue is so important that it must serve as a guiding lens throughout all stages of the legal process: care must be taken to prevent the reproduction of racist stereotypes in the assessment of evidence, and judges must engage in critical self-reflection to identify and mitigate any unconscious biases that may diminish the significance of what is being reported.

The key questions at this stage include:

a) Could evidence generally considered relevant have been produced in this case? (e.g., are there circumstances – such as fear of retaliation - that may have prevented eyewitnesses from testifying?)

b) Given the answer to the first question, should the victim's testimony be afforded greater weight?

c) Could the evidence presented be influenced by racial stereotypes? (e.g., assumptions that a Black witness lacks education or knowledge; that a Black person is inherently linked to crime or violence; or that their territorial or cultural background discredits their testimony).

d) Could personal experiences influence the assessment of the facts? (e.g., I have never practiced racism and, therefore, it seems unlikely to me that someone with a background like mine could behave in a racist way).

131 Available at https://www.tjdft.jus.br/informacoes/programas-projetos-e-acoes/pro-vida/dicas-de--saude/pilulas-de-saude/racismo-e-saude-emocional-como-o-trauma-afeta-as-vitimas

e) Am I giving undue weight to an element that appears important only because of preconceived notions that shape my worldview? (e.g., testimonies suggesting that Black people tend to victimize themselves, or that racism allegations are exaggerated or baseless?).

f) Similarly, am I minimizing certain relevant facts? (e.g., Am I overlooking relationships of subordination or power imbalances between the parties that may have affected the production of evidence?)

g) Am I failing to consider how structural inequalities interfere with a person's lived reality? (e.g., If a Black woman took a long time to report domestic violence due to financial dependence or fear of retaliation, am I wrongly interpreting this delay as complicity or consent?)

Questions concerning the racial vulnerability of individuals:

a) Does this Black person face specific inequalities due to their gender and race?

b) Do they have access to adequate social and legal support?

c) Is there a history of domestic violence or abuse in their life?

d) Are their safety and physical integrity currently at risk?

e) Are there cultural or linguistic barriers that may be limiting their ability to participate in the legal process?

f) Is their physical and mental health being duly considered and protected?

g) Are there conditions of economic vulnerability that need to be addressed?

h) Are they aware of their rights and do they fully understand the legal process?

i) In the case of a Black child or adolescent, is there a risk of abuse or neglect?

j) Are the specific needs of this Black person being addressed, particularly considering age and racial vulnerability?

k) Does the child or adolescent have access to adequate education and health care, free from racial discrimination? Are they in the school year appropriate for their age? If not, what are the reasons?

l) Is there any prejudice or discrimination associated with the cultural environment in which the child or adolescent lives?

m) Do the child or adolescent and their family understand the process and feel safe expressing their concerns?

4.5 Normative, doctrinal, and jurisprudential frameworks considered for case analysis

To conclude this section, it is essential to pay close attention to the legal norms being (dis)considered in support of the decision, as well as to the doctrinal and case law references involved.

Although the 1988 Constitution introduced a substantial set of anti-racist norms, their effectiveness remains limited due to their frequent underapplication by the Judiciary. This raises important questions: What efforts has the Judiciary made to expand the normative frameworks guiding its decisions? Are internal rules and international treaty provisions – ratified by Brazil – being invoked to guarantee the fullest possible legal protection in each case? For example, is the Racial Equality Statute regularly referenced in judicial reasoning? Has the new constitutional framework for combating racism, ground in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), been incorporated into the interpretation of relevant norms?

In relation to international standards, is conventionality control being exercised to ensure that domestic laws are compatible with the international human rights treaties incorporated into Brazilian law? This is particularly crucial – though not exclusively so –in cases involving human rights violations, where the principal instruments of the Inter-American human rights system may override, suspend, or nullify domestic rules that provide less protection or conflict with international obligations.

In this regard, CNJ Recommendation No. 123/2022 affirms that every Brazilian judge also acts as an Inter-American judge. It is therefore incumbent upon them to apply the standard most favorable to promoting human rights, within the normative landscape increasingly shaped by international law. Therefore, the CNJ recommends compliance with international human rights treaties and conventions in force in Brazil, the use of Inter-American Court of Human Rights (I/A Court H.R.) case law, and the implementation of conventionality control in evaluating the conformity of domestic laws.

In addition to concerns about applicable rules, it is worth asking: do the doctrinal references supporting decisions reflect a racialized interpretation of the law, or do they reproduce perceptions that conceal the effects of racism – particularly in its intersections with other systems of oppression – thus

perpetuating the very model of racial injustice that the law ought to dismantle? Since the 1980s, the field of Law and Race Relations has broadened the analytical lens through which we examine the law's role in reproducing racism. Drawing on diverse epistemological and methodological influences (such as, for example, Critical Race Theory, Anti-Discrimination Law, Critical Studies of Whiteness, Afro-Brazilian and Afro-diasporic Law, among others), scholars across all legal fields have challenged the myth of legal neutrality and universality, exposing how the law often reinforces racial hierarchies in Brazil.

In recent years, these perspectives have been increasingly incorporated into public examination syllabuses, continuing legal education programs, and the establishment of Working Groups and Specialized Centers dedicated to disseminating and fostering such critical reflections in the different institutions that comprise the justice system.

However, it is important to distinguish between the mere citation of critical concepts, such as those indicated in Part II of this protocol, and the genuine incorporation of their guidelines in the handling of specific cases. A racially grounded theoretical framework must not serve as a rhetorical device or a shield to deflect scrutiny from decisions that may reproduce discriminatory outcomes. Rather, the integration of these concepts must transform how all parties are treated, how evidence is evaluated, how narratives are heard, and ultimately how justice is administered. Only then can judicial rulings meaningfully contribute to racial equity, both symbolically and materially.

Given the tendency to rely on familiar doctrinal frameworks, it is important to question whether such perceptions are being critically engaged or merely reproduced. A broadened conceptual foundation enables a more complex and accurate treatment of the case, paving the way for more appropriate accountability, reparative measures, and guarantees of non-repetition, aligned with the principles of due diligence.

Another key dimension to consider is the jurisprudence invoked in legal reasoning. Courts must cease relying on precedents that reinforce stereotypes or discriminatory assumptions, regardless of whether such rulings are well established. Although this may seem self-evident, a critical part of the judicial role involved rejecting racially unjust precedents and instead turning to decisions that embody an effort to judge from a racial perspective. Where such decisions fall short, it is equally important to highlight, within the ruling itself, the elements that constitute a protective advance.

The development of a racially informed jurisprudential repertoire must be a continuous process. As racism is continually reshaped in response to resistance, the strategies to confront it must also evolve - open to ongoing revision and improvement.

PART IV

Racial issues by specific branches of Justice

Part IV – RACIAL ISSUES BY SPECIFIC BRANCHES OF JUSTICE

5.1 Family law

Studies on family law have evolved significantly in recent years, aiming to update concepts defined centuries ago considering contemporary social realities.

Social and, above all, cultural transformations over time have directly impacted on the concept of family. The historically patriarchal and conservative structure, which placed men at the center of decision-making and regarded marriage as the sole institution conferring family status on human relationships, has been gradually challenged. In its place, *affection* has emerged as a determining value in shaping diverse family models, which are increasingly recognized and legitimized in society.

There is a clear intention to honor and protect human relationships based on constitutional principles such as human dignity, solidarity, and citizenship. The goal is to promote the well-being of all, without prejudice based on origin, race, sex, color, age, or any other form of discrimination. This protection extends to single-parent families, families formed through public, continuous, and stable cohabitation regardless of civil marriage or the sexual orientation of their members, and families united not solely by blood but especially by socio-affective ties.

A harmonious reading of the 1988 Constitution – specifically the chapter that outlines the foundations of the Federative Republic of Brazil alongside the chapter that addresses the family as the basis of society - leads to the inevitable conclusion that the family deserving of special protection by the State is the one that, among other values, respects racial diversity.

It is no coincidence that the constituent legislator established it as a duty of the family, society, and the State to ensure children, adolescents, and youth, with absolute priority, the right to life and other fundamental rights, protecting them from all forms of discrimination.

Therefore, the concept of family necessarily entails the enshrinement and respect of racial equality. This understanding carries significant implications for the day-to-day practice of family law in the justice system.

Judges working in this sensitive area must remain attentive to the specificities of each case, especially when ruling on matters such as custody, visitation, parental alienation, alimony, adoption, and the exercise of parental authority, whether the parties involved are Black or when the case concerns the interests of members of an interracial family.

> **For reflection**: it is important to keep in mind that the power exercised by racist parents in the family environment can foster prejudice in children. From the perspective that no one is born racist, it becomes evident the environment in which a child is raised plays a fundamental role in shaping their values and worldview.

Children are beings in formation who, as a rule, absorb the lessons and beliefs transmitted by their parents or caregivers, defining their understanding of right and wrong accordingly. A white child who spends part of their life being indoctrinated with the belief that Black people are inferior will probably, at some point, come to accept this notion as an absolute truth. As a result, they may express racist attitudes and behaviors during adolescence and adulthood, reproducing the reality they were introduced to. On the other hand, a Black child who is persistently treated as inferior because of the color of their skin may internalize this stigma and grow up with a diminished sense of self-worth, marked by the inherited belief that they are a second-class citizen.

The development and perpetuation of a racist upbringing hinder the possibility of children from different racial and ethnic backgrounds forming relationships based on mutual respect and friendship. Empathy cannot flourish between people who are conditioned not to understand one another.

Furthermore, the structural racism that permeates various sectors of society, if not properly understood and firmly addressed, can distort critical discussions in the field of family law, particularly in cases involving custody disputes or the definition of visitation and family living arrangements.

It is a sad reality in Brazil that a large portion of the Black population faces limited access to quality education and cultural opportunities, contributing to higher illiteracy rates compared to white individuals. This structural inequality results in a large contingent of Black people who are unemployed or underemployed and who tend to earn lower wages. However, these circumstances must not be treated as determinative factors in custody decisions involving interracial couples, as doing so would reinforce systemic exclusion and deny Black individuals equal rights to parenthood.

If courts adopt the reasoning that a Black parent - often living in areas marked by greater urban violence and inadequate public services - should lose custody to a white parent solely because the latter is presumed to offer a more stable living environment, the Judiciary will be reinforcing the subordination of the Black population.

Likewise, special care must be taken regarding religious racism, which must never serve as a justification for removing custody or restricting visitation rights. Several articles have warned of custody losses resulting from a parent

taking their child, for example, to undergo initiation into *Candomblé*. When a Black father or mother, follower of a religion of African origin, is prevented, or at least finds it challenging, to cultivate their beliefs to their offspring, this constitutes a denial of the constitutionally enshrined freedom of religion.

The same constitutional protection must be extended to cultural expressions such as clothing, hairstyles, and musical preferences. These elements, passed down through generations in Black communities, must not be impeded in legal disputes over custody and family cohabitation. Black parents must be free to introduce their children to their cultural heritage, even when such practices may not align with the preferences or worldviews of others.

It is not uncommon to encounter public discourse that seeks to undermine the image and intellectual capacity of Black individuals. When this reasoning is used by a white ex-spouse concerning the Black parent – particularly in the presence of the couple's children - it constitutes a clear form of racial parental alienation. Judges must be extra careful in such cases, as the alienation may be subtle, disguised in behaviors or statements that covertly convey to the child that the other parent is less qualified simply because of their skin color.

Judicial decisions must actively guard against misguided premises based on racial stereotypes, such as the idea that Black people are inherently less capable of raising children or providing a stable family environment due to lower income, fewer assets, or lower levels of education. In this regard, *whiteness* must be critically examined as an expression of power.

Another important factor is the limited access to adequate legal assistance faced by many Black individuals, which may compromise their legal representation. Judges must take this structural inequality into account and actively uphold the principles of equality and the right to a full legal defense.

Without appropriate safeguards, it becomes easy to accept distorted narratives that portray many Black working mothers as negligent – when they often lack time not by choice but because they face severe obstacles in accessing public services such as daycare, which are essential to supporting their parental role.

In discussions about removing Black children from their family environment due to financial hardship. Poverty must never be the sole criterion for terminating parental authority. Whenever possible, the priority must preserve the child's ties to their biological family. Love and care do not require wealth, and the economic challenges faced by much of the Black population must be viewed in proper context.

Similar caution must be exercised in cases involving the adoption of Black children or adolescents, who are too often overlooked. Moreover, it is unacceptable for interracial adoption to be used as a means of legitimizing domestic servitude – a practice that echoes the darkest chapters of slavery.

Historically, there has been a significant number of prospective parents who register for adoption but are only willing to adopt white children. This reality reflects a persistent social logic in which, for a portion of the white population, raising a Black child in a country marked by structural racism– where racial prejudice is based on skin color – means confronting the harsh truth that the child will be burdened by stereotypes of inferiority, lack of culture, and criminal propensity.

Not everyone is prepared to assume the responsibility of raising a Black child in a society where the idea persists that the best opportunities and most prestigious jobs are reserved for white individuals.

It is also essential to remain attentive to whether interracial adoptions may, even unconsciously, reproduce a culture of whitening. In such cases, adoptive families, often acting under the belief that they are expressing love and protection, gradually seek to deny the child's Black identity, distancing them from their history, values, and ancestry. For some, it may seem easier and more efficient to reclassify the child socially, attempting to shield them from racism by not confronting it, but erasing visible or cultural markers of Blackness.

> **Attention**: all professionals working in the field of family law must recognize that racial literacy, anti-racist education, and the constant monitoring and improvement of public policies aimed at racial equality are components that cannot be disregarded, negotiated, or neglected, as they are directly linked to the constitutional precept that requires the promotion of wellbeing for all, without prejudice based on origin, race, sex, color, age, and any other form of discrimination. Only by upholding this principle can we move toward building a free, just and inclusive society, founded on the recognition that the family must be itself rooted in racial equality.

5.2 Private relationships

In private relationships, it is necessary to be alert to racist or discriminatory practices hidden behind the veil of private autonomy or the apparent neutrality of the State concerning unequal situations consolidated over time.

A fundamental premise in this context is the horizontal applicability of fundamental rights, which established that constitutional and treaty-based guarantees also apply in private relations. This means that the duty to respect these rights lies not only with the State but also with individuals, and private autonomy cannot be invoked as a justification to deny or restrict such rights.

In the anti-discrimination field, this translated into the adoption, within the civil domain, of prevention and accountability measures for any conduct that may give rise to the crimes provided for in Law No. 7,716/1989. Considering the independence of legal spheres (Art. 935 of the Civil Code and Art. 66 and 67 of the Code of Criminal Procedures), violations addressed in the criminal sphere also deserve civil assessment.

Therefore, clauses or behaviors that restrict or prevent Black people from accessing specific spaces – such as clubs, restaurants, social entrances, elevators, schools, and public transportation – are prohibited, as are those that target practices or lifestyles, such as bans based on appearance, clothing, or hair. Likewise, harassment by security personnel in establishments, selective and unjustified searches, and denial or inadequate provision of service by employees may constitute discriminatory practices.

Hiring processes – whether in employment relationships or in the provision of services – that indicate a preference for white people are a clear expression of racism[132]. Such preferences, historically conveyed through the racist euphemism "good-looking person," can also manifest in other forms, such as restrictions on certain physical traits (e.g. the use of braids or dreadlocks) or on specific clothing, speech, or demeanor. Detecting these discriminatory practices is not always straightforward, which is why particular scrutiny is needed regarding the justification of hiring criteria and the reasoning behind excluding certain candidates.

In this regard, it is important to highlight Convention No. 111 of the International Labor Organization, which prohibits any discrimination that nullifies or impairs equality of opportunity or treatment in matters of employment or occupation. Discrimination, as defined therein, applies not only to employment relationships but also to access to professional training and to different professions (Art. 1, 1.3).

The same reasoning applies in consumer relations, regardless of the means used: physical stores, online platforms, or social media. Under Art. 39, IX and X, of Law No. 8,078/1990, suppliers may not refuse to sell goods or provide services to anyone willing to purchase them; conscientious objection cannot be invoked to justify denying service. Refusing to sell or provide a service to a *Candomblé* practitioner or a Black person, for example, is therefore prohibited. Furthermore, discriminatory advertising constitutes abusive advertising (Art. 37, § 2). These prohibitions must not be confused with the legitimacy of affirmative measures designed to reduce racial inequality, such as training and education programs aimed exclusively at Black people, which align with the principles of inclusion and social responsibility.

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132 CIDH. Report No. 66/06. Case 12,001. Merits. Simone André Diniz. Brazil. October 21, 2006. Available at http://www.cidh.org/annualrep/2006port/brasil.12001port.htm. Accessed on October 29, 2024.

In the specific case of quilombola communities or other traditional communities, it is equally important to consider the circumstances in which agreements are made. While group autonomy prevails, failure to observe specific procedures in interethnic and intercultural dialogue – such as the requirement for prior, free and informed consultation under Art. 6 of ILO Convention No. 169 – may invalidate the legal transactions concluded.

Beyond these specific relationships, various measures promoting racial equality apply not only to the State but also individuals. Law No. 10,639/2003, for instance, amended the Law of Guidelines and Bases of National Education to make the teaching of "Afro-Brazilian History and Culture" mandatory in the official curriculum (Art. 26-A). This obligation was reinforced by the Racial Equality Statute, which emphasized its compulsory nature in public and private elementary and secondary schools (Art. 11). The adoption of this curriculum is therefore not optional, and its implementation can be legally required.

In higher education, the law encourages public and private institutions to develop postgraduate programs addressing topics relevant to the Black population and to incorporate content on Brazil's ethnic and cultural diversity into training course curricula. It also promotes university extension programs aimed at expanding access for young Black people to advanced technologies, ensuring gender proportionality among beneficiaries (Art. 13 of the Statute). These provisions authorize the implementation of targeted initiatives for specific groups without infringing the principle of equality.

In the field of health, non-discriminatory treatment by health plans is guaranteed (Art. 6, § 2). Data, however, reveals significantly unequal treatment of the Black population. For example, Black women face a higher risk of developing uterine fibroids without receiving adequate medical care and a higher incidence of hysterectomies. Studies also show that mortality rates among Black women are considerably higher than among white women, even in cases of preventable and avoidable deaths[133]. Young Black men, in turn, represent the highest share of homicide victims. As described by Gláucio Soares and Doriam Borges, mortality patterns differ markedly: while deaths among the white population tend to occur in a more "natural" way, primarily from illness associated with aging, in the Black population, they are more often the result of "misfortunes," such as pregnancy, childbirth, and external violence[134].

133 Cf. MARTINS, Alaerte. Mortalidade materna de mulheres negras no Brasil. Cad. Saúde Pública, nov. 2006 Rio de Janeiro, 22 (11); 2473-2479.

134 SOARES, Gláucio; BORGES, Doriam. A Cor da Morte. Ciência Hoje, Rio de Janeiro, v. 35, n 209, p. 26-31, 2004.

5.2.1 Abuse of freedom of expression and hate speech

The abuse of freedom of expression is another area in which the Judiciary is frequently called upon to intervene in private relations. Hate speech is recognized as a risk factor for mass atrocities, including crimes against humanity and genocide, as it represents systematic discrimination against certain social groups. Preventing and curbing hate speech is therefore an important measure to contain the escalation toward more serious violations.

Although there is no legal-normative definition, "hate speech" is understood as

> [...] any form of communication, in speech, writing or behavior, that attacks or employs pejorative or discriminatory language with reference to a person or group based on who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factor135.

The Committee for the Convention on the Elimination of All Forms of Racial Discrimination, in Recommendation No. 35, highlights that the absence of a formal legal definition of "hate speech" does not preclude identifying and addressing the phenomenon. It proposes understanding the concept as encompassing violations of fundamental human rights principles relating to dignity and equality, aimed at diminishing the standing of certain individuals and groups in society's esteem (item 10). This interpretation extends beyond the explicit propagation of ideas of superiority or direct incitement to hatred, covering also subtler forms of discrimination with the same underlying intent.

The STF ruling in the Ellwanger Case (HC 82,424-2) affirmed that freedom of expression may be restricted in cases involving racist or discriminatory speech. In 2023, the Ministry of Human Rights and Citizenship endorsed the Rabat Plan of Action, which contains OHCHR guidelines on the parameters for accurately characterizing hate speech, namely:

a) context: the social and political circumstances in which the speech occurs;

b) who speaks: the status and influence of the speaker, including whether they are an authority or leader;

c) intention: whether the incitement or defense of the speech's contents is deliberate;

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135 "United Nations Strategy and Plan of Action on Hate Speech." Available at: <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> Accessed on: March 7, 2020.

d) content and form: the degree of provocation, the style and tone used, the nature of the arguments, and the format adopted;

e) extent of the speech act: the reach of the speech, including its public nature, magnitude, audience size, and means of dissemination; and

f) probability and imminence: the likelihood and immediacy of resulting harm, incitement, or danger.

Attention: in the Brazilian context, discriminatory expressions are not always expressed. In some situations, understandings that express racist bias are given a merely analytical or opinionated form, such as the statement that "Africans were responsible for the enslavement of people," as a way of mitigating the impact of the transatlantic colonial slave trade and justifying slavery. In this case, the discriminatory and demeaning meaning of the discourse may not characterize hate speech. However, it still fosters effects that diminish the human dignity of Black people. It should give rise to mechanisms that can offer counter-discourses and new understandings on the subject in the public debate.

5.2.2 Right to land, territory, and housing

Land and housing

The denial of access to land, housing, and territorial rights was one of the main factors perpetuating inequality in the treatment of the Black population after the abolition of slavery. In the countryside, the absence of agrarian reform and the legislation following the Land Law (Law No. 601/1850) led to the recognition of property rights mainly for those able to pay for them. In urban areas, processes of removing the formerly enslaved Black populations from central districts pushed them to the outskirts. According IPEA data, in 2004, 54.3% of the Afro-descendants in Brazil lived in situations of irregular land tenure[136].

The concentration of landownership and the whitening of large urban centers had profound and disproportionate impacts on the realization of the right to land and housing. In 2019, IBGE reported that 45.2 million people lived in 14.2 million households with at least one of five inadequacies: lack of an exclusive-use bathroom, external walls made of non-durable materials, overcrowding, excessive rent burden, or lack of property documentation. Of these 45.2 million, 13.5 million were white, while 31.3 million were Black or

136 Available at https://portalantigo.ipea.gov.br/agencia/images/stories/PDFs/livros/05_moradia.pdf.

Brown[137]. In rural areas, so-called "land racism" prevails. Data from 2017 show that, although Black people form most of the rural population, 79.1% of the owners of large estates (equivalent to 10,000 soccer fields) are white, compared with only 17.4% Brown and 1.6% of Black owners[138].

The 2022 Demographic Census confirms that the most precarious housing conditions continue to be found among Black, Brown, and Indigenous households. Access to essential sanitation, in-home sanitary facilities, regular garbage collection, and safe water supply remain higher among white households. Even in municipalities with generally good infrastructure, disparities persist: in all 20 Brazilian municipalities with the largest populations, white residents have better access to these basic services than Black, Brown, or Indigenous residents[139].

To address these inequalities, the Federal Constitution establishes housing as a fundamental social right (Art. 6) and regulates agricultural and agrarian reform policies (Art. 184 to 191). Noncompliance with the social function of urban (Art. 182) and rural (Art. 184) property allows for the expropriation of land for urban and agrarian reform purposes. Furthermore, infra-constitutional legislation authorizes public policies targeting the Black population to guarantee access to land and adequate housing. The Racial Equality Statute, for example, contains a dedicated chapter on this subject (Art. 27-37).

Internationally, the Committee on Economic, Social, and Cultural Rights defines adequate housing as encompassing legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural suitability (General Comment No. 4 to Art. 11 of the ICESCR). The International Convention on the Elimination of All Forms of Racial Discrimination likewise calls for positive measures to address racial discrimination in the enjoyment of the right to housing (Art. 5, *e*, III).

Along these lines, the Racial Equality Statute emphasizes the provision of services to the Black population living in slums, tenements, and underutilized or degraded urban areas. Such services must go beyond housing, ensuring the provision of adequate urban infrastructure and public services. Furthermore, housing programs under the National Social Housing System (Law No. 11,124/2005) must consider the social, economic, and cultural specificities of the Black population. Financial agents – whether public or private – are also required to adopt measures that facilitate access to housing finance for Black communities. Within the scope of the right to the city, the principle of fair distribution of the benefits and burdens arising from the urbanization process must prevail (Art. 2, IX, of Law No. 10,257/2001).

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137 See PNAD 2019. Available at <https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/29433-trabalho-renda-e-moradia-desigualdades-entre-brancos-e-pretos-ou-pardos-persistem-no-pais>

138 The Black population in the countryside would be 2.6 million, while the white population would be 2.2 million. Cf. IBGE Agricultural Census in 2017. Available at <https://g1.globo.com/economia/agronegocios/noticia/2022/11/20/racismo-fundiario-negros-sao-maioria-no-campo-mas-tem-menos-terras-do-que-brancos.ghtml>.

139 IBGE. Censo, 2022.

The right to land includes access by all individuals to bodies of water, coastal areas, fisheries, pastures, and forests, along with the right to manage these resources sustainably, achieve an adequate standard of living, and secure a place to live in safety, peace, dignity, and in harmony with one's own culture. Discrimination in access to land must therefore be prohibited[140], since this right underpins the enjoyment of several others, including health, family life, food, housing, and even spirituality. In line with this, the Racial Equality Statute also provides measures to expand the access of the Black communities to agricultural credit, rural technical assistance, logistics infrastructure for production and marketing, and simplified access to rural financing.

Consistent with constitutional and international obligations to combat racism, public policies aimed at reducing inequalities are not only permitted but necessary. As noted earlier, such initiatives constitute a form of positive discrimination, priorities that were historically presented as neutral yet produced discriminatory effects on the Black population.

> **Attention**: Environmental racism must also be addressed, as defined in Part II of this document. It refers to the disproportionate and unequal environmental impacts borne by specific social groups, primarily non-white populations (Black and Indigenous). Currently, climate change reproduces these same dynamics, driving expulsions from territories, forced displacement, prioritization of certain areas, gentrification, and segregation.

In the context of agrarian and land conflicts, it is essential to observe the provisions of **CNJ Resolution No. 510/2023**, which establishes the National Commission for Land Solutions and the Regional Commissions for Land Solutions. Among the guidelines set forth in this Resolution is the requirement to conduct technical visits to areas subject to collective land disputes. These visits are critical for preventing human rights violations, commonly associated with repossession proceedings, and for providing a more thorough analysis of the conflict at hand.

Quilombola territorial rights

Beyond land and housing rights, the territorial rights of quilombola communities require particular attention (Art. 68 of the ADCT). When the Constitution refers to remnants of quilombola communities, it encompasses a much broader and more plural reality than the traditional notion of enslaved people who fled to isolated places in search of freedom. As explained in Part II

140 Declaration on the Rights of Peasants. Art. 17.

of this Protocol, these are ethnic groups with a distinct connection to territorial spaces marked by resistance, historicity, and ancestry. As Abdias Nascimento and Candeia have emphasized, the term *quilombo* also carries with it an affirmation of identity and an enduring struggle for rights.

It is worth noting that the expression "remnant of quilombo" has largely fallen out of use, as it suggests that these groups are merely what "remains" - a transitory social organization assumed to have disappeared or destined to vanish. Instead, the emphasis today is on the continuity and vitality of quilombola communities, which preserve cultural, social, and economic practices rooted in history but constantly renewed in response to contemporary challenges.

For this reason, the expression "quilombola community" is preferable. It emphasizes these groups' continuity, resilience, and autonomy, recognizing them as subjects of rights under Convention No. 169 of the International Labour Organization on Indigenous and Tribal Peoples.

Currently, the Palmares Cultural Foundation (FCP) is responsible for certifying communities that self-identify as quilombola. INCRA, under Decree No. 4,887/2003, conducts the administrative process for granting definitive title to quilombola territories.

Importantly, quilombola communities' rights to their territories are guaranteed by their own traditional and ancestral possession. Accordingly, the absence of a definitive title cannot be used to bar these communities from accessing public policies, whether general policies guaranteed to all citizens or specific measures designed to support quilombola communities.

To learn more: as the Federal Supreme Court (STF) stated in ADI 3239, quilombola territorial rights encompass both the dimension of the struggle for recognition – by affirming the distinctiveness of this ethnic-cultural group – and the dimension of the struggle for redistribution, which emphasizes the socioeconomic justice achieved through land demarcation and land deconcentration. The implementation of quilombola territorial rights can also be understood as a measure of reparation for the historical debt owed to the enslaved population over centuries, while at the same time enabling these groups to thrive and to exercise of their ways of life with autonomy and free from oppression. On this point, Art. 215 and Art. 216 of the Federal Constitution reinforce the protection of Afro-Brazilian cultures (Art. 215, § 1), recognizing them as part of Brazil's cultural heritage. In addition, Art. 216, § 6 expressly determines the preservation of all documents and sites that contain historical reminiscences of the former quilombos.

ILO Convention No. 169 also addressed quilombola rights by requiring recognition of their traditional lands, including demarcation, titling, and protection against invasion by third parties. It guarantees the right to free, prior, and informed consultation whenever decisions may affect them directly or indirectly; the right to participate in the management and use of natural resources in their territories, according to their customs, social organization and traditions; the right to be included in national agrarian programs to allocate land when their current lands are insufficient to ensure the conditions for daily life or to accommodate possible demographic growth; the right to the means necessary to develop he lands they already occupy, among others.

Given the specificities of this issue and its direct impact on public policies – notably regarding access to health and education – the justice system must rely on interethnic and intercultural dialogue. It should employ mechanisms that bring the Judiciary closer to the perspectives of quilombola communities on justice and rights (see Art. 5 of CNJ Resolution No. 454/2022). In this sense, differentiated routines and procedures that respect these people's sociocultural specificities are essential.

Measures such as facilitating entry into court buildings, providing tailored reception, recognizing the use of specific clothing and symbols, ensuring informality where appropriate, and acknowledging forms of conflict resolution are central to genuine intercultural dialogue. Equally important are respect for the self-identification of each group and each quilombola individual, recognition of anthropological expertise to clarify disputes, and the guarantee that community's deliberations – both in dealings with the State and private actors – are preceded by prior, free and informed consultation (Art. 6 of Convention 169[141]). By analogy, this also aligns with Arts. 4 and 14 of CNJ Res. No. 454/2022.

Civil liability and racial wrongdoings

Art. 1.1 of the Inter-American Convention against Racism and Racial Discrimination defines racial discrimination any distinction, exclusion, restriction, or preference in any sphere of public or private life that has the purpose **or effect** of nullifying or **curtailing** the equal recognition, **enjoyment**, or **exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States-Parties**.

The Convention was incorporated into Brazilian law with a qualified quorum and, therefore, holds constitutional status (Art. 5, § 3, of the CF/1988).

141 The Inter-American Court of Human Rights (I/A Court H.R.), in the case of the Saramaka People vs. Suriname, in a ruling of November 28, 2007, recognized that the Surinamese State had violated the human rights of the Saramaka people, and as a result, ordered it to adopt reparatory measures for the said traditional people, including the need to consult the Saramaka People, following their customs and traditions, under the terms of ILO Convention No. 169.

Importantly, the norm establishes that discrimination may result from any of the listed conducts ("distinction, exclusion, restriction, or preference"), regardless of intent. Thus, civil liability and the duty to provide reparation may arise even in the absence of discriminatory intent[142].

Peoples and communities of *terreiro*

ILO Convention No. 169, along with all legislation on traditional peoples and communities, may also apply to peoples and communities of *terreiro*, which are groups rooted in religions of African origin. In this regard, Decree No. 6,040/2007 is particularly relevant, as it defines traditional peoples and communities as culturally distinct groups that recognize themselves as such, maintain their own forms of social organization, and occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic reproduction, drawing on knowledge, innovations, and practices generated and transmitted through tradition (Art. 3, I).

The rights of these communities include freedom of conscience and belief, as well as the free exercise of religious worship, with the preservation of spaces reserved for such purposes. Their organization, however, differs from that of conventional religious institutions: it often coincides with family and housing units, rather than resembling church-like structures. For this reason, religious centers are not always formally registered with their own CNPJ [tax ID], reflecting the distinctive way in which groups are structured.

While formalization is not mandatory, it can be important in securing certain rights, such as tax exemptions and access to specific policies. From an intercultural perspective, however, the absence of formalization must not result in restrictions on rights; ultimately, it is up to each community to determine the path that best suits its needs.

The Civil Code reinforces this guarantee by ensuring freedom in the creation, organization, internal structuring, and operation of religious organizations, explicitly prohibiting public authorities from denying recognition or registration of the constitutive acts and acts necessary for their operation" (Art. 44, § 1).

Respect for sacred rites and religious festivals must also be upheld. In this sense, the STF has recognized, in the name of religious freedom, the constitutionality of legislation authorizing ritual animal sacrifice in African-based religious practices, ruling that such rites do not constitute mistreatment (RE 494601). Addressing religious racism also likewise requires preventing the dissemination of hate speech, primarily through public radio and television concessions.

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142 About the topic: SILVA JUNIOR, Hédio *et al*. *Responsabilidade civil objetiva por ilícito racial e religioso*. São Paulo: Expressa, 2023. Local 394 de 1259.

Finally, it is essential to advance efforts to inventory, restore, and protect documents, works, and protect documents, works, and other assets of artistic and cultural value – such as monuments, water sources, flora, and archaeological sites - linked to African-based religions.

5.3 Childhood and youth

5.3.1 Protection of children and adolescents with an emphasis on racial equality

In the long history of how the Brazilian State treated children, the bifurcation between institutional interventions aimed at protecting them from violence and those intended to hold them accountable for unlawful acts is relatively recent. Historian Danielle Franco da Rocha identifies three themes that permeate this entire history: abandonment, crime, and labor[143]. In all three, Black children and adolescents have been the primary target of institutional interventions. The *Lei do Ventre Livre* (Law of Free Birth), for example, is considered by the historian to be the first legislation on child labor in Brazil.

Against this backdrop, this protocol marks, within the Judiciary, the introduction of special racial lens in the treatment of diverse childhoods and youth – recognizing the social markers that set them apart.

Although the Statute of the Child and Adolescent (ECA) provides that its regulations must apply to all children and adolescents without discrimination based on birth, family status, age, sex, race, ethnicity, color, religion or belief, disability, personal development or learning conditions, economic status, social environment, region, or any other differentiating condition of individuals[144], families, or communities, **the race marker requires a distinct interpretive approach. It calls upon judges to exercise a specific awareness, one that is indispensable for proper application of Anti-Discrimination Law**[145].

In recent years, the Center on the Developing Child at Harvard University, which is part of the Science for Early Childhood Center (NCPI), has advanced

143 CASTILHO, E. P.; ROCHA, D. F.. O Tratamento da Infância e Juventude na História Brasileira: Trabalho, Abandono e Criminalização. In: XXVIII SIMPÓSIO NACIONAL DA HISTÓRIA, 2015, Florianópolis/SC.

144 Sole paragraph of Art. 3 of Law 8,069/90.

145 In the words of Adilson Moreira, this is a protective system composed of legal norms and government initiatives aimed at preventing harmful discrimination, a form of intentional and arbitrary disadvantageous treatment, and by public or private initiatives aimed at promoting positive discrimination, actions aimed at the social integration of minorities. MOREIRA, A.J. Tratado de Direito Antidiscriminatório. São Paulo: Contracorrente, 2020, pp. 50.

studies incorporating **ethnic-racial variables**[146]. According to Harvard researchers, the systematic experience of prejudice and discrimination generates toxic stress, impairing brain development and learning capacity, while also heightening the risk of chronic diseases and reducing life expectancy. These outcomes persist regardless of economic class, affecting Black, Indigenous, or other racialized children exposed to discrimination, as well as their caregivers, mothers, and fathers – whose own experiences of racism directly impact the quality of their interactions with the children. The Center considers **racism to be an "adverse childhood experience," with lifelong repercussions**.

Article 227 of the Federal Constitution establishes that it is the duty of the family, society, and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, vocational training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of neglect, discrimination, exploitation, violence, cruelty, and oppression.

> **Attention**: an interpretation of Article 227 of Federal Constitution of1988 through a racial lens should guide judges to recognize that, in a racialized society like Brazil, childhoods are diverse. Therefore, when the child, adolescent, and young person to whom the constitutional text refers is Black, they require specific protection of rights aimed at ensuring racial equality.

This approach is necessary because:

- **Black children and adolescents face disproportionate discrimination, exploitation, violence, cruelty, and oppression**[147]. Most victims of intentional violent deaths are Black boys, across all age groups[148];

- **Black and white children do not enjoy the same health care** conditions, and this disparity begins even before birth: Black women have less access to health care in general, including adequate and quality prenatal care[149];

146 Available at https://developingchild.harvard.edu/resources/racism-and-ecd/

147 According to the Brazilian Public Security Forum, in 2022, among children up to 11 years old who were victims of homicide, 67.1% were Black. Among adolescents aged 12 to 17 who were victims of homicide, 85.1% were Black. To learn more and see this data available: <https://apidspace.forumseguranca.org.br/server/ api/core/bitstreams/391c914e-08ac-42f5-8c1d-b6fbbbb2b14b/content>

148 Data according to the research "Panorama da violência letal e sexual contra crianças e adolescentes no Brasil." Available at <https://www.unicef.org/brazil/media/16421/file/panorama-violencia-letal-sexual-contra-criancas-adolescentes-no-brasil.pdf>

149 Caderno Primeiras Infâncias Negras e a Saúde. Available at <https://www.unicef.org/brazil/

• Children and adolescents who practice religions of African origin are subjected to **religious racism**. Their religious freedom of belief and worship is often threatened[150], and in some cases, they are even removed from family life;

• Black children and adolescents are targets of **racism in the educational process**. Beyond direct discriminatory acts, they face institutional and systemic racism and frequently live in areas with inadequate educational services. Even those from more privileged socioeconomic backgrounds require the visibility and recovery, within the classroom of the decisive contributions of the Black population to Brazil's social, economic, political, and cultural development. Thus, the fundamental right to education for Black children presupposes full compliance with Law No. 10.639/2003[151].

In addition, children and adolescents from quilombola or other traditional Black peoples communities hold specific rights protected by the ECA and by international instruments such as ILO Convention No. 169 (Arts. 28 and 29) and the United Nations Convention on the Rights of the Child (Art. 30). These rights include: the right to know, preserve, and express their culture, religion, and language; the right to differentiated education that enables full and equal participation both in their own community and in national life; the right to community life without forced removal; and the recognition and protection of their traditional lands.

Therefore, to ensure the protection of children and adolescents with an emphasis on racial equity, it is necessary for judges to reflect on the following questions:

a) In the cases processed in the district/court, is there recognition of the existence of different childhoods and that Black children and adolescents therefore require specific rights protections?

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me- dia/23871/file>. Some data from a study conducted by Fiocruz highlight the seriousness of the differences in life expectancy between Black and white children, such as the fact that the risk of death from malnutrition in Black children is twice as high among Brown and Black children than in white children. Study available at https://portal.fiocruz.br/noticia/estudo-aponta-para-profundas-desigualdades-na-mortalidade-de-criancas-no-brasil

150 To check the data and learn more, see Religious Racism: New Lenses on Violations Related to the Growing Tension between Religious Freedom and Freedom of Expression and Belief. Available at https://catarinas.info/wp-content/uploads/2023/09/Ebook_Racismo-Religioso.pdf

151 Art. 11. In public and private elementary and secondary schools, studying the general history of Africa and the history of the Black population in Brazil is mandatory, following the provisions of Law No. 9,394 of December 20, 1996.

§ 1 The content related to the history of the Black population in Brazil will be taught throughout the school curriculum, highlighting their decisive contribution to the country's social, economic, political, and cultural development.

b) Do Judiciary professionals, guardianship counselors, and other actors in the child protection system participate in systematic training focused on racial literacy?

c) Have community health agents received training on racial issues, which allow them to identify disparities between Black and white children in health care?

d) Is Law No. 10,639/2003, which makes the teaching of Afro-Brazilian History and Culture mandatory, being effectively implemented in the district where you work?

e) Can the removal of custody from a parent who professes an African-based religion be connected to discriminatory practices or fundamentalist religious ideologies, thereby constituting religious racism?

f) In cases involving children and adolescents who are victims or witnesses of violence, have the provisions of Law No. 13,431 of April 4, 2017, and CNJ Resolution No. 299 of November 5, 2019, been duly observed?

g) In the case of quilombola children or those from other traditional peoples and communities, are their socio-cultural specificities respected?

To learn more about Racism, Early Childhood Education, and Early Childhood Development (2021), access https://ncpi.org.br/publicacoes/wp7-racismo/.

About Equity and Child Development (2019), access https://ncpi.org.br/wp-content/uploads/2019/10/2-Naercio-Menezes.pdf.

5.3.2 Maintenance, family reintegration, adoption, and racism

According to the Convention on the Rights of the Child (Arts. 9 and 21) and the Statute of the Child and Adolescent (ECA), family maintenance or reintegration must be the primary objective of all juvenile courts. Article 19 of the ECA establishes that children and adolescents should be raised and educated within their families, and only in exceptional circumstances should they be placed in foster care, while always ensuring family and community life in an environment conducive to their full development.

However, reintegration into the natural or extended family is not always possible due to absence, neglect, or abuse from parents or guardians. In such cases, adoption emerges as an exceptional yet necessary measure, in line with the principle of the best interests of the child (Art. 39, ECA).

Updated data from the National Adoption System (SNA) of the National Council of Justice report that there are currently 35,801 prospective adopters registered nationwide, compared with 4,797 children eligible for adoption[152]. Despite this apparent numerical advantage, most institutionalized children do not match the profiles sought by potential adopters. Therefore, while there are far more prospective adopters than adoptable children, the mismatch of expectations perpetuates the imbalance (CNJ, 2015).

Did you know? Black children and adolescents are disproportionately represented in foster care units in Brazil due to historical factors that have long been documented and recognized.

The SNA reports that, although 49.1% of adoptees have no recorded information on color/race, Black children and adolescents represent 34.1% (26.4% Brown and 7.7% Black). In comparison, white children and adolescents represent only 16.1%. Overrepresentation is also evident among those awaiting adoption: 68.9% are Black (51.6% Brown and 17.3% Black).

Among those adopted, however, the proportion of Black children and adolescents decreases – a trend consistent with expert studies on the desired profile in Brazil[153]. Since January 2019, non-Black children have accounted for 38.1% of adoptees (35.7% white and 2.4% Asian), while Black children represented 53.6% (44.4% Brown and 9.2% Black). The number of cases without racial data remains high at 8%. The gap between the number of Black adoptees and those effectively adopted demonstrates the persistence of racism in Brazilian society. Recognizing this, the ECA explicitly mandates awareness campaigns to encourage adoption, specifically interracial adoption (Item VII, Art. 87).

In the same spirit, the ECA requires prospective applicants to participate in programs offered by the Juvenile and Youth Court, which include psychological preparation, guidance, and encouragement for interracial adoption.

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152 Data retrieved from the SNA on August 18, 2024. https://sna.cnj.jus.br/#/home

153 Experts point out that choosing an idealized profile results in obstacles to the realization of the right to family life for children over six years of age, those with infectious diseases, those with disabilities, those of Brown or Black skin color, and groups of siblings. About the topic: https://ibdfam.org.br/artigos/2094/Perfil+idealizado%3A+entrave+%C3%A0+efetiva%C3%A7%C3%A3o+da+ado%C3%A7%C3%A3o+de+crian% C3%A7as+e+adolescentes+no+Brasil

> **Attention**: judges must ensure that technical teams in Juvenile and Youth Courts are equipped with racial literacy, enabling them to apply a racial lens – particularly when qualifying prospective adopters.

> **Attention**: another crucial point is the place of Black children in judicial proceedings that concern them. Although children and adolescents are rights-holders entitled to full protection, including protection from all forms of discrimination, adult-centrism frequently dominates proceedings, leaving little space for children's voices and perspectives.

Article 12 of the Convention on the Rights of the Child states that childhood is not universal, but diverse and, therefore, and must treated as such. Black children, who are the majority in institutional care, need to have their specific issues voiced. It is necessary to understand (and, to this end, listen) whether these children feel institutionally supported and whether racism is also being reproduced in places that should provide protection and care.

In addition, quilombola children have specific rights in adoption, custody, or guardianship processes. Article 28, § 6, of the ECA requires that their social and cultural identity, customs, traditions, and institutions be respected, provided they are not incompatible with the fundamental rights guaranteed by law and the Federal Constitution. Family placement should, whenever possible, occur within their community or with members of the same ethnic group. Finally, anthropologists must be involved and heard by the interprofessional or multidisciplinary team monitoring the case.

Therefore, in the process of maintenance, family reintegration, or adoption, the judge must be aware of the following points:

a) Does the Juvenile and Youth Court's program include psychological preparation, guidance, and encouragement of interracial adoption for those seeking adoption?

b) Is the lack of applicants for the adoption of Black children and adolescents in foster care related to racist attitudes that merit pedagogical intervention?

c) Have I, as a judge, participated in training on racial issues that enable me to apply Anti-Discrimination Law effectively?

d) Does the technical team of the Juvenile and Youth Court have racial literacy?

e) Have awareness campaigns promoting interracial adoption been implemented in my district?

f) During inspections or hearings, is there space to listen to Black children about experiences of racism they may have faced?

g) Are shelters and special testimony rooms equipped with toys, such as Black male and female dolls, that represent the diversity of Brazilian childhoods?

h) At any point in the proceedings, might my actions (or omissions) reproduce prejudiced behaviors or racist stereotypes?

i) In the case of quilombola children or children from other traditional peoples and communities, are their socio-cultural specificities being respected? Have efforts been made to locate kinship or community-based placements to ensure community life?

5.3.3 Black juvenile offenders

Regarding the socio-educational system, the CNJ's report Socio-Educational Vacancy Centers (2023) indicated that, in 2022, 76% of adolescents in the system were Black (including both Black and Brown). Of these, 57% were identified as Brown and 19% as Black[154]. When compared to the general Brazilian population, this group is clearly overrepresented: nationwide, Brown people account for 47% and Black people for 9%. On the other hand, the white population is underrepresented in the system, comprising only 23% of adolescents and young people in closed socio-educational measures, despite representing 43% of the Brazilian population.

According to the CNJ Annual Report (2023)[155], this recurring pattern of criminal suspicion, marked by the early imposition of punishment, systematically pushes poor and Black populations into spaces of deprivation and restriction of freedom. This phenomenon has been widely debated in the literature on prisons, juvenile justice, and the socio-educational system, with significant contributions from scholars Michel Misse[156], Marcos César Alvarez, Luís Cláudio Lourenço, and Juliana Tonche[157].

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154 The SINASE National Survey was launched in 2023. The most recent national data indicates that around 63.8% of adolescents in the socio-educational system are Black (it is not possible to compare the data from the SINASE Survey with that from the Report on the Vacancy Center and state whether there was an increase or decrease in the number of Black adolescents in the system since different methodologies were used to collect data).

155 BRASIL. Conselho Nacional de Justiça. Centrais de vagas do socioeducativo [recurso eletrônico]: relatório anual/ Conselho Nacional de Justiça, Programa das Nações Unidas para o Desenvolvimento ; coordenação de Luís Geraldo Sant'Ana Lanfredi ... [et al.]. Brasília: Conselho Nacional de Justiça, 2023. Available at https://www.cnj.jus.br/wp-content/uploads/2023/11/relatorio-centrais-vagas-socio-digital.pdf. Accessed on November 12, 2024.

156 MISSE, Michel. Crime, sujeito e sujeição criminal: Aspectos de uma contribuição analítica sobre a categoria bandido. Lua Nova, n. 79, pp. 15-38, 2010.

157 ALVAREZ, Marcos César; LOURENÇO, Luís Cláudio e TONCHE, Juliana. A experiência precoce da punição: justiça juvenil, adolescentes em conflito com a lei e instituições de internamento. PLURAL, Revista do Programa de Pos-Graduacao em Sociologia da USP, São Paulo, v.24.1, 2017, p.1-9

Comparative Table (Report on the Vacancy Center, CNJ 2023)		
RACE/COLOR	BRAZILIAN POPULATION	SOCIO-EDUCATIONAL SYSTEM
BROWN	47%	57%
BLACK	9%	19%
WHITE	43%	23%

Given this irrefutable evidence of the overrepresentation of Black adolescents in the socio-educational system, judges must remain vigilant to prevent the reproduction of institutional racism at every stage of the socio-educational cycle, from the initial assistance, through the process of investigating infractions, to the execution of socio-educational measures.

It is also essential to highlight that the considerations presented in the following chapter on Criminal Law are directly applicable to the treatment of Black adolescents subject to investigation or socio-educational measures. They cannot be subjected to harsher treatment than that which already affects Black people in general. Therefore, it is recommended that both chapters be read together by all professionals engaged in this subject.

5.3.3.1 Juvenile proceeding

This section will address key aspects of the process: initial assistance and presentation hearings, the assessment of evidence through a racial lens, and anti-racist sentencing.

Initial assistance and presentation hearing

Regarding the initial assistance of adolescents accused of an offense, it must be underscored that police harassment is disproportionately directed against Black people, revealing systemic problems of structural racism in public security policies.

In this sense, the STF, in Habeas Corpus 208,240, unanimously established that police searches motivated by race, sex, sexual orientation, skin color, or physical appearance are illegal. The Court held that a warrantless search must be grounded in concrete evidence that the individual is in possession of a prohibited weapon, illicit objects, or documents that may constitute evidence of a crime. This decision represents significant precedent, directly challenging both the training practices of security forces and the entrenched social imagination that casts young Black people are ‘’suspicious elements.”

Therefore, at the stage of initial service, judges must remain attentive to:

a) the need to avoid reproducing discriminatory biases against young Black people;

b) the possibility of racist, violent, or xenophobic police approaches;

c) the frequent occurrence of police violence against homeless adolescents.

d) Systemic failures in facial recognition technologies, which often reinforce racial discrimination;

e) forging of *flagrante delicto* reports by police officers targeting young Black people;

f) the need to investigate the State's responsibility in cases of police violence, especially when grounded in racial stereotypes;

g) the recurrent reproduction of racial stereotypes in Detailed Police Report (BOC, the acronym in Portuguese), where young Black people are frequently treated with hostility and disrespect, and

h) the existence of judicial decisions influenced by the public exposure of young Black bodies in digital media, which contributes to the fetishization of the genocide of the Black population.

When addressing violence and security in Brazil, it is impossible to overlook the country's socio-historical formation, marked by centuries of colonialism and the enslavement of Black people - a process grounded in violence, social control, and racism. These mechanisms of control persist to this day, with Black people still often criminalized solely because of skin color.

Direct contact between the judge and the adolescent, as well as with their family, is therefore crucial for identifying the historical and structural aspects of racism.

Protocols established for the presentation hearing phase are also essential for identifying **selectivity** in apprehensions[158], the occurrence of torture, and the broader social context of the adolescent.

158 The case law of the I/A Court H.R. has established that "In the absence of objective elements, the characterization of a certain conduct or appearance as suspicious, or a certain reaction or movement as nervous, responds to the personal convictions of the officials who intervene and to the practices of law enforcement personnel that involve a level of arbitrariness that is incompatible with Article 7(3) of the American Convention. When, in addition, these convictions or personal opinions are based on prejudices concerning the supposed characteristics or conducts of a determined category or group of persons or their socio-economic status, this may result in a violation of Articles 1(1) and 24 of the Convention." (Fernández Prieto y Tumbeiro vs. Argentina case. Fondo y Reparaciones. Judgment of September 1, 2020. Paragraph 81.)

The National Mechanism for the Prevention and Combat of Torture has highlighted a panorama of underreporting that renders much of the violence, mainly against Black adolescents, invisible, thereby hindering the formulation of effective public policies to address this reality.

Thus, during the presentation hearing, the judge should reflect on the following:

a) Is the language used in hearing accessible and appropriate to the socio-cultural context of the adolescent and their family?

b) Do all parties involved understand what is being discussed?

c) Are there authorities present who lend legitimacy to the representation of the detained adolescent?

d) Does the environment in which the hearing occurs respect the secular nature of the State?

e) At any point, through my actions or omissions, am I reproducing prejudiced behavior based on racist stereotypes?

The Handbook to Prevent and Combat Torture and Ill-treatment for Detention Control Hearings, published by CNJ, advises that:

> Reports of torture from Black people must be analyzed in light of the Racial Equality Statute (Law No. 12,288/2010). Article 53 of this statute requires the State to adopt special measures to curb police violence against the Black population. This imposes on the judicial authority an enhanced duty to prevent and confront torture in cases involving Black people. It is also important to note that racial selectivity affects not only Black people, but also Indigenous people and migrants[159].

Therefore, judges presiding over custody and presentation hearings must remain alert to signs of racist practices at every stage - approach, arrest, investigation, and deprivation of liberty. Considering that adolescents cannot be subjected to harsher treatment than adults, the same safeguards must be rigorously applied in juvenile proceedings.

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159 BRASIL. Conselho Nacional de Justiça. Manual de prevenção e combate à tortura e maus-tratos para audiência de custódia / Conselho Nacional de Justiça, Programa das Nações Unidas para o Desenvolvimento, Escritório das Nações Unidas sobre Drogas e Crime; coordenação de Luís Geraldo Sant'Ana Lanfredi ... [et al.]. Brasília: Conselho Nacional de Justiça, 2020. P. 82. Available at https://www.cnj.jus.br/wp-con- tent/uploads/2020/11/manual_de_tortura-web.pdf . Accessed on November 12, 2024.

Finally, beyond judicial attention in hearings, race/color data must be systematically included in institutional public security records, such as the Detailed Police Report. This is essential both for developing public policies that promote racial equality and for structuring training programs for security officers on racial issues – key measures to mitigate racism that disproportionately affects Black adolescents.

Evaluating evidence from a racial perspective

The ECA guarantees that no adolescent shall be deprived of their liberty without due process of law (Article 110), ensuring, among others: **(a)** complete and formal knowledge of the charges; **(b)** equality of arms, including the right to confront victims and witnesses and produce evidence; **(c)** technical defense by counsel; **(d)** free legal assistance when applicable; **(e)** the right to be heard in person by the competent authority; and **(f)** the right to request the presence of parents or guardians at any stage of the proceedings.

Yet, even procedures that appear neutral can produce discriminatory effects and result in violations of the rights of adolescents, including in judicial proceedings for alleged offenses.

Given the racial selectivity that characterizes the practices of police and other institutions within the Juvenile Justice System, which leads to the overrepresentation of Black youth in the socio-educational system, judges must carefully examine racial bias in the testimonies of witnesses, especially police officers and alleged victims.

Therefore, judicial authorities must apply the findings of the CNJ Working Group on the Recognition of Persons[160] and the determinations of **CNJ Resolution No. 484/2022** when admitting and valuing recognition procedures that identify an adolescent as the alleged perpetrator.

Likewise, judges must **critically assess police testimony and ensure that interrogations are conducted without prejudice**, in accessible language, with credibility given to the adolescent's version of events - ensuring that it is effectively considered.

When admitting and evaluating evidence, judges must constantly ask whether the naturalization of racial stereotypes – i.e., attributing certain behaviors, roles, or characteristics to Black adolescents – is influencing the evidentiary assessment and decision-making process.

160 Report available at https://www.cnj.jus.br/wp-content/uploads/2023/05/relatorio-gt-reconhecimento-de-pessoas-v5-17-10-2022.pdf

In this sense, during the investigation stage, judges should therefore reflect on the following:

a) Is the police report overriding the adolescent's right to defense?

b) Are measures in place to prevent racial profiling in law enforcement practices in line with the CNJ Working Group's guidelines on recognition procedures?

c) Did any recognition procedure that identified the adolescent as the perpetrator comply with CNJ Resolution No. 484/2022?

d) Was the interrogation conducted respectfully, in accessible language, with due regard for the adolescent's vulnerability, ensuring that their version of events was given real weight?

Anti-racist sentence

Once the procedural investigation of an infraction has been concluded, it falls to the judge, with proper reasoning, to decide whether to impose a socio-educational measure on the adolescent.

Because the legal parameters established by the ECA provide limited objectivity for choosing the most appropriate measure, it is even more important that judges act with an explicitly anti-racist perspective when sentencing, to avoid discrimination resulting from direct or indirect racial profiling.

Indirect racial profiling occurs when judicial decisions concerning members of a particular collective or ethnic-racial group are based on subjective assessments or lack sufficiently well-founded reasoning. To prevent this, socio-educational measures must be supported by robust evidence of authorship and materiality, and the choice of measure should rely not only on concrete elements in the case file but also on a critical analysis of the adolescent's trajectory, vulnerabilities, and lived experiences in a society deeply marked by racism.

Drug trafficking is a particularly sensitive example. Adolescents who occupy marginal positions in this market often engage in such activities out of necessity, to survive and frequently to support their families[161]. The prevailing

161 BRASIL. Conselho Nacional de Justiça. Manual para incidência da temática do tráfico de drogas como uma das piores formas de trabalho infantil / Conselho Nacional de Justiça, Programa das Nações Unidas para o Desenvolvimento ; coordenação de Luís Geraldo Sant'Ana Lanfredi ... [et al.]. Brasília: Conselho Nacional de Justiça, 2021.Available at https://www.cnj.jus.br/wp-content/uploads/2021/12/manual-in- cidencia-tematica-trafico-de-drogas-como-uma-das-piores-formas-de-trabalho-infantil.pdf . Accessed on November 12, 2024.

taboo around drugs, combined with the emphasis on small-scale dealers, conceals the dynamics of a criminal economy that persists and expands despite police repression and significant state investment[162]. The weight of this system falls disproportionately on Black adolescents and young people.

To ensure non-discrimination, it is crucial to recognize that drug trafficking constitutes one of the worst forms of child labor, according to Convention 182 of the International Labor Organization (ILO). This perspective supports the avoidance of socio-educational measures involving internment or semi-liberty.

Accordingly, the following points should guide the sentencing:

a) Do historical, institutional, and structural inequalities related to race and class play a role in this case?

b) Does the norm disproportionately impact a particular social and racial group?

c) If so, does this impact reproduce or reinforce structural inequalities such as racism?

d) What is the adolescent's family structure?

e) What position does the adolescent occupy within the hierarchy of drug trafficking?

f) Which socio-economic conditions, racial background, and personal trajectory led the adolescent to the alleged offense?

g) Will the imposition of harsher measures foster the adolescent's full development and a change in life trajectory, or will it simply reinforce a classist and racist mindset?

5.3.3.2 Execution of the socio-educational measure

As indicated by the data previously presented, most adolescents in the socio-educational system are Black, indicating the selectivity of the entry point to juvenile justice.

The **ECA, in Art. 3, sole paragraph**, affirms that the rights set forth therein apply to all children and adolescents without discrimination based on race, ethnicity, or color, among other characteristics. The **SINASE law**, in **Art. 35**,

162 JESUS, Maria Gorete. Verdade policial como verdade jurídica: narrativas do tráfico de drogas no sistema de Justiça. Revista Brasileira de Ciências Sociais [online], v. 35, n. 102, 2020.

also establishes that the implementation of socio-educational measures should be guided by the principle by non-discrimination, notably regarding ethnicity. Likewise, the United Nations **Havana Rules** determine that their guidelines must be applied without any form of discrimination, including on the grounds of race and color, and with total impartiality (**Rule 4**). Therefore, judges with jurisdiction over socio-educational measures must act with an expressly anti-racist perspective.

Concentrated hearings and reassessment of socio-educational measures

Concentrated hearings are intended to strengthen the reassessment of socio-educational measures. They must be guided by principles of legality, brevity, exceptionality, minimum intervention, proportionality, individualization, and strengthening of family ties. Equally important, they must be governed by the principle of non-discrimination, which requires full respect for the socio-cultural and individual contexts of adolescents.

During concentrated hearings, or at any other stage of reassessment, the judicial authority and actors of the SGD (System for the Guarantee of Rights) may monitor the Individual Assistance Plan (PIA), identifying possible violations or discriminatory practices based on race or ethnicity. This monitoring includes examining situations of discrimination suffered within socio-educational units, during police approaches, or in open-environment measures, and defining measures of protection and reparation measures where necessary.

In concentrated hearings, or at any other time of reassessment of socio-educational measures, it is essential that judges consider, among other issues:

a) Do Black adolescents have equal access, compared to white adolescents, to adequate housing structures, food, drinking water, material assistance, as well as educational, cultural, leisure, and sports activities?

b) Given the overrepresentation of Black adolescents in socio-educational units, do pedagogical and cultural activities reflect the actual profile of the adolescents being served?

c) In open-environment measures, do adolescents have the same access to social policies as white adolescents?

d) Are there reports of discrimination, disrespect, institutional violence, torture, or racism - including recreational racism - in the unit or services provided?

e) Is there a safe channel, guaranteeing anonymity and protection against retaliation, for reporting racial discrimination?

f) Does the PIA include affirmative measures to forest access to rights historically been denied to Black adolescents?

g) Is the duration of socio-educational measures served by Black adolescents generally longer than that of non-Black adolescents?

h) Are Black adolescents overrepresented among adolescents subjected to disciplinary sanctions in the socio-educational unit?

i) Are adolescents required, under any circumstance, to participate in religious services or follow a particular faith, or do restrictions exist on those who use symbols from African-based or minority religions?

Religious intolerance is most often directed at Afro-Brazilian religions. It is therefore essential to safeguard the free exercise of religion by ensuring spaces dedicated to rituals or at least areas for ecumenical worship, and by respecting religious symbols and paraphernalia belonging to different traditions. For example: Indigenous headdresses or Muslim hijabs.

CNJ Recommendation No. 119/2021 establishes guidelines for judicial authorities to guarantee the rights to assistance, religious diversity in its various forms, and freedom of belief in prisons. Importantly, this recommendation also applies to Juvenile Justice and to the socio-educational system.

Judicial inspection in socio-educational units and programs

CNJ Resolution No. 77/2009, amended by **CNJ Resolution No. 326/2020**, establishes in Art. 1 the duty of judges with jurisdiction over socio-educational measures to personally conduct judicial inspections in socio-educational programs. In addition to **strengthening the socio-educational system**, such inspections enable judges to promote **coordination within territories and among other SGD actors, thereby deepening anti-racist judicial practice**.

Based on inspection data, judges may demand and coordinate with the Executive Branch the creation of programs and initiatives to ensure Black adolescents' access to rights. This includes learning and vocational programs, access to cultural and leisure facilities, and guaranteeing access to affirmative action. Inspections also allow for the evaluation of the implementation and effectiveness of pedagogical projects within socio-educational units.

Some questions are fundamental to understanding this reality:

a) Is information on the color and ethnicity of adolescents serving socio-educational measure recorded?

b) Is this information collected according to self-declaration, in line with IBGE classification standards?

c) Are there adolescents from Indigenous, quilombola, or other traditional community in the unit?

d) Are courses and/or workshops offered that address differences and inequalities related to race and skin color?

e) Are there educational or cultural activities in the unit designed to value and encourage discussions on diversity, equity, and inclusion?

f) Is the unit's technical staff reflecting ethnic-racial and gender diversity representative of Brazilian society?

g) Are racial literacy courses provided for the technical teams working in socio-educational units and programs?

Attention! The relationship between an adolescent in a situation of violence and the interviewer can directly influence the information provided. Differences in ethnicity, gender, color/race, social class, or age must therefore be carefully considered. For example, adolescents who are victims of torture or who have experienced racism may feel greater empathy or sisterhood when speaking with other Black people.

Learn more: **United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules, UN, 1990)**. Rule 48 guarantees adolescents the right to observe the precepts of their religion, participate in services or meetings organized in the establishment, hold their own religious services, and possess books or objects related to their beliefs. They also have the right to receive visits from qualified representatives of any legally recognized religion of their choice, to abstain from religious services, and to freely refuse religious teaching, advice, or indoctrination.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985). Establish the duty of States to promote the well-being of children, adolescents, and their families without discrimination of any kind, including religion (Art. 6).

Law No. 12,594 of January 18, 2012 (SINASE Law). Prohibits discrimination against adolescents based on religious orientation and requires that architectural projects of socio-educational facilities include suitable spaces for religious practices, respecting their inherent diversity (Art. 35, VIII, and Art. 49).

5.4 Criminal Law

5.4.1 Criminal selectivity, social vulnerability, and racism

A. Criminalization process:

According to the concept of criminalization, all contemporary societies that institutionalize power, such as the State, select a specific group of people over whom coercion is exercised and penalties are imposed. This process is not random; it results from the coordinated action of the various institutions that make up the penal system[163].

Selectivity is a structural feature of the penal system, expressed in both qualitative and quantitative dimensions. Although crime is a democratic phenomenon that can affect all members of society, there exists what is conventionally referred to as the "hidden figure of criminalization". This expression denotes that some behaviors which violate important legal rights are not criminalized, and many crimes are not reported to authorities. For this reason, crime statistics reflect the processes of criminalization more closely than the actual phenomenon of crime itself[164].

The qualitative dimension of selectivity is revealed in the penally immunity of certain social groups. Those occupying privileged positions are effectively shielded from the punitive system, while vulnerable groups are disproportionately targeted. These groups live under conditions of constant hypervigilance, subject to repeated police stops, constant surveillance, and large-scale operations directed at the territories in which they reside.

> **For reflection**: criminal selectivity is more pronounced in highly stratified societies such as Brazil, marked by extreme income concentration, limited possibilities for upward mobility, and a deeply rooted and naturalized form of racism embedded in social imagination and practices. These factors intensify the violent actions of secondary criminalization agencies.

It is important to note that vulnerability alone does not automatically subject a group to penal control. Rather, it is the specific circumstances criminalizing risk in which a person is placed that makes them a target of criminalization. However, the stronger the association between a person and the stereotype

163 BATISTA, Nilo. ZAFFARONI, Eugenio. ALAGIA, Alejandro. SLOKAR, Alejandro. Direito Penal Brasileiro: primeiro volume. Revan. Rio de Janeiro. 4ª ed. Maio de 2011. 3ª reimpressão, maio de 2017. p. 43

164 BARATTA, Alessandro. Criminologia crítica e crítica do direito penal: introdução à sociologia do direito penal. Revan. Instituto Carioca de Criminologia. 3ª edição. 2002.

of the delinquent or social enemy, the less effort is needed for them to fall into a situation of criminalizing risk (on the contrary, they will have to make a great effort to avoid being criminalized)[165].

> **For reflection**: the social vulnerability of the Black population allows the image of the "delinquent" to be projected onto them. Since this group does not control the agenda of the mass media and therefore lacks the power to shape its own representation, crimes committed by Black individuals are disproportionately reported. This creates the distorted impression that these are the only crimes being committed, and that these individuals are the only delinquents[166].

A young, Black person from the outskirts of the city, for example, whose image is routinely used in soap operas, films, series, and police programs to portray a "drug dealer", must exert enormous effort to avoid being placed in a situation of criminal risk.

At the same time, drug trafficking is often portrayed in both mass media and court rulings as the cause of a series of social problems, such as "family breakdown," "drug addiction," "increase in property crimes," "rise in violent crimes," "deaths of police officers," and a "permanent feeling of insecurity that restricts freedom of movement."

It is important to note that such narratives, which magnify the supposed social consequences of drug trafficking, legitimize the concentration of human efforts and public investment on combating the illegal drug trade – to the detriment of addressing other crimes – and justify harsher criminal treatment of those accused of drug offenses, who are overwhelmingly poor, young, Black men.

The widespread suspicion that falls upon Black people is evident in judicial reasoning expressed in statements such as: "he had already been convicted for the same crime," "they were all together", or "the defendant must have done something to be stopped by the police."

This false correlation between Blackness and criminality must be addressed because it reproduces the premises of Lombrosian criminological positivism, reviving the figure of the "born criminal." Such reasoning legitimizes a Criminal Law of the Author, whose intrinsically authoritarian features are incompatible with a Democratic State governed by the rule of law.

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165 BATISTA, Nilo; ZAFFARONI, Eugenio. ALAGIA, Alejandro. SLOKAR, Alejandro. Op. cit., p. 49

166 BATISTA, Nilo; ZAFFARONI, Eugenio. Direito Penal Brasileiro. Volume 1. Revan.

Furthermore, the persistent association of the Black population with criminality prevents the recognition of Black people as victims of violations. Racism informs notions of victim, perpetrator, and crime, producing static and Manichean representations that distort social realities and ignore the fluid, interchangeable nature of these roles.

B. The victimization process:

Racism generates processes of victimization by combining violence with discriminatory dynamics that violate the rights of Black people. At the same time, because of its dehumanizing nature, racism diminishes the social visibility of Black suffering. In other words, as a legacy of centuries of slavery – a system based on the imposition of pain on Black bodies – society tends to ignore, minimize or remain indifferent to the victimization of Black people. Indifference shapes the inadequate response, or even omission, of the criminal justice system when faced with violations of their rights. By contrast, the status of "victim" is more readily recognized in relation to rights violations suffered by the racialized white population. The category of victim, therefore, functions as a political-legal construct tied to white privilege[167].

> **Attention**: racism, therefore, is closely linked to processes of vulnerability, producing disproportionately high rates of primary victimization (violence resulting from the commission of crime) and secondary victimization (harms resulting from the ineffective response of criminal justice institutions). Secondary victimization not only amplifies the negative and traumatic effects of crime but also generates a sense of helplessness and lack of state protection.

Paradoxically, while Black people are more vulnerable to violence and rights violations, they face greater obstacles to political and institutional recognition as victims. This deepens their social vulnerability, reinforcing a vicious cycle that exacerbates precarious living conditions.

Therefore, it is important that the Judiciary, when dealing with Black victims:

a) distance itself from the historically inherited logic of trivializing and naturalizing the suffering imposed on Black bodies; b) recognize the inseparability between the victimization of the Black population, the historical legacy of

167 FLAUZINA, Ana. FREITAS, Felipe. Do paradoxal privilégio de ser vítima: terror de Estado e a negação do sofrimento negro no Brasil. In: Revista Brasileira de ciências criminais. Ano 25. 135. Setembro. 2017. Dossiê especial. Direito penal, criminologia e racismo. 50-71p.

slavery, and the contemporary dimensions of racism that sustain exclusion and marginalization in political, economic, social and cultural fields; c) take precautions to avoid secondary victimization; d) define adequate, effective, and rapid reparation measures aimed at overcoming the legacy of colonialism and neutralizing the effects of systemic racism, with attention to intersectionality of gender, age, social class, and other factors.

Reparation measures are essential not only to transform the social status of victims and reduce racial inequities but also restore confidence of the Black population in the criminal justice system.

5.4.2 Racial stereotypes and criminal justice

Stereotypes consist of the arbitrary and generalized attribution of a set of generally negative characteristics to all members of a vulnerable group, based on an alleged biological determinism.

By reducing a group to such traits, stereotypes function as instruments of social control, defining the marginalized, inferior, and disempowered place that certain groups are allowed to occupy. They do not aim to reflect reality; rather, they mystify social relations and the naturalize inequalities[168].

> **Attention**: because racial stereotypes form part of the social imaginary, they frequently infiltrate the administration of criminal justice, producing concrete and harmful impacts on the distribution of justice.

As the UN Committee on the Elimination of Racial Discrimination has warned, stereotypes distort perceptions of facts and can lead to errors in judicial decision-making, harsher sentencing, excessive use of force, and re-victimization.

> **For reflection**: Black men are often labeles as inherently "violent," "suspicious," "animalistic," or "dangerous". Racial stereotypes also intersect with gender, shaping the way society perceives and judge Black women and girls. They are frequently portrayed as "hyper sensual," "promiscuous," "angry," "criminal factories," or simply as "Black mothers."

The construction of these stereotypes is historically rooted. They were created to legitimize slavery and, in the post-abolition period, to preserve racism as a structuring principle of society and its hierarchies.

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168 This is a reference made by Patrícia Hill Collins to Hazel Carby in the book "Pensamento feminista negro." Boitempo. 2019. p. 151. The work of Hazel Carby referenced by Patrícia is: Reconstructing Womanhood: The Emergence of the Afro-American Woman Novelist (Nova York, Oxford University Press, 1987), p. 22.

The presumption of dangerousness attributed to Black men is connected to the need to justify the gratuitous violence inflicted on Black bodies during slavery. Defined in law as property, Black people were subjected to torture, flogging, mutilation, and other brutalities regardless of any alleged wrongdoing. After abolition, the idea of dangerousness remained, shaping the repressive apparatus of the State.

Similarly, the colonial rape of Black women – whose reproductive capacity was exploited to replenish and expand the enslaved population – was rationalized by constructing the image of Black women as inherently "promiscuous" and possessing an aggressive, deviant sexuality, in contrast to the supposedly "passive" sexuality of white women.

The intensive exploitation of Black women in monoculture and mining – where they performed the same heavy labor as Black men because they too were viewed as profitable labor units – gave rise to another stereotype: that Black women are "strong," capable of enduring endless hardship and insensitive to pain. This perception, which portrays them as almost "genderless,"[169] continues to hinder the Judiciary from approaching their suffering with empathy and recognition, particularly in roles involving wifehood, motherhood, and domestic work.

Another colonial construction is the image of the "Black mother": the obedient, docile, and resigned servant who accepts her condition because she knows "her place." This stereotype resembles the maid, more devoted to the employer's family than to her own. It reflects the dominant elite's vision of the ideal relationship with Black women, justifying their reintegration to domestic work – which is marked by informality, precarity, and denial of rights. It also legitimizes the historical exclusion of this category from the labor and social security protections afforded by other workers. More insidiously, the "Black mother" serves as a normative standard against which Black women are judged. Any Black woman who takes a stand against injustice risks being swiftly discredited and dismissed as "angry," an effective device for silencing and punishing assertiveness[170].

When latent and erroneous perceptions about Black femininity penetrate - consciously or unconsciously - the criminal justice system, they give rise to multiple human rights violations. For example:

> a) Black women and girls have their accounts of sexual violence dismissed because they are labeled as "promiscuous." This stereotype, even when operating implicitly, can lead to hasty conclusions that they "provoked" the aggression or that prior sexual experience renders them somehow "immune" to sexual violations;

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169 DAVIS, Angela. Mulheres, raça e classe. Boitempo. 1ª ed. 2016. p. 17.

170 NS, Patricia. Pensamento feminista negro. Boitempo. 2019.

b) Cases involving domestic slave labor may fail to be criminalized when the stereotype of the "Black mother" is invoked to suggest that the victim passively accepts her condition and does recognize herself as a victim of slavery or crime;

c) Black women may be subjected to humiliating intimate searches in prisons without any justification, under the stereotype that they are "factories for criminals." [171];

d) Prejudices that portray people of African descent and *terreiro* communities as "practitioners of black magic," "demonic," "uncivilized," or "backward" – combined with ignorance of their cosmological principles - can lead to the criminalization of their cultural practices. For example, in certain *Candomblé* traditions, shaving the head is a fundamental initiation ritual. Understanding this practice within its religious and cultural context (intercultural translation) is essential to prevent its misclassification as bodily harm and to ensure the free exercise of religion and belief (Art. 5, item VI, FC/1988). The persistence of such Eurocentric stigmas, fueled by religious intolerance, has even led to the criminal persecution of leaders of Afro-Brazilian religious leaders under accusations of "witchcraft" (Art. 284 of the Penal Code);

e) Because of the stereotype linking Black men to criminality, justice system agents may, in borderline cases of possession of small amounts of narcotics, hastily and wrongly presume drug trafficking instead of recognizing the situation as mere use. Even when trafficking is properly established, Black men may receive harsher sentences than white men in equivalent circumstances[172]. Furthermore, the stereotype of the Black male criminal masks the overrepresentation of this group in prison statistics, preventing these numbers from being recognized as evidence of racial selectivity and institutionalized racism.

5.4.3 Formal and effective participation of victims and family members in the criminal process

In cases of serious human rights violations committed by public security agents, the burden of investigating - collecting additional information, identifying witnesses, producing forensic counterevidence, and so forth - often falls on the victims and their families.

171 Resolution No. 28 of the National Council of Criminal and Penitentiary Policy (CNPCP); ARE 959,620 with General Repercussion (Topic 998).

172 Negros são mais condenados por tráfico e com menos drogas em São Paulo Agência Pública (apublica.org)

While the collaboration of victims and family members is essential to elucidating the facts, it is the criminal justice system that must support them to ensure that investigations are based on robust evidence and carried out effectively.

Ensuring the participation of victims at all stages of criminal prosecution is also an indispensable condition of transparency in a democracy, as it ensures oversight, accountability, and social control over the justice system[173].

Rule No. 35 of the Minnesota Protocol – a document prepared by the UN High Commissioner for Human Rights for the investigation of potentially unlawful deaths – establishes that:

> The participation of the family members or other close relatives of a deceased or disappeared person is an important element of an effective investigation. The State must enable all close relatives to participate effectively in the investigation, though without compromising its integrity[174].

Similarly, in the Cosme Genoveva et al. v. Brazil (Favela Nova Brasília) case, the Inter-American Court of Human Rights underscored the right of victims' families to participate in all stages of proceedings:

> [...] the Court recalls that this means the possibility of presenting suggestions, receiving information, attaching evidence, formulating allegations, and, in short, asserting one's rights. This participation should be aimed at access to justice, knowledge of the truth of the facts, and the eventual granting of fair compensation.

The Superior Court of Justice (STJ), Sixth Panel, unanimously held that victims' families, through their lawyers or public defenders, must be granted access to evidence already documented in police investigation records, in compliance with Binding Precedent No. 14.

In this precedent, the Court recognized the possibility of qualifying the victims' families, through their legal representatives, as assistants to the prosecution with respect to accessing already-documented evidence in police investigations. This consolidated the understanding that police investigations are only relatively confidential once proceedings have been completed and documented, and it extended to victims and their families rights already recognized for the Public Defender's Office and the legal profession.

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173 Caso Favela Nova Brasília (Cosme Genoveva e outros versus Brasil. Sumário Executivo. Conselho Nacional de Justiça. 2021. Available at cnj.jus.br/wp-content/uploads/2022/02/sumario-executivo-favela-nova-brasilia-v8-2022-02-21.pdf

174 Free translation of "La participación de los miembros de la familia y otros parientes cercanos de la persona fallecida o desaparecida constituye un elemento importante en una investigación eficaz. El Estado debe permitir a todos los parientes cercanos participar de manera efectiva en la investigación, aunque sin poner en peligro su integridade."

Both panels of the STJ's Third Section have since reaffirmed this position (e.g. RMS 55,790/SP, Justice Jorge Mussi, Fifth Panel, DJe 12/14/2018).

This jurisprudence aligns with the Inter-American Court's judgment in the Gomes Lund and others vs. Brazil, which emphasized that:

> [...] victims of human rights violations or their families must have ample opportunities to be heard and to act in the respective processes, both in seeking clarification of the facts and punishment of those responsible, and in seeking due reparation (Judgment of November 24, 2010, § 139).

The National Council of Justice issued Resolution No. 386/2021 requires courts to establish Specialized Centers for Victim Assistance, tasked with, among other duties, "providing information on the progress of inquiries and legal proceedings that have as their objective the investigation of a crime or infraction, or the reparation of damages resulting from its commission." Until such Centers are in place, the Resolution requires

> [...] the courts to provide these services provided through existing channels, such as ombudsman offices, specialized on-call services, and multidisciplinary assistance units.

It is important to note that guaranteeing follow-up rights for victims and family members in criminal proceedings is not the same as qualifying them as assistants to the prosecution. The role of assistant to the prosecution does not apply to the investigation stage (Arts 268 and 269 of the CPP).

In this regard, Law No. 13,964/2019 amended Article 28 of the CPP to strengthen victim's rights. The provision now ensures that victims have the right to be informed by the Public Prosecutor's Office when a police investigation or equivalent procedure is archived. If victims or their legal representative disagrees with the decision to archive, they may, within 30 (thirty) days of receiving the communication, request review by the competent body of the Public Prosecutor's Office, under the terms of the respective organic law.

5.4.4 Trial of crimes in which the victims are (preponderantly) Black

Crime of racism and racial defamation

Racism is a crime against humanity and is imprescriptible (Art. 5, Item XLII, of the Constitution). This means it cannot be subject to oblivion, requiring vigilant action by public authorities in both preventive and repressive aspects.

In *Habeas Corpus* (HC) No. 154,248/DF, the STF, by a majority vote (8-1), recognized that the crime of racial defamation, included in Art. 140 of the

Penal Code by Law No. 10,741/2003, is imprescriptible, non-bailable, and punishable by imprisonment. The Court further established that the same legal consequences apply to all current or future criminal provisions aimed at curbing racial discrimination. Thus, while the legal system must provide for punishment to classify racist practices, the offense need not be restricted to the provisions of Law No. 7,716/1989. As a logical consequence, the limitation periods that apply to crimes against honor do not apply to racial defamation.

The ruling rejected the traditional doctrinal and jurisprudential distinction that considered racial defamation as an offense directed solely at an individual, while racism targeted a collective. The STF pointed out that racial defamation necessarily relies on negative stereotypes tied to membership in a group whose characteristics are socially stigmatized under the notions of supposed biological determinism and inferiority. As Justice Fachin noted in HC No. 154,248/DF:

Racial defamation achieves the concrete objective of spreading racial stereotypes and stigmas by reaching a specific recipient, the racialized individual. This would not be possible without their belonging to a social group also demarcated by race. Here, the argument that racism is directed against the group while insult affects the person individually is rejected. Distinguishing them is impossible; a person can only be considered a victim of racial defamation if they conform to the stereotypes and stigmas imposed on the group to which they belong.

Therefore, Law No. 7,716/1989, which "defines crimes resulting from racial or color prejudice," is not the exclusive legal basis for criminalizing racist behavior. Its list of crimes is not exhaustive, and other legal instruments may apply, provided the offense contains a racial element and discriminatory behavior as determining factors.

This interpretation reflects a constitutional criminal policy grounded in proportionality, which includes not only preventing excesses and arbitrariness by the State but also prohibiting insufficient protection of fundamental rights. To deny racial insult the same legal treatment as racism would amount to insufficient protection of the rights to equality, non-discrimination, and dignity, particularly of Black people. Such an omission would also run counter to the constitutional mandate to criminalize racism contained in Article 5, Item XLII, of the Federal Constitution, as to Brazil's commitment to the repudiation of racism as a guiding principle of its international relations (Article 4, Item VIII, FC/1988).

Attention: when judging crimes involving the practice of racism, it is essential that judges remain aware of the persistent pattern of impunity surrounding such offenses. Frequently, criminal acts reported to the police are not adequately investigated, inquiries fail to result in charges, and charges do not lead to convictions, even in cases where sufficient evidence exists.

In the case of Simone André Diniz vs. Brazil, the Inter-American Commission on Human Rights, while acknowledging the progress of Brazilian criminal legislation in addressing racial discrimination, concluded that impunity for racial crimes remains widespread in the country. This situation was attributed to the leniency of justice system actors in handling racism cases, reflected in attempts to downplay the seriousness of the facts and in frequent claims of lack of typicality or difficulty in proving discriminatory intent whenever the perpetrator denied having acted out of racial hatred.

The Commission pointed out that such institutional practices amount to indirect discrimination, as they disproportionately harm Black citizens by depriving them of equal protection under the law and limiting their access to justice to seek redress for racial discrimination.

The persistent inequality in access to justice for victims of racial crimes in Brazil is closely correlated with the use of an excessively high and difficult-to-attain evidentiary standard in such cases. Courts often expect the accused to explicitly confess that their conduct was racially motivated for intent to be recognized, while racist behavior is frequently minimized.

Overcoming this institutional culture that perpetuates racial inequities in access to justice requires the Brazilian Judiciary to develop a profound understanding of the phenomenon of racism. It must be acknowledged that "Brazilian racism" – while sharing the essential characteristics of all forms of racism - has its own historical and social specificities. Shaped by the central political role attributed to miscegenation in the construction of national identity and social ethos, Brazilian racism is marked by its denial: a racism that is ashamed of itself, refusing to acknowledge itself as such.

> **For reflection**: racism in Brazil often manifests in subtle or so-called "joking" forms, yet this does not make it any less painful for its victims, nor any less effective in reinforcing power relations that sustain the hierarchical organization of society and the unequal distribution of wealth, opportunities, and power among different racialized groups.

Therefore, it is essential that, when investigating racial crimes, allegations that racist offenses were merely "jokes" not be admitted as grounds to discredit the crime of racism. The dehumanizing perspective inherent in racism cannot be framed as having any recreational aspect.

Likewise, the fact that an alleged perpetrator reports having had a previous negative experience with a Black person does not entitle them to discriminate against other Black people.

Furthermore, a defendant's claim of having Black friends, children, or partner does not, factually or legally, exempt them from the practice of racism or serve used as a mitigating factor of guilt.

It is well known that proving the subjective element of this type of offense is always a difficult task, given the absence of any scientific mechanism capable of establishing certainty regarding the intentions or purposes consolidated in the agent's psychological and internal world. However, it does not follow that the mere statement by the accused – whether claiming that their conduct was not prejudiced, that they do not harbor a prejudiced view of the offended party, or that any prejudiced was not the motivation for their act - can be deemed sufficient for the judge to dismiss the recognition of racism.

Proof of intent cannot depend exclusively on the subjective allegations of the accused, since such a practice would overvalue the perpetrator's perspective to the detriment of the victim's. In the absence of confession, it is recommended that the judge deduce intent through logical reasoning, combining the examination of all the proven circumstances of the crime, duly tested under the adversarial system, with the guidance of common experience.

Concerning the treatment of victims, their accounts must be afforded credibility and not dismissed as merely "subjective" or the result of "misunderstandings." Black people, unfortunately, are forced from an early age to confront racism in its many forms and across all spheres of social life.

Because racism is systemic, it manifests concretely and objectively in the workplace, in schools, in the media, in recreational contexts, in the provision of public services and access to rights, in consumer relations, and even within families - intensely shaping the opportunities, trajectories, and destinies of Black people across generations and undermining the full enjoyment of human rights. **Thus, the ability to identify situations of racial discrimination is a skill that Black people acquire throughout their lives as a means of a self-protection and survival. This competence should not, *a priori* or without cause, be questioned by actors in the criminal justice system.**

The **victim's testimony** is therefore a crucial means of evidence in racial crime investigations, indispensable for understanding the crime and its circumstances, as well as for assessing the nature, severity, and extent of the damage caused. Without careful and sensitive listening to the victim, it is impossible to ensure proportionate and fair accountability of the offender. It is also vital to recognize that incidents of racism reported to the justice system are rarely isolated in the victim's life; they often act as catalysts for a history of accumulated frustrations, pain, and trauma, generating a legitimate and heightened expectation of a fair judicial ruling for the specific *sub judice* case.

Finally, the Judiciary must consider the conditions of vulnerability that hinder or obstruct victims' access to justice, such as precarious housing, residence in remote areas, low educational level, limited family income, digital exclusion, and socio-cultural or religious contexts. These factors should be treated as essential indicators for neutralizing the asymmetries between the parties, determining the most appropriate forms of support to victims, and guiding the consideration of their statements and other evidence collected.

On the incompatibility of the non-prosecution agreement with racial crimes

Article 28-A of the Code of Criminal Procedure establishes that it is up to the judicial authority to approve the Non-Prosecution Agreement (ANPP) in a hearing in which the voluntariness of the agreement must be verified by hearing the person investigated in the presence of their defense attorney, as well as its legality. If the judge finds the conditions of the ANPP inadequate, insufficient, or abusive, the case must be returned to the Public Prosecutor's Office for reformulation, with renewed consent from the accused and their defense.

The analysis of the proposal's legality requires the judicial authority to systematically interpret both the constitutional mandate to criminalize racism and the international commitments assumed by the Brazilian State.

In this sense, when the ANPP concerns racial crimes, the reasons set forth by the Second Panel of the STF must be observed. In its ruling of February 7, 2023, on Ordinary Appeal in Habeas Corpus No. 222,599/SC, the Panel held by majority that:

> [...] the delimitation of the material scope for the application of the "de-criminalizing" agreement and the inhibition of *persecutio criminis* requires compliance with the constitutional text and with the commitments assumed by the Brazilian State internationally as a necessary limit for the preservation of the fundamental right to non-discrimination and non-submission to torture – whether psychological or physical, or to inhuman or degrading treatment, operated by the set of stereotypical meanings that circulate and that attribute to both women and Black people an inferior position, in a perverse hierarchy of humanities.

Following this reasoning, the Second Panel concluded that the ANPP does not apply to racial crimes (including racial defamation), consistent with the legislator's theology of exceptionality in Article 28, Paragraph 2, Item IV, which excludes the applicability of the agreement to crimes committed within the scope of domestic or family violence, or against women because of their gender.

The leading vote of the decision further highlighted Article 10 of the Inter-American Convention against Racism, Racial Discrimination, and Related

Forms of Intolerance, adopted in Guatemala during the 43rd Regular Session of the OAS General Assembly (June 5, 2013). This provision commits Brazil to guaranteeing victims (i) equitable and non-discriminatory treatment, (ii) equal access to justice, (iii) prompt and effective proceedings, and (iv) fair compensation in both civil and criminal spheres, as appropriate.

Indeed, extending the ANPP to racial crimes would conflict with the Supreme Court's most recent jurisprudence, notably its ruling recognizing racial insult as a crime of racism. This precedent reinforced the abominable nature of distinctions based on the arbitrary notion of race and attributed to this crime the constitutional predicates of being unbailable and imprescriptible.

Action in cases of police lethality

Police violence represents a serious human right concern in Brazil[175]. Since the Judiciary is responsible for overseeing the legality of administrative acts by police authorities, it must ensure that deaths caused by police officers are not classified as "resistance followed by death" or "resisting arrest." Such designations, which lack legal basis, create conditions that mask possible extra-judicial executions with an appearance of legality.

Investigations must not proceed from the assumption that the officer proportionally responded to a threat or aggression by the deceased. This approach narrows the line of inquiry to the crime allegedly committed by the victim, paving the way for evidence of extra-judicial executions to be disregarded – such as *post-mortem* examinations revealing that victims in an operation were shot multiple times at close range in vital areas.

In Favela Nova Brasília vs. Brazil, the Inter-American Court of Human Rights concluded that this pattern of investigations leads to the re-victimization of those executed and their families, while preventing the full clarification of the circumstances of death.

Judiciary must also consider the potential lack of independence of civil police investigations in cases of police lethality, and examine whether the investigative action was partial, inefficient, or biased, regardless of its outcome. For example, it is essential to assess whether the authority leading the investigation belonged to the same team as the officer(s) under investigation.

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175 Senado Federal, Relatório Final da Comissão Parlamentar de Inquérito sobre o Assassinato de Jovens (Brasília, 2016); Relatório do Relator Especial sobre Formas Contemporâneas de Racism, Discriminação Racial, Xenofobia e Intolerância Correlata, U.N. Doc. E/CN.4/2006/16/Add.3, 28 de fevereiro de 2006, par. 33, 36 e 38; Mapa da Violência IV: os jovens do Brasil (Brasília, 2004), p. 57 -58; Anistia Internacional, "Eles entram atirando": Policiamento de comunidades socialmente excluídas, 2005, p. 38. ADPF 635; Caso Favela Nova Brasília versus Brasil, dentre outros.

When analyzing cases, judges must be guided by the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary, or Summary Executions. Additionally, under Article 156, Item I, of the Code of Criminal Procedure, the Judiciary has authority to order, ex *officio*, the early production of evidence in cases involving police violence.

Action in torture cases

CNJ Resolution No. 414/2021[176] establishes guidelines and expert requirements for conducting forensic examinations in cases involving evidence of torture or other cruel, inhuman, or degrading treatment, in accordance with the Istanbul Protocol.

The rule establishes that, during hearings and other procedural acts carried out in criminal and juvenile jurisdiction, the judicial authority must inquire into and analyze the conditions under which the person deprived of liberty is presented, the circumstances of their detention or arrest, and the treatment received. The objective is to identify possible signs of torture or other cruel, inhuman or degrading treatment, especially when the individual is in custody. The resolution also emphasizes that such analysis must consider factors of heightened vulnerability to violence, such as race and ethnicity.

Additionally, Protocol II of CNJ Resolution No. 213/2015[177] established procedures for hearing, collecting information, recording, and forwarding cases with indications of torture or ill-treatment.

5.4.5 Trial of crimes in which defendants are (predominantly) Black

Identification of persons

A nationwide survey conducted by the Public Defender's Office of the State of Rio de Janeiro identified that in 60% of cases of mistaken photographic identification at police stations, preventive detention was ordered. On average, defendants remained imprisoned for 281 days, or approximately nine months.

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176 BRASIL. Conselho Nacional de Justiça. Resolution No. 414 of September 2, 2021. Establishes guidelines and expert requirements for conducting forensic examinations in cases where there is evidence of torture and other cruel, inhuman, or degrading treatment, following the parameters of the Istanbul Protocol, and contains other provisions. Available at https://atos.cnj.jus.br/atos/detalhar/4105. Accessed on November 2, 2024.

177 BRASIL. Conselho Nacional de Justiça. Resolution No. 213 of December 15, 2015. Provides for presenting every arrested person to the judicial authority within 24 hours. Available at https://atos.cnj.jus.br/ atos/detalhar/2234. Accessed on November 11, 2024.

The study also revealed that in 83% of mistaken identification cases, the individuals wrongly identified were Black, highlighting structural racism and the selective nature of the criminal justice system[178].

Recent jurisprudence from the STJ and STF has consolidated the mandatory observance of the minimum guarantees set forth in Art. 226 of the Code of Criminal Procedure for identification procedures, with the aim of improving evidentiary standards and minimizing errors (HC No. 598,886/STJ, HC No. 652,284/STJ, REsp No. 1,954,785/STJ, HC No. 712,781/STJ, and RHC No. 206,846/STF).

Specialized literature also recommends additional safeguards to reduce errors and wrongful convictions:

a) Ensuring the non-repeatability of the act of recognition, as recommended by testimony psychology;

b) Adopting a double-blind system in which the official conducting the procedure is not involved in the investigation, to prevent suggestion – intentional or otherwise;

c) Recording the entire procedure through audiovisual means, from the victim's or witness's initial description to the conclusion of the act, thereby strengthening the chain of custody and adversarial testing;

d) Replacing the stigmatized expression "suspect person" with more neutral or technical terms, such as "a person to be recognized," or "potential perpetrator";

e) Formally recording the victim's or witness's assessment of the recognition result and their degree of certainty;

f) Requiring racial self-identification of all individuals placed in lineups, enabling verification of compliance with lineup standards (e.g. phenotypic similarity) and allowing the analysis of cross-racial effect; and

g) establishing clear criteria that define "just cause" for submitting someone to a recognition procedure, preventing arbitrary or generic justifications.

178 Available at https://www.defensoria.rj.def.br/uploads/arquivos/54f8edabb6d0456698a-068a65053420c.pdf

The address these challenges, CNJ **Resolution No.484/2022**[179] was adopted to standardize good judicial practices regarding identification procedures and their evaluation in criminal proceedings. The CNJ has also created a Working Group on Recognition of Persons (Ordinance No. 209/2021) which produced: a) a Collection on recognition of persons: paths to improving the criminal justice system[180]; b) a Diagnosis of factors leading to wrongful imprisonment; c) a Protocol for recognition procedures in police stations; and d) a Draft bill amending Art. 226 of the CPP[181].

The construction of legal truth in drug trafficking cases

In most drug trafficking cases, the prosecution relies primarily on police testimony. A study analyzing 800 first-instance rulings issued between July 2013 and June 2015 in eight states (São Paulo, Minas Gerais, Bahia, Rio Grande do Sul, Paraná, Goiás, Maranhão, and Pará) found that in 90% of cases, prosecution witnesses were security agents. Of these, 58.17% were military police officers, 22.12% were civil police officers, 5.21% unspecified police officers, 1.86% metropolitan guards, 1.55% prison officers, and 1.55% federal police officers. Military police, therefore, represent roughly two-thirds of all security agents heard as witnesses[182].

It has generally been accepted that police statements may be admitted as evidence even when they are the sole evidence presented by the prosecution. As a result, the credibility of police testimony has become central in drug trafficking cases.

However, the study noted that most rulings ascribe special credibility to police testimony, often invoking the notion of "public faith" in the statements of security agents. Some decisions go further, relying on a " presumption *iuris tantum* of the veracity of administrative acts" or on a "presumption of impartiality" of police testimony. Such reasoning assumes that police officers, as public servants tasked with crime prevention, always act exclusively in the interest of enforcing the law and therefore deserve full credence - unless incontrovertible evidence to the contrary emerges.

Yet there is no legal basis for automatically granting police statements greater probative value than other forms of evidence. Brazilian criminal procedural

179 BRASIL. Conselho Nacional de Justiça. Resolution No. 484 of December 19, 2022. Establishes guidelines for identifying individuals in criminal proceedings and processes and their evaluation within the scope of the Judiciary. Available at https://atos.cnj.jus.br/atos/detalhar/4883. Accessed on November 11, 2024.

180 Available at coletanea-reconhecimento-de-pessoas-v6-2022-12-06.pdf (cnj.jus.br)

181 Available at relatorio-final-gt-sobre-o-reconhecimento-de-pessoas-conselho-nacional-de-jusica.pdf (cnj.jus.br)

182 SEMER, Marcelo. Sentenciando tráfico. Tirant lo Banch. São Paulo.2019.

does not recognize standardized hierarchies of evidence. Each element, including police testimony, must be assessed individually within the context of the specific case.

The function of criminal jurisdiction is precisely to scrutinize the legitimacy of investigative against the defendant, a task assigned to the Public Prosecutor's Office. Thus, the credibility of police testimony should result from confrontation with other evidence, not from presumptions.[183] Granting a priori veracity to police statements would empty the meaning of criminal jurisdiction, undermine the presumption of innocence, and improperly shift the burden of proof to the defendant.

As highlighted by doctrine, "the presumption of legitimacy of administrative acts, which belongs to administrative law, does not apply to a highly personal act such as testifying"[184].

Accordingly, in drug trafficking cases where the evidence rests solely on police testimony, the investigation cannot function merely as a validation of police activity - especially when the accused presents a conflicting version of the events. In such cases, as the STJ's Sixth Panel ruled (REsp No. 2,101,494/2023), conviction requires irrefutable and sufficient evidence, since the State has ample means to produce it - such as body-worn camera footage.

Beyond body cameras, other elements may strengthen evidentiary assessment, including: a) scientific studies on average daily amount of drug consumption by substance type; b) surveillance footage from the scene, in addition to police body cameras; c) documentary and photographic records of observed factual dynamics; d) complete documentation of anonymous reports; e) testimony of third parties who may have witnessed the police operation.

Racial profiling and well-founded suspicion

Racial profiling – also referred to as racial filtering - is directly related to unjust stops, searches, and arrests, miscarriages of justice, and the perpetuation of institutional racism.

The Durban Declaration and Program of Action (2001), adopted at the Third World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, urges States to adopt measures against racial profiling. This practice includes actions by police and other law enforcement officials that are based on race, color, ethnicity, ancestry, religion, nationality, or any combination of these factors, and that subject individuals to criminal prosecution through

183 Semer, Marcelo. Sentenciando tráfico. Tirant lo Banch: São Paulo,2019. p. 199.

184 Ibid., p. 189.

stops, searches, arrest, or other measures used to determine whether they are involved in criminal activity.

The **UN Committee on the Elimination of Racial Discrimination (CERD), in General Recommendation No. 31**, stressed that States must take effective measures to prevent interrogations, detentions, and searches carried out solely based on an individual's racial or ethnic background, even if cloaked in other formal justifications. In an in-depth consideration of the subject, it pointed out that:

> Racial profiling by law enforcement officers has far-reaching consequences at all levels of the administration of the justice system, especially in the criminal justice system. Racial profiling can lead to (a) the excessive criminalization of specific categories of persons protected by the Convention; (b) the reinforcement of misleading stereotypical associations between crime and ethnicity and the cultivation of abusive operational practices; (c) disproportionate incarceration rates of groups protected by the Convention; (d) greater vulnerability of persons belonging to groups protected by the Convention to abuse of force or authority by law enforcement officers; e) underreporting of acts of racial discrimination and hate crimes and f) sentencing by courts with harsher penalties for targeted communities, among others.

The United Nations Working Group of Experts on People of African Descent has likewise affirmed that racial profiling violates the right to non-discrimination, highlighting its role in entrenching negative stereotypes that stigmatize people of African descent as potential criminals.

In Nechiporuk and Yonkalo v. Ukraine, the European Court of Human Rights held that arrests must be based on reasonable suspicion and not merely serve as fishing expeditions to create suspicion.

In Brazil, however, the absence of a clear normative definition of "well-founded suspicion" legitimizes police stops without a judicial warrant under Articles 240 and 244 of the Code of Criminal Procedure (CPP), creating legal uncertainty. The lack of a binding protocol for police conduct and of mandatory record-keeping on such interventions fosters a lack of transparency. It therefore falls to the Judiciary, in each case, to carefully define the contours of "well-founded suspicion."

Far from increasing police effectiveness or public safety, racial profiling heightens the risk of judicial error and exposes innocent individuals – particularly racialized and socially vulnerable groups - to arbitrary procedures. This practice reinforces structural racism, deepens inequality, and erodes public trust in the justice system.

In line with these principles, the 6th Panel of the Superior Court of Justice (STJ), in RHC 158,580/BA, suspended a criminal action for drug trafficking where police officers were unable to specify the suspicious behavior that justified a personal search. The Court emphasized that the subsequent discovery of illegal material does not validate evidence obtained in violation of the "fruits of the poisonous tree" doctrine (Art. 157, § 1, CPP).

On April 11, 2024, the STF unanimously established **a binding thesis in HC No. 208,240/STF**, reported by Justice Edson Fachin:

> A personal search, independent of a court order, must be based on objective evidence that the individual is carrying a prohibited weapon or illicit objects or papers that constitute evidence of a crime. It is unlawful to conduct a search based on race, sex, sexual orientation, skin color, or physical appearance.

The STF further clarified that subjective or unverifiable parameters do not satisfy the legal requirement. A "personal search based on racial profiling violates the Federal Constitution, domestic law, and Brazil's international commitments."

Importantly, the Court held that the legality of a search must be established prior to its execution, regardless of whether incriminating evidence is subsequently found.

Given the persistence of formal justifications masking racial bias in policing, the Judiciary bears the duty to exercise substantive and rigorous oversight. Courts must verify compliance with criminal procedural legislation (Art. 240, §§ 1- 2; 243, I-II; 244 CPP) and enforce due process by nullifying unlawful acts committed, while ensuring disciplinary, civil and criminal liability of offending officers, including under Law No. 7,716/89 (RE 603616, Reporting Justice: Gilmar Mendes).

Special caution is required to prevent the normalization of discretionary powers that allow preventive or exploratory searches without concrete data supporting well-founded suspicion, or detentions "for investigations." The Brazilian legal framework authorized only searches aimed at producing evidence, when there is demonstratable probability that the individual possesses an illicit weapon, drug, or other object constituting criminal evidence. Even then, the principle of urgency must be respected to prevent indiscriminate and humiliating searches, which disproportionately target racialized groups.

Attention: it is essential to avoid – even tacitly – granting discretionary powers to police officers as an automatic consequence of their constitutional duty to preserve public order and the safety of people and property. Otherwise, prejudices cloaked as "police intuition" may justify arbitrary detentions. Judicial review must go beyond rubber-stamping police actions and provide cautious and equidistant assessment of the police narrative.

International jurisprudence reinforces this understanding. In Prieto & Tumbeiro v. Argentina case, the Inter-American Court of Human Rights found a violation of due judicial protection where courts failed to require objective justification for police detentions, instead fully validating officers' subjective accounts. The Court ruled that unjustified, arbitrary, and discriminatory searches cannot be legitimized even when they lead to seizure of incriminating evidence[185].

Similarly, in Acosta Martinez and others vs. Argentina case, the Court held that any restriction of liberty must derive from a clear legal norm established by democratically elected legislative bodies. States must set out in advance, and as concretely as possible, the causes and conditions justifying deprivation of liberty. Generic and overly broad legislation, the Court found, provides only a façade of legality for arbitrary detention[186].

While those rulings apply specifically to Argentina, the interpretive authority of the Inter-American Court is legally binding on Brazil, which has recognized its jurisdiction. Thus, Brazilian courts are obliged, both under the principle of good faith and Brazil's international commitments, to ensure that the rights to liberty, equality, dignity, privacy, and non-discrimination under the American Convention on Human Rights are given full effect in domestic jurisprudence.

To ensure compliance with legality and conventionality standards, judges may ask key questions not only during custody hearing but also throughout the criminal investigation:

a) Are there objective elements that make it plausible that the person placed under suspicion was linked to the perpetration of a crime?

b) If so, are these elements explicitly described in the arrest report?

c) Are there images from the officers' body cameras?

d) If an anonymous complaint is cited, has its source been identified and is there a detailed record of its content?

e) Was any intelligence activity conducted before the approach? If so, is there a formal record of the investigative steps, and do their partial conclusions objectively demonstrate a reasonable probability of criminal conduct?

185 For more information on the case, see https://publicacoes.ibccrim.org.br/index.php/boletim_1993/ article/view/685/134.

186 For more information on the case, see https://www.corteidh.or.cr/docs/comunicados/cp_101_2020_port.pdf.

f) Are the elements supporting suspicion independent, or are they confused with personal aspects of the individual affected, or with illicit evidence produced to retroactively validate the police action?

A careful analysis of police reports is essential to prevent mere intuition, subjective impressions, or intangible considerations – none of which can be clearly and concretely demonstrated – from being treated as sufficient to characterize a well-founded suspicion. For instance, citing the "nervousness" of the individual, or the fact that they stopped, stood still, or ran upon noticing the police, does not suffice to characterize well-founded suspicion.

The 6th Panel of the STJ has made this point explicit: the perception of nervousness by police officers is excessively subjective and, therefore, insufficient to justify a personal search[187].

Similarly, claims that the alleged suspect is already known to the police or that they were in an area with a high incidence of drug trafficking are generic presumptions of guilt, inconsistent with the legal requirement of well-founded suspicion.

5.5 Execution of the sentence

5.5.1 Preliminary note: the specification of the subject of rights in criminal enforcement

While the recognition of equality in its formal dimension has been a significant achievement, its effectiveness is undermined by what has been called a hermeneutical coup: the use of abstraction, generality, and the illusion of neutrality in legal interpretation. These interpretive practices have historically reinforced hegemonic perspectives, limiting the protection of marginalized groups.

In the international legal framework - still met with resistance in Brazilian law and judicial practice – there is a pressing need to specify the subject of rights in criminal enforcement. This involves explicitly recognizing that certain groups - such as older people, women, Black people, persons with disabilities, refugees, children, and Indigenous people – face particular vulnerabilities. Their specific demands must be acknowledged and addressed in the process of implementing enforcement norms.

187 STJ. 6th Panel. REsp 1.961.459-SP, Rapporteur Min. Laurita Vaz decided on April 5, 2022 (Info 732).

Specifying Black people as subjects of rights, the International Convention on the Elimination of All Forms of Racial Discrimination (March 7, 1966), ratified by Brazil on December 8, 1969, guarantees to all individuals under the jurisdiction of its member states both protection and effective remedies before national courts and other competent state bodies.

The Convention ensures the right to equal treatment before the courts and any other authority that administers justice (Art. V, a), protection against racial discrimination that violates individual rights and fundamental freedoms, and the right to fair and adequate reparation for damages resulting from such discrimination (Art. VI).

At the regional level, the Organization of American States (OAS) adopted the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance on June 5, 2013. In Brazil, it was approved by the National Congress and incorporated with constitutional amendment status on February 18, 2020. Through this convention, Brazil undertook the obligation to guarantee victims of racism equitable and non-discriminatory treatment, equal access to justice, and fair reparation in both civil and criminal spheres (Art. 10).

Within the criminal justice system, however, the challenges of confronting racism are profound, particularly regarding indirect discrimination resulting from the disproportionate impact of legislation on Black populations. Criminal enforcement is no exception, which underscores the need to recover and apply Black hermeneutics.

According to Article 8 of the Inter-American Convention against Racism, Brazil is bound to ensure that the adoption of any measures - including those related to public security - does not result in direct or indirect racial discrimination.

Nonetheless, Brazil's prison system remains deeply racialized. Racial profiling in public security, reinforced by criminal justice practices, reverberates in prison demographics. The 2024 Brazilian Public Security Yearbook reports that approximately 70% of country's prison population is Black – nearly half a million people. Of those incarcerated for drug trafficking, 68% are Black men. As addressed in the section "Racial stereotypes and criminal justice", studies indicated the presence of sentencing biases influenced by the racial profile of defendants.

5.5.2 Race and execution of the sentence

Racial inequality impacts not only criminal prosecution but also the execution of sentences – though there is still a lack of systematic data on how race impacts decisions concerning sentence-related benefits. Seemingly neutral requirements, such as proof of employment, have disproportionately adverse effects on Black incarcerated individuals.

The Federal Constitution provides that sentences must be individualized (Art. 5, item XLVI) and served in appropriate facilities according to the nature of the crime and the convict's characteristics, such as age and sex (Art. 5, Item XLVIII). It also guarantees women prisoners the right to remain with their children during breastfeeding (Art. 5, Item XLVI).

The Sentence Execution Act (LEP) establishes that the rights of all convicted and interned individuals must be safeguarded without racial, social, religious, or political distinction (Art. 3). Art. 5 requires the classification of convicts according to their background and personality, to guide individualized enforcement. The LEP provides for progression through prison regimes when objective and subjective criteria are met, as well as temporary release, sentence remissions, parole, and electronic monitoring. For a critical racial perspective, it is also essential to examine the use of alternative penalties, security measures, and disciplinary procedures, as these too can be applied in ways that reproduce racial inequality during sentence enforcement.

5.5.2.1 Progression of prison regimes

Progression between prison regimes depends on good conduct (attested by the facility director) and the results of a criminological examination (Art. 112, § 1, of the LEP). However, these subjective criteria, if uncritically applied, can be influenced by stereotypes that stigmatize the Black population as inherently more dangerous – hindering fair assessments of eligibility for progression.

The law also requires proof of employment or the possibility of immediate work placement (Art. 114, Item I, of the LEP) as well as evidence that the convict will adapt to the new regime with self-discipline, low dangerousness and responsibility (Item II). These requirements place an additional burden on Black individuals, who often face barriers to employment opportunities even outside prison.

The problem is exacerbated when prisoners are held far from their communities of origin, as progression may depend not only on a job offer but also financial resources to cover relocation. Consequently, the formal requirements for regime progression, combined with discretionary conditions imposed by judges, risk perpetuating racial inequality in the enforcement of sentences.

Questions to be considered:

a) Can stereotypes (such as dangerousness, aggressiveness, or other disqualifying attributes) attributed to the Black population - considering the intersectionality of gender and other social markers – be relevant to negatively assessing prison conduct and preventing the inmate from progressing to another regime?

b) Is there evidence that the criminological examination – which confirmed that there were no conditions for the progression in the execution of the inmate's sentence – was conducted without the influence of conscious or unconscious discriminatory biases?

c) Is the requirement for proof of a promise of paid employment compatible with the actual opportunities available to the Black population for access to work and income?

d) Are requirements involving financial costs - such as depositing funds to cover transportation to the defendant's place of residence –compatible with the financial conditions of Black people, also considering the intersectionality of gender and other social markers?

e) Can the application of other normative texts relevant to the case disregard the historical and ongoing denial of access to rights affecting the Black population, without neglecting the intersectionality of gender and other social markers?

f) Given that the claimant is a Black woman, is the intersectionality between race and gender relevant to altering the assessment of the case and the applicable rules?

g) When other social markers are also present (sexuality, disability, age, class), do the interpretation of requirements for regime progression in legal texts and administrative norms require implementation that reflects the historical and current experiences of the Black population and its intersectionality?

5.5.2.2 Temporary release

For temporary release, two requirements must be assessed with an understanding that incorporates the historical and present realities experienced by the Black population: I *appropriate behavior*; II *compatibility* of the benefit with the objectives of the sentence (Art. 123 of the LEP). If these requirements are interpreted only through a pre-existing framework that defines "appropriate behavior" and "compatibility with the objectives of the sentence" in comparison with is tolerated from non-Black individuals, systematic cognitive distortions will prevent recognition that Black people are equally entitled to the benefit.

Questions to be considered:

a) Can stereotypes of dangerousness, aggressiveness, or other disqualifying attributes associated with the Black population – considering the intersection of gender and other social markers –

influence a negative evaluation of “appropriate behavior” and of the “compatibility of the benefit with the purposes of the sentence”, thus affecting the granting or revocation of temporary release?

b) Can interpretations shaped by spatial racism lead to negative and dehumanized view of housing conditions and the neighborhoods where most of the Black population resides, thereby undermining access to temporary release?

c) In assessing potential non-compliance with the obligation to return to prison, are the elements addressed in the previous item adequately considered?

5.5.2.3 Earned time

Earned time is granted through school attendance – elementary, secondary, vocational, higher education, or professional requalification - or through days worked (Art. 126, Items I and II, of the LEP). This framework presents a considerable obstacle since, according to CNJ data, among the more than 700,000 incarcerated people in Brazil, 8% are illiterate, with this group disproportionately comprised of Black individuals.

While literacy falls under elementary education and qualifies for earned time, it is necessary to recognize the historical inequality of access to education faced by the Back population. Thus, illiterate Black individuals often lack the same conditions to begin the learning process within prison.

In response, the National Council of Justice approved **Resolution No. 391/2021**[188], which allows non-school educational social practices to also count toward earned time (Art. 2, Item II). These include cultural, sports, vocational training, health, and other voluntary activities – whether individual or collective - integrated into the political-pedagogical project (PPP) of the prison unit or system. Such activities, when carried out by autonomous initiatives, public or private institutions, or by individuals and organizations authorized by the public, may also qualify for earned time.

Questions to be considered regarding earned time through work and its relations to sentence progression:

a) When evaluating continuous participation in the educational process, if the incarcerated individual struggles to meet certification

188 BRASIL. Conselho Nacional de Justiça. Resolution No. 391 of May 10, 2021. Establishes procedures and guidelines to be observed by the Judiciary to recognize the right to earned time through educational and social practices in prisons. Available at https:// atos.cnj.jus.br/atos/detalhar/3918. Accessed on November 11, 2024.

requirements and thus to accrue earned time, has the historical context of unequal access to education been considered?

b) Does the criteria for earned time through work align with the actual employment and income opportunities available to the Black population?

c) Do the requirements for recognizing certain activities as valid for earned time overlook the reality of underemployment and precarious work conditions disproportionately affecting the Black population?

d) If the applicant is a Black woman, can the intersection of race and gender alter how professional activity is assessed, particularly in cases of unpaid or informal domestic labor?

e) When other social markers intersect with race and gender (e.g. sexuality, disability, age, or class), should the interpretation of requirements for days worked reflect the historical and current experiences of the Black population under these intersectional conditions?

5.5.2.4 Parole

The judicial authority may grant eligibility to parole to a person serving a custodial sentence if, among other requirements, they demonstrate: a) good behavior during the execution of the sentence; [...] c) satisfactory performance in the work assigned; and d) ability to provide for their own subsistence through honest work (Art. 83, of the Penal Code). Additionally, Art. 132, § 1 of the Law requires that the beneficiaries secure lawful employment within a reasonable period, provided they are able to work.

A crucial concern lies in the open-ended nature of these requirements, which may be applied through a network of negative stereotypes disproportionately attributed to Black individuals. This dynamic is particularly acute in the prison system, where Black people are dehumanized for transgressing an established order that relegates them to spaces of subordination.

Questions to be considered:

a) Can the expressions “good behavior,” “good performance,” and “ability to provide for one’s own subsistence” be interpreted in biased ways, consciously and unconsciously, through stereotypes of dangerousness, aggressiveness, or other disqualifying attributes historically imposed on the Black population?

b) Does the requirement of lawful employment adequately account for actual work opportunities accessible to the Black population, given the prevalence of underemployment and precarious labor conditions?

c) If the applicant is a Black woman, does the intersection between race and gender alter the evaluation of occupation activity, particularly in cases of unpaid domestic labor or informal work without formal employment ties?

d) When other social markers intersect with race and gender (e.g. sexuality, disability, age, or class), do the interpretation of lawful employment requirements need to incorporate the historical and current experiences of the Black population under these intersectional conditions?

5.4.2.5 Electronic monitoring

Although electronic monitoring is often considered an important alternative to incarceration, it may disproportionately disadvantage the Black population. Essential conditions for its use are not always available, such as reliable access to electricity to recharge the device or the capacity to keep the ankle monitor free from damage. For unhoused individuals, constant exposure to the sun and rain makes compliance even more difficult. The result is often the reduction or revocation of benefits, which undermines future eligibility for release measures.

Another dimension concerns the spatial and temporal restrictions associated with electronic monitoring. These disproportionately affect individuals who live in peripheral areas with poor infrastructure, difficult or restricted access, or who work far from home, requiring lengthy commutes. Such circumstances can lead to unjust findings of non-compliance.

Questions to be considered:

a) In granting or revoking the benefit, were the material conditions necessary to maintain the device considered - such as access to electricity and protection against environmental exposure – which are not equally available to all, particularly to Black individuals?

b) In assessing compliance with temporal and spatial restrictions, was it considered that Black individuals disproportionately reside in locations with limited access and may work in distant areas, facing long commutes and unpredictable barriers, thereby risking unfair treatment?

5.5.3 Alternative sentence

The enforcement of alternative sentences (Art. 44 of the Penal Code) may disproportionately impact Black individuals. Financial obligations, weekend restrictions, or the requirement to balance working with community services can impose heavier burdens on those already facing economic precarity. For example, weekend restrictions may conflict with supplementary income activities that are crucial for subsistence.

Additionally, penalties involving restraint of rights (Art. 47 of the Penal Code) – such as prohibition from exercising a profession, activity, or trade requiring special qualification, license, or government authorization, or suspension of a driver's license – can have direct repercussions on the material survival of Black individuals. From a racial perspective, prohibitions against frequenting certain places must also be critically examined.

Questions to be considered:

a) Are restrictive penalties that involve financial costs or reduce income through limitations on professional activity compatible with the material conditions of Black individuals, also considering gender and other intersecting social markers?

b) In imposing prohibitions on frequenting certain places, was consideration given to the racialized stigmatization of community spaces predominantly inhabited by Black populations?

5.5.4 Commitment

According to Art. 175 of the LEP, the certificate of cessation of dangerousness must be verified at the end of the minimum period of the commitment by examining the personal conditions of the individual.

Once again, it is important to highlight how negative meanings historically attributed to the personality of Black people can influence the attestation of dangerousness in the context of commitment.

Question to be considered:

a) Can stereotypes (dangerousness, aggressiveness, and other disqualifying meanings) attributed to the Black population - considering the intersectionality of gender and other social markers - negatively influence the assessment of the cessation of dangerousness?

5.5.5 Disciplinary regime

Article 50 of the LEP provides for the following infractions: disciplinary incitement or participation in a movement to subvert order or discipline (item I); improper possession of an instrument capable of offending the physical integrity of another (item III); and causing a work accident (Item IV). These provisions are broadly worded, which may allow biased interpretations, classifying behaviors that lack sufficient disvalue to as materially typical infractions.

Similarly, the Differentiated Disciplinary Regime (RDD) may be imposed on anyone who commits a willful crime constituting a serious offense and causes subversion of internal order or discipline. It may also apply to convicted or provisional prisoners who present a high risk to the order and security of the penal establishment or society, or who are suspected of involvement in a criminal organization, association, or private militia, regardless of whether a serious offense has been committed (Art. 52, § 1, I and II, LEP).

Questions to be considered:

a) Can the expressions "incitement or participation," "improper possession of an instrument," "causing an accident," and "causing subversion of order" be interpreted in a biased manner, consciously and unconsciously, through negative stereotypes (dangerousness, aggressiveness, and other disqualifying meanings) attributed to the Black population, leading to the imputation of disciplinary infractions?

b) Is it possible that stereotypes (dangerousness, aggressiveness, and other disqualifying meanings) attributed to the Black population and considering the intersectionality of gender and other social markers, negatively influence the classification of a person as "high-risk" for the purposes of determining the differentiated regime?

c) Was the assessment of the evidence of the materiality and authorship of the disciplinary infractions conducted free of conscious and unconscious biases that, due to the stigmas attributed to the Black population, could violate the principle of the presumption of innocence?

5.6 Electoral Law

Since the creation of the Commission for the Promotion of Racial Equality on March 8, 2022, the Electoral Court has made a public commitment to "increase the participation of the Black population in the electoral process"[189].

189 Article 1 of Ordinance 230, of March 8, 2022 (TSE).

In recent years, several legislative initiatives have been approved with the aim of strengthening racial equity in the Legislature by promoting the active and passive electoral capacity of the Black population – for example, the express requirement that part of the campaign financing fund be allocated to ensure the electoral viability of Black candidates. For such measures to be effective, however, the approval of affirmative action policies must be accompanied by strict control over their implementation[190].

A key debate now before the Electoral Court concerns the identification of the actual beneficiaries of these affirmative action policies. Should the legal prerogatives created by law in the electoral sphere for the Black population apply to all citizens who self-identify as Black?

While Black candidates can often be identified through phenotypic analysis, the same does not apply to candidates who self-identify as Brown. In a country historically marked by miscegenation, many individuals may see themselves as Brown even if society does not necessarily perceive them as a person of color.

To address this complexity, Hetero-identification Committees have emerged as important mechanisms in the electoral sphere. These committees replicate society's perspectives to assess whether candidates who self-identify as Black are in fact socially perceived as such. Their adoption by regional electoral courts – or the use of additional judicial analysis and help minimize distortions in election results[191].

That said, the role of the electoral judge remains central. Whether or not preceded by the opinion of a hetero-identification committee, it is up to the judge to analyze a candidate's self-declared race to determine whether they fall within the scope of affirmative action policies.

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190 According to Article 24 of Resolution 23,729 of February 27, 2024:

§ 7 The Electoral Public Prosecutor's Office will be notified of the statements made under the terms of § 5 of this Article and their processing for monitoring and, if necessary, adoption of measures related to the inspection of transfers of public resources reserved for candidacies of Black people and the investigation of possible illicit acts.

§ 8 Civil society associations, collectives, and movements may request a list of candidates who have declared their race following § 5 of this Article. Under the penalties of the governing legislation, the requesting individuals and entities shall be obliged to ensure that the data is used to monitor the transfer of public funds to Black candidates.

§ 9 Political parties, federations, and coalitions may, as a means of promoting the reliability of information on the candidacies of Black people, create a hetero-identification committee to analyze the phenotypic elements of their candidates who intend to declare their race as Black or Brown in their candidacy registration.

191 "Half of the elected parliamentarians who claim to be people of color are white. In the 2022 elections, Brazil elected 517 members of parliament who declared themselves persons of color, representing 32.3% of the federal, state, and senators who will take office in 2023. However, not all these politicians can be considered people of color in the eyes of Brazilian society. At the request of UOL, a racial hetero-identification panel — a method used to prevent fraud in racial quotas — indicated that only 263 of these elected officials are people of color." Available at https://noticias.uol.com.br/politica/ultimas-noticias/2022/11/20/metade-dos-parlamentares-eleitos-que-dizem-ser-negros-sao-brancos.

It is essential to distinguish between two issues: every citizen has the right to self-identify as they see themselves and whether that self-declared identity aligns with the criteria established by public policy.

> **Attention**: self-declaration must be respected as a fundamental individual right, allowing citizens to present themselves in the way they perceive their own identity. However, the electoral judge has the institutional duty to assess whether a citizen, even if self-declared as Brown, falls within the scope of the affirmative action policies under discussion – policies conceived with specific criteria that must be preserved. One matter concerns the individual right to self-declaration; another concerns the determination of whether that individual meets the criteria established by the public policy for the application of affirmative action.

A person who is not socially perceived as Black should occupy spaces – nor receive resources – intended to promote those who experience the discrimination historically faced by Black people.

In this regard, the judge must verify whether a self-identified Brown candidate is, in practice, a potential victim of racial prejudice in daily life and in the electoral process. For example, in a society marked by phenotype-based racism[192], some Brown individuals may pass as white in certain contexts and thus not suffer discrimination. In these cases, granting them the prerogatives of affirmative electoral policies risks undermining the policy's intended beneficiaries.

Questions to be considered by the judge:

a) From a social standpoint, would a company resist hiring a self-identified Brown person because of their skin tone? Would they receive special treatment in social or professional settings due to their Afro-descendant status?

b) In the electoral sphere, is the candidate a potential victim of racial prejudice during the campaign - for example, facing resistance in presenting ideas or difficulties convincing voters because of their skin tone or physical features?

192 It is often said that there are two types of racism, namely, racism of mark and racism of origin. Racism of mark is based on the social marker "skin color," so the darker a person's skin color is, the more Afro-descendant features they have (hair, nose, lips, etc.), the greater their exposure to discriminatory social situations. Racism of origin is centered on a person's ancestry. In Brazil, racism of mark is predominant because there is a social standard that indicates more significant difficulties in transit when a person has more characteristics that identify them with the phenotype of a Black person.

c) Does the person who self-identifies as Brown recognize themselves as being a person of color, or are there indications that such recognition has arisen only in the context of potential electoral benefits?

In borderline situations, it may be advisable for the judge to summon the candidate for an in-person or videoconference interview. This can help clarify doubts when phenotypic analysis is impaired by poor-quality documentation or photos.

The analysis should always be case-specific and time-specific. Previous recognition of a candidate as Black – by another hetero-identification committee or using quota in another context – does not create a vested right to benefit from affirmative action in future elections. These policies must adapt to the social and territorial realities of each electoral cycle.

Finally, in addition to traditional sanctions for electoral violations, judges could also impose educational measures, such as campaigns against racial discrimination in elections or awareness-raising activities on hetero-identification criteria and their fair distribution of party resources and campaign time.

It is crucial to stress that indiscriminately including all Brown individuals in affirmative electoral policies, especially those with lighter skin or without phenotypic traits socially associated with Blackness (hair, nose, lips, etc.), could distort and undermine these policies. Such inclusion would broaden the beneficiary group excessively, leaving those who truly suffer racial discrimination in a more vulnerable position. Ensuring the careful and consistent application of affirmative action in the electoral context is, therefore, a fundamental condition for promoting racial equality in the competition for elected office.

5.7 Social Security Law

This section addresses the judging of social security lawsuits from the perspective of race, considering how this social marker of difference influences requests for social security and welfare benefits[193]. Black people who make such requests often encounter greater obstacles in having their rights recognized due to stereotypes and social inequalities resulting from structural and institutional racism.

193 Benefits consist of cash payments made by Social Security to insured individuals or their dependents to cover the events of illness, work-related accidents, disability, death, or old age, as well as contribution time and work subject to special conditions; maternity protection; family allowance and imprisonment assistance; and welfare payments paid to the elderly or disabled. Source: Boletim Estatístico da Previdência Social – BEPS, vol. 28, número 12.

Black people account for 56.1% of the Brazilian population. They are also the majority among the unemployed and informal workers, according to data from the second quarter of 2023 from the IBGE's Continuous National Household Sample Survey (PNAD)[194].

The same survey revealed significant disparities in education: in 2023, 3.2% of white people aged 15 or over were illiterate, compared to 7.1% of Black people. The gap widens among the elderly: illiteracy affected 8.6% of white people aged 60 or over, while among Black people in the same age group it reached 22.7%. In every case, the illiteracy rate of Black people was at least twice as high as that of white people.

Illiteracy and low levels of education reduce access to formal, better-paid jobs, forcing Black people into unemployment, informal work, or precarious, low-paid activities such as construction work, day labor, domestic work, and general services. For Black women - who are positioned at the bottom of the social structure - the disadvantages are even worse, as they remain concentrated in care tasks, both within their own families and as domestic workers and day laborers[195].

In the second half of 2023, 46.1% of the employed Black population worked informally. Among Black women, 46.5% worked without a formal contract and did not contribute to Social Security. Their wages placed them at the lowest end of the pay scale: they earned 38.4% less than non-Black women, 52.5% less than non-Black men, and 20.4% less than Black men. In turn, Black men earned 40.2% less than non-Black men and 22.5% less than non-Black women[196].

In management and executive positions, IBGE data from 2023 also highlight inequalities: non-Black men held 5.1% of these roles, non-Black women 4.5%, while Black men and Black women each accounted for only 2.1%.

This scenario of inequality – marked by low educational attainment, high informality, higher unemployment, and predominance in low-paid activities – leads Black people to contribute less frequently and in smaller amounts to social security, or sometimes not at all. Consequently, with fewer records of formal employment, they tend to receive lower benefits and face more difficulties in the procedures before the National Institute of Social Security (INSS) and in court.

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194 DIEESE: A inserção da população negra no mercado de trabalho. Available at https://www.dieese. org.br/infografico/2023/populacaoNegra.html. Accessed on September 10, 2024.

195 As dificuldades das trabalhadoras domésticas no mercado de trabalho e na chefia da família. Available at https://www.dieese.org.br/boletimespecial/2024/trabalhoDomestico.html . Accessed on September 10, 2024.

196 Non-Black people: white, Asian, and Indigenous people.

Another barrier arises from racist stereotypes during the medical examinations required for disability-related benefits. Black people are often perceived as more resistant to pain or physically stronger, which can lead experts to conclude that they are fit to continue working – primarily in manual labor – even when their health, age, and education clearly impose considerable limitations.

It is therefore essential to adopt a racial perspective in the analysis of evidence and the judgment of social security lawsuits, recognizing the vulnerabilities that affect the Black population. Doing so makes it possible to address the difficulties they face, especially concerning proof of requirements such as waiting period, insured status, and incapacity for work – requirements that also apply to continued welfare benefits for people with disabilities.

To ensure a fair and equitable analysis of social security actions from a racial perspective, while also taking into account possible intersectionality with gender, the following guidelines are recommended:

a) Identify vulnerabilities, such as race or ethnicity through self-declaration or self-identification, preferably from the initial petition. If necessary, request sensitive but essential data (e.g. race, ethnicity, gender, age, social class) to understand structural violence in the case;

b) Recognize the existence of racial and gender biases that assign Black women predominance in care and domestic tasks;

c) Consider both formal and informal work, so as not to compromise Black people's right to social security benefits, since they are disproportionately concentrated in informal activities without records in the Work and Social Security Card (CTPS);

d) In analyzing insured status and need, consider historical inequalities that hinder Black people's access to formal employment;

e) Recognize and value contributions made in informal and precarious work, adapting the assessment of evidence to reflect these realities, and include them in the calculation of contribution periods when supported by testimonial or documentary proof beyond formal records;

f) In disability benefit cases, reject expert conclusions that undervalue domestic work or suggest work capacity inconsistent with the evidence, especially when permeated by racial and gender biases (e.g., the idea that Black people are more resistant to pain, or that women are destined for domestic tasks);

g) Allow diverse forms of evidence, including those listed in Art. 106 of Law No. 8,213/1991, such as non-traditional testimonial

and documentary evidence (e.g., videos and photos), to recognize the special insured status of Black rural workers;

h) Interpret Art. 11 of Law No. 8,213/1991 in line with the Federal Constitution, ensuring that Black women are not excluded from insured status because they do not work "directly" in rural activities, and instead include their invisible contributions (care work, food preparation, gardening, child and animal care, among others);

i) Accept documentation in the name of third parties for single Black women, when consistent with testimonies and other supporting evidence of the status of special insured persons;

j) Ensure that occasional or concurrent precarious "side jobs" – such as manicurist, cleaner, driver – do not disqualify or undermine special insured status. When judging such cases, consider the seasonal nature of rural activities together with the subsistence role of the claimant's work for themselves and their families;

k) In hearings, use simple language and avoid expressions that reinforce stereotypes about Black people's work, especially Black women's historic placement in informal, precarious, and low-paid activities; and

l) Understand the judicialization of social security benefit claims in terms of race and gender stereotypes and biases, and prioritize structural solutions to recurring demands.

Attention: by adopting a racial perspective in the assessment of evidence and the judgment social security lawsuits, the Judiciary recognizes that Black people have historically been concentrated in lower-paid, informal, or precarious work, and in activities involving significant physical strain, such as domestic work and other forms of manual labor.

Without recognizing the social inequalities that affect the lives of Black people, it is impossible to ensure their access to essential goods on an equal footing with others. This is also true for social security benefits, which are designed to cover circumstances that prevent the insured from carrying out their work activities – whether due to age or temporary or permanent disability.

Thus, by observing the guidelines established in this document, the Judiciary is expected to move toward racial justice and equity within the field of social security, guaranteeing that all individuals may access the social security and welfare benefits to which they are entitled, free from racial discrimination and from stereotypes that cause significant harm to society.

5.8 Labor Law

5.8.1 Introduction

Brazil's racial inequality is deeply rooted in its colonial past and the history of slavery. Although slavery was formally abolished in 1888, the marginalization and denial of rights of the Black population persisted in the post-abolition period, with long-lasting impacts that continue to shape contemporary society. In the labor sphere, these structural inequalities restrict full citizenship and the socioeconomic inclusion of Black people, manifesting in wage discrimination, limited access to qualified employment, and precarious working conditions.

Labor Law is an essential tool for guaranteeing human dignity, establishing minimum rights to be ensured for all, as provided by the Federal Constitution and labor laws. However, the application of these standards must explicitly incorporate a racial perspective, since a merely neutral interpretation of the law risks perpetuating discrimination and reinforcing the marginalization of the Black workers.

Adopting a Protocol for Judging with a Racial Perspective in Labor Law expands the understanding of labor relations beyond the traditional dichotomy between capital and labor. In this sense, it contributes both to national and international commitments[197] to combat racism and constitutes an important step toward transforming and promoting equality, especially in the labor market.

This Protocol therefore seeks to guide judges, lawyers, prosecutors, law students, and the broader labor law community to engage actively with the racial agenda, promoting justice that goes beyond the formal application of the law. Its objective is to prepare professionals to act as key agents in the fight against structural inequalities and to use this instrument to promote, implement, and continuously improve racial justice.

197 Brazil is a signatory to several international treaties aimed at combating discrimination and racism, such as: the International Convention on the Elimination of All Forms of Racial Discrimination, signed by Brazil on March 7, 1966 (Legislative Decree No. 23 of June 21, 1967); the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance, ratified by Brazil, under Decree No. 10,932 of January 10, 2022; Convention 111 of the International Labor Organization, concerning Discrimination in Employment and Occupation, ratified and enacted by Brazil (Decree No. 10,088/2019, art. 2, XXVIII); and the Durban Declaration on Racism, Racial Discrimination, Xenophobia, and Related Forms of Intolerance

5.8.2 Racism and racial discrimination in labor relations

Structural Racism and the Racial and Sexual Division of Labor

Despite extensive legal protections, racial discrimination in the Brazil's labor market remains a persistent reality. Research demonstrates the existence of a racial and sexual division of labor that structures and reproduces inequalities[198]. Even within environments governed by the same standards, Black people and women continue to face lasting disadvantages[199].

The racial division, rooted in colonialism and slavery, manifests in occupational segregation based on race[200]. This involves both the concentration of racial groups in certain professions and disparities in hierarchy, pay, and working conditions. Charles W. Mills, in "The Racial Contract," exposes how modern Western societies are built on implicit racial structures that underpin power and racial oppression[201].

In Brazil, slavery created the foundation for structural racial segregation in the labor market. Black workers remain overrepresented in low-wage and undervalued sectors such as domestic services, construction, and low-tech industries, while white workers dominate higher-paying professions in technology, finance, and other elite fields. Even when educational levels and experience are equivalent, Black workers earn significantly less than their white counterparts[202].

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198 IBGE. Desigualdades Sociais por Cor ou Raça no Brasil. Estudos e Pesquisas Informação Demográfica e Socioeconômica, n.41 Available at https://biblioteca.ibge.gov.br/visualizacao/livros/liv101681_in- formativo.pdf. Accessed on August 18, 2024.

199 Apud MOREIRA, Adilson José. Tratado de Direito Antidiscriminatório. São Paulo: Contracorrente, 2020.p.3242

200 The term "race" is used here in a social sense, reflecting the historical and cultural construction that has been used to justify inequalities and segregation. As highlighted by Ta-Nehesi Coates (COATES, Ta-Nehisi. *Entre o mundo eu*. Translation by Paulo Geiger. São Paulo: Objetiva, 2015), "Racism created the concept of race, and not the other way around," emphasizing that racial categories were constructed to legitimize the domination and exploitation of certain social groups. Brazilian sociologist Clóvis Moura complements this view in "*Dialética Radical do Brasil Negro*" (MOURA, Clóvis. *Dialética Radical do Brasil Negro*. 3 ed. São Paulo: Anita Garibaldi, 2020) when analyzing how "race" was an ideological tool used to maintain inequalities and structural racism in Brazil. These perspectives emphasize the need to understand "race" as a concept deeply rooted in social, political, and economic structures.

201 MILLS, Charles W. *O contrato racial*. Rio de Janeiro: Zahar, 2023.

202 In the same year, the unemployment rate was 11.3% for the white population, 16.5% for the Black population, and 16.2% for the Brown population. The underemployment rates for these populations were 22.5%, 32.0%, and 33.4%. The average income of white workers (R$3,099) was much higher than that of Black workers (R$1,764) and Brown workers (R$1,814) in 2021. More than half (53.8%) of the country's workers in 2021 were Black or Brown, but these groups, together, occupied only 29.5% of management positions, while whites occupied 69.0% of them. Source: IBGE, Op. cit.

Did you know? Domestic work - historically neglected by law and policy - is performed predominantly by Black women[203]. This illustrates the intersection of race and gender as compounded markers of inequality. This reality perpetuates exploitation and economic vulnerability, limiting opportunities for mobility and reinforcing structural disparities.

Institutional Racism and the Myth of Meritocracy

Even in the face of evident racial and gender disparities, the ideology of meritocracy remains influential in Brazilian society. Merit is often presented as a neutral and objective criterion for distributing rights, resources, opportunities, social roles, and power. According to this perspective, inequality in the workplace results solely from differences in effort and ability, rather than from inherited structural conditions[204].

However, as Adilson Moreira notes, neutrality and objectivity are not beyond question[205]. The discourse of meritocracy masks both the historical restrictions imposed on Black people and the contemporary disadvantages arising from stereotypes and stigmas. In recruitment and promotion, criteria irrelevant to job performance are frequently applied - consciously or unconsciously – reinforcing exclusionary practices. As Adilson Moreira explains, even an employer who genuinely seeks to act objectively may be influenced by unconscious racial biases or latent animosity toward certain racial groups, thereby favoring candidates perceived as belonging to hegemonic groups[206].

Discrimination does not always stem from intentional prejudice but often from unconscious biases that shape negative perceptions of racialized groups. This leads to institutional discrimination, when workplace "rules, processes, standards and tools used subtly favor those perceived as belonging to hegemonic groups"[207].

5.8.3 Racial discrimination in hiring, promotion, retention, and the workplace

Promoting racial equality and combating discrimination in labor relations are fundamental principles guaranteed by Brazilian legislation and international treaties ratified by Brazil. The Federal Constitution of 1988 establishes equality

203 Ibid

204 VAZ. Lívia Sant'anna. Cotas raciais. São Paulo: Jandaíra, 2022.

205 MOREIRA, Adilson José. Op. cit., p.336.

206 Ibid, p.329.

207 BENTO, CIDA. O pacto da branquitude. São Paulo: Companhia das Letras, 2022. p. 72.

before the law and prohibits all forms of discrimination. The Consolidation of Labor Laws (CLT) similarly forbids discriminatory practices, while Law No. 9,029/1995 explicitly prohibits discrimination in hiring and in maintaining employment on the grounds of sex, origin, race, color, or marital status, among others.

On the international level, ILO Convention No. 111 and the UN International Convention on the Elimination of All Forms of Racial Discrimination reinforce Brazil's obligations to ensure inclusive, non-discriminatory workplaces.

Recruitment and Selection

Racial discrimination in hiring reflects structural and institutional racism across Brazilian society. As Sueli Carneiro observes, "blackness comes before the person, blackness comes before the professional, blackness comes before gender, blackness comes before the university degree, blackness comes before wealth"[208]. This highlights how racial identity is often prioritized above qualifications or professional experience.

In recruitment processes, requiring photographs on resumes functions as a mechanism of racial discrimination. The Black phenotype often does not align with the idealized corporate image, making appearance the first stage of exclusion[209], regardless of qualifications. Discrimination may also manifest in interviews, once candidates' racial identity becomes visible.

In addition, seemingly neutral requirements – such as fluency in a foreign language or specialized software skills - may be imposed even when not essential to the role. Such criteria, in practice, serve to exclude certain racial groups with less access to these resources.

As Adilson Moreira notes, such standards disguise racial exclusion beneath a false neutrality[210].

Promotion and Representation in the Workplace

Hiring Black workers is not sufficient to eradicate racism in the workplace. Judges must assess not only the quantitative presence of Black employees but also the qualitative dimension: the positions they occupy.

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208 CARNEIRO, Aparecida Sueli. A construção do outro como não-ser como fundamento do ser (Doctoral dissertation). University of São Paulo, São Paulo, 2005.p.131-132.

209 DIAS, Arleam Francislene Martins. Proposta para a construção de um Protocolo de Julgamento com Perspectiva Racial. 2024.

210 MOREIRA, Op. cit.

Black employees are frequently concentrated in cleaning, maintenance, and security, while remaining absent from leadership and strategic roles. This distribution signals institutional racism.

Disparities in promotion and pay also reveal significant disparities. The lack of Black professionals in leadership roles provides strong evidence of discriminatory practices. Selection for management often relies on subjective criteria such as trust, even when roles are technical, enabling exclusion in favor of personal affinities. Judges must scrutinize whether objective, transparent criteria were applied in such cases.

Retention and Wage Inequality

As discussed earlier, statistical data indicate that Black workers are less likely to hold formal jobs and, when formally employed, are paid less than white workers. These inequalities are amplified by gender: Black women remain at the bottom of wage scales, with minimal career prospects.

Motherhood further compounds these disadvantages, as the absence of family and state support forces many women to leave employment, curtailing advancement.

Black workers also face disproportionate dismissal rates during corporate restructurings. Even though Brazilian Labor Law does not require justification for termination of employment without cause, judges must conduct both quantitative and qualitative analyses to determine whether race was a hidden factor in the dismissal.

Recreational Racism in the Workplace

As defined earlier in this Protocol, recreational racism trivializes racial discrimination under the guise of humor. In the workplace, it produces hostile environments, undermines collaboration, and harms the mental health of affected employees. Practices such as jokes, nicknames, and imitations dehumanize individuals and normalize discrimination. Though often minimized as “just jokes,” these practices reinforce exclusion and must be treated with the seriousness they deserve.

> **To learn more**: for example, an employee who makes a joke about a Black colleague’s physical traits or cultural stereotypes perpetuates racial stigmas, undermines the colleague’s self-esteem, and reinforces harmful stereotypes. Another common manifestation is the use of racist nicknames – such as referring to people as animals - or imitating accents in a caricatured way. These practices dehumanize individuals and ridicule their racial identity.

Recreational racism fosters a toxic work environment in which Black employees feel devalued and insecure. This hostile climate also weakens other team members who, even if not directly involved, often feel powerless to intervene for fear of reprisals. The result is heightened stress and anxiety, with negative repercussions on workers' well-being and mental health.

Another common practice is the isolation of victims of recreational racism, even within collective settings. This segregation hinders access to professional opportunities, leads to reduced productivity and emotional exhaustion, and creates a cycle of devaluation: Black professionals are denied tasks compatible with their skills, experience a decline in performance, and ultimately face dismissal, which is then rationalized as justified.

Lívia Sant'Anna Vaz[211] reflects on the impact of racial microaggressions, which are subtle manifestations often disguised as harmless comments or jokes, which are classified as a form of recreational racism. According to her, "microaggressions are a constant reminder to Black people that they do not belong in the spaces they occupy"[212].

Although often underestimated, recreational racism produces profound impacts on the workplace and the lives of workers. To combat it, companies must adopt equity policies, provide continuous education, and ensure leadership is genuinely committed to inclusion.

In legal proceedings, it is essential that judges recognize that these acts, despite being presented as "harmless pranks," have real and damaging consequences. The evaluation must consider testimonies, internal complaints, and evidence of the company's diversity training and policies. As Adilson Moreira emphasizes, a company's failure to respond adequately to these practices "reinforces structural and institutionalized racism"[213].

Judging from a racial perspective, therefore, requires courts to ensure that such practices are identified, corrected, and sanctioned. This includes recognizing the psychological harm caused by recreational racism and determining appropriate reparations[214].

Work Environment

By its hierarchical nature, the employment relationship creates a power imbalance: employers control production and decision-making, while employees

211 VAZ, Lívia Sant'Anna. Cotas Raciais. São Paulo: Jandaíra, 2022.p. 45.

212 Ibid.

213 MOREIRA, Op. cit., p. 329.

214 Ibid, p. 345.

exchange their labor for wages. This imbalance becomes particularly harmful when combined with discrimination, creating conditions for racialized moral harassment.

Promoting harmony in the workplace through inclusivity and non-discrimination is not only a matter of justice and human rights but also a legal duty. Articles 156 and 157 of the CLT require companies to ensure healthy and safe working conditions, complying with occupational health and safety standards.

Harmony in the workplace is built on respect and inclusion, supported by affirmative action, occupational health policies, accessible reporting and support mechanisms, and active monitoring of anti-discrimination practices. Such an A environment benefits both workers and organizations: it improves collective well-being, enhances productivity, and facilitates the early identification and prevention of discriminatory behavior.

Moral harassment is a particularly insidious form of psychological violence, undermining workers' dignity, health, and integrity. Marie-France Hirigoyen defines it as:

> [...] any and all abusive conduct manifested primarily through behaviors, words, acts, gestures, or writings that may harm a person's personality, dignity, or physical or psychological integrity, jeopardize their employment, or degrade the work environment[215].

Moral harassment ranges from disqualification to outright exclusion in the workplace. It can occur not only in hierarchical employee-employer relations but also among peers or even with external parties, illustrating how structural discrimination permeates daily professional interactions.

For Black workers, racialized moral harassment can trigger depression, anxiety, post-traumatic stress, and suicidal ideation. These effects are often aggravated by the lack of institutional support, leaving victims without adequate resources to cope – whether due to ineffective company mechanisms or the stigma of reporting such violence.

The phenomenon can also manifest collectively. Collective moral harassment arises when abusive practices are systematically directed at groups, undermining their dignity and creating hostile environments. In such cases, racial discrimination can stem both from interpersonal behaviors and from organizational policies that, even subtly, perpetuate exclusion and marginalization.

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215 Hirigoyen, M.-F. Assédio moral: a violência perversa no cotidiano. Rio de Janeiro: Bertrand Brasil. 2011. p. 65.

Employers' repeated failure to address discriminatory practices or their active misuse of authority become tools of oppression, violating fundamental rights and perpetuating systemic inequality.

Meaningful change requires concrete action. Companies must implement transparent criteria for hiring, promotion, and dismissal, and prepare leaders to make decisions grounded in racial awareness rather than stereotypes. A lack of diversity and inclusion policies or of regular training on unconscious bias signals an absence of institutional commitment to employee dignity.

In proceedings involving racism or racial harassment, testimony from parties and witnesses is central to understanding workplace. HR reports on discrimination complaints and the measures taken in response are also vital evidence.

If a company claims to value diversity, its actual practices must be verified: for instance, the existence of racial quotas in recruitment, training and development programs for Black employees, retention policies, and measures to ensure Black representation in leadership positions. These are essential tools to reduce racial discrimination and promote equality.

Despite the existence of HR departments, ombudsperson offices, and internal committees, these channels are not always activated by employees. Even when they are, the procedures and outcomes often fail to provide adequate remedies or prevent recurrence.

Judges, therefore, may request the production of documentation to assess the organizational context and verify both interpersonal and institutional patterns of discrimination, as well as the effectiveness of preventive measures.

When adjudicating labor claims from a racial perspective, judges must recognize the role of their decisions in correcting inequalities and fostering fairer work environments. Beyond financial compensation, imposing corrective measures, such as diversity policies and mandatory training, are essential instruments for sanctioning and transformation available to the Judiciary.

Concealment and Resistance Strategies against Racism and Racial Discrimination in the Workplace

Cida Bento, in "O Pacto da Branquitude," discusses the discriminatory practices faced by Black people in corporate settings and the strategies they adopt - concealment, denial, and resistance to Black identity - to avoid reproducing racial stigmas and stereotypes that could jeopardize their chances of inclusion[216].

216 BENTO, CIDA.O pacto da branquitude. São Paulo:.Companhia das Letras,2022. p. 71.

Adilson Moreira systematizes these strategies in three categories:

> a) **Conversion process:** the Black individual alters personal features or identity to conceal their Blackness and avoid discrimination. For example, a Black woman may straighten her hair, or a Black man may shave his head to conform to corporate aesthetic standards that disfavor Afro-textured hair and hairstyles;
>
> b) **Passing:** the individual hides their racial identity, presenting themselves as a member of the dominant group to obtain its privileges and avoid racism. This can be seen when an employee of African-based religions conceals their practices and instead adopts religious or cultural expressions aligned with the dominant group.
>
> c) **Covering up:** the individual publicly affirms their identity but employs strategies to deflect attention from it. For example, a Black professional may affirm their racial identity yet avoid discussing race in the workplace to prevent being labeled as "militant" or "confrontational"[217].

These strategies reveal how workplace structures can coerce Black people into denying or concealing aspects of their racial, cultural and religious identities to meet corporate expectations. While such actions constitute forms of resistance to oppression, they also perpetuate ideologies of racial superiority and deepen inequality. They underscore the urgency of transforming the discriminatory structures that impose such sacrifices on the exercise of identity.

5.8.4 Contemporary slave labor

According to the historical series compiled by the Observatory for the Eradication of Slave Labor and Human Trafficking, between 1995 and 2023 approximately 63,516 people were found in conditions analogous to slavery. Most were Black and Brown workers recruited from areas of extreme socioeconomic vulnerability, particularly in the North and Northeast regions of Brazil, where limited opportunities in education and employment expose them to exploitation[218].

The sectors with the highest prevalence of rescues remain concentrated in rural areas - cattle ranching, sugarcane, forestry, and coffee production. However, contemporary slavery is a nationwide scourge, also affecting urban

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217 Another example is an employee who participates in diversity support groups or events outside of work but who, in the corporate environment, avoids discussing these issues openly or does not mention their participation in these groups to avoid attracting negative attention or being associated with stereotypes.

218 Observatório da Erradicação do Trabalho Escravo e do Tráfico de Pessoas. Available at https://smartlabbr.org/trabalhoescravo/localidade/0?dimensao=prevalencia. Accessed on August 20, 2024.

spaces. Domestic labor, for example, shows a striking prevalence of Black women among rescued workers[219].

> **Did you know?** Regarding the profile of victims of contemporary slave labor, in rural areas, most rescued workers are young, Black or Brown men with little or no education[220]. Although women account for only 6% of rescues across economic activities, 86% of them were subjected to domestic slavery[221].

The data show that contemporary slave labor is both racialized and shaped by intersections of class, regional origin and regional identity, disproportionately affecting poor, undereducated Black individuals in the North and Northeast regions.

Although Brazil has abolished slavery[222] [223], the exploitation of Black labor persists, differing mainly in that modern exploiters do not own the person but still subject them to degrading and coercive conditions.[224].

Despite the constitutional and international commitments assumed by the country, which condemn any form of submission of a human being to forced labor or labor analogous to slavery, contemporary slave labor persists. This reality not only reflects the extreme vulnerability of the victims but also highlights the lack of effective action by the Brazilian State to include the Black population in activities that provide them with a dignified existence and guarantee access to fundamental human rights.

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219 Ibid.

220 Ibid.

221 HADDAD, Carlos HB; MIRAGLIA, Lívia MM. Trabalho escravo: entre os achados da fiscalização e as respostas judiciais. Tribo da Ilha, 2018.

222 In the Brazilian domestic legal system, the grounds for rejecting the exploitation of slave labor derive, firstly, from the principles included in the text of the 1988 Constitution, provided for in its Article 1, Items III and IV, namely, the principles of human dignity and the social value of work. Still, in the constitutional sphere, Article 5, Items XIII (freedom of work, trade or profession) and XLVII, Item c (prohibition of forced labor), and Articles 6 to 11 protect the right to free and dignified work, with Articles 6 and 7 relating to the individual rights of workers and Articles 8 to 11 referring to collective labor rights and relations. In Article 170 of the Constitution, which concerns economic activity, it is noted that the principles of valuing human work, the right to a dignified existence for all, social justice (these three are provided for in the caput of Article 170), the socio-environmental function of property (extracted from the combination of Items III and VI of Article 170) and the pursuit of full employment (Item VIII of Article 170) also impose minimum civilized standards of dignity for work in the exploitation of economic activities, repugnant to any and all forms of forced and/or degrading labor.

223 As provided for in Art. IV of the Universal Declaration of Human Rights, in Art. 6 of the American Convention on Human Rights, in Art. 8 of the International Covenant on Civil and Political Rights, in Decree No. 5,017/2004, and ILO Conventions No. 29 and 105, as well as in the ILO Declaration on Fundamental Principles and Rights at Work of 1988.

224 JACOB, Valena; GUIMARÃES, Sandra Suely Moreira Lurine; MACHADO, Juliana. Escravidão: um conceito atenuado no Brasil neocolonial In FIGUERIA, Ricardo Rezende et al (org) Trabalho escravo contemporâneo: fenômeno global, perspectivas acadêmicas. Rio de Janeiro: Mauad X, 2023.

Under Art. 149 of the Penal Code, work in conditions analogous to slavery includes: forced labor, exhaustive working hours, degrading conditions, restriction of movement (e.g. debt bondage, denial of transportation, document retention), or overt surveillance.

The Ministry of Labor and Employment (MPT), through Ordinance MPT No. 671/2021 and Normative Instruction MTE No. 2/2021, further detail these concepts, listing indicators such as: recruitment through fraud or coercion; exploiting vulnerable conditions to impose abusive contractual terms; isolating workers in inaccessible areas without transport; and restricting freedom through debt or document seizure.

By way of example, Annex II of the aforementioned Normative Instruction sets out specific indicators of forced labor that can guide the characterization of contemporary slave labor and support the analysis of claims alleging a worker's submission to such conditions:

> 1 The following are indicators of submission of a worker to forced labor:
>
> 1.1 a worker who is a victim of human trafficking;
>
> 1.2 recruiting a worker through threats, fraud, deception, coercion, or other devices that lead to a defect in consent, such as false promises at the time of recruitment or payment to a person who has hierarchical power or command over the worker;
>
> 1.3 maintaining a worker in the provision of services through threats, fraud, deception, coercion, or other devices that lead to a defect in consent regarding their freedom to dispose of the labor force and to terminate the employment relationship;
>
> 1.4 maintaining a reserve workforce recruited without observing the applicable legal requirements through the dissemination of promises of employment in a location other than that where the services are provided;
>
> 1.5 exploiting the worker's vulnerable situation to insert abusive conditions or clauses into the employment contract, formally or informally;
>
> 1.6 a worker restricted to the workplace or accommodation when such location is in an isolated or difficult-to-access area, not regularly served by public or private transportation, or due to barriers such as lack of knowledge of the language or customs and traditions, lack of personal documents, situation of social vulnerability or non-payment of remuneration;
>
> 1.7 inducing or obliging the worker to sign blank documents with false information or information about which the worker does not understand.

For judges, these instruments are critical in applying abstract legal definitions to concrete cases. Any analysis must start acknowledging that contemporary practices are extensions of a Brazil's slaveholding past, where exploitation of Black population was naturalized.

Thus, a racial lens is indispensable: failing to recognize the racial marker risks naturalizing subordination and ignoring that slave labor is among the gravest offenses in society – comparable to torture, genocide, and rape[225].

Socioeconomic vulnerability remains a central factor. Workers, lured by promises of dignity, are often taken far from home, isolated, and unable to report their situation or escape.

Frequently, they bear all costs of employment – transport, food, housing – falling into perpetual indebtedness. Employers cannot justify degrading conditions by pointing to workers' preexisting poverty. On the contrary, they are legally and morally obliged to ensure dignified work conditions including food, housing, pay, and adequate clothing.

Domestic Slave Labor

Domestic slavery presents unique features. Often intergenerational, victims may not even recognize their condition, having lived in servitude since childhood or adolescence under the guise of "social charity."[226]. Poor families in remote areas may send children to wealthier households with promises of education and opportunity. Instead, these children are exploited by the host family in exhausting hours of domestic labor, forced to abandon schooling, and deprived of fundamental right to education[227].

This form of exploitation is considered one of the worst forms of child labor under Federal Decree No. 6,481/2008. It causes profound harm to development, leaving children literate or with major cognitive and communication deficits, and deepening their dependence on the employing family[228].

Despite claims that such workers are treated "as family," their reality is one of servitude: they lack healthcare, education, and freedom of social interaction. Their contact with the outside world is severely restricted, often leading to total social isolation and loss of ties with their biological families[229].

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225 MATOS, Saulo Monteiro Martinho de; SOARES, Pollyana Esteves, "Dizer para viver": trabalho escravo e a importância do relato para o resgate da confiança no mundo, Revista Direito e Práxis, 2024.

226 MESQUITA, Rodrigo Octavio de Godoy Assis; MESQUITA, Gabriela Piai de Assis. Grilhões ideológicos e escravidão contemporânea: a escravidão tradicional não se definia pela privação do direito de ir e vir. Revista dos Tribunais, vol. 1025/2021, Mar. 2021, p. 327-346.

227 Contributions to the Working Group forwarded by the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination at Work of the Public Ministry of Labor, signed by labor prosecutors Danielle Olivares Corrêa and Fernanda Barreto Naves, on May 3, 2024.

228 Ibid.

229 Ibid.

The domestic setting itself exacerbates invisibility, Cultural acceptance and social isolation make detection of slave labor difficult, with some victims rescued only after decades.[230] This scenario highlights that domestic servitude is not a mere exchange of favors or coexistence with the altruistic purpose of providing a humble person with a better life and work opportunities. It is, in fact, a sophisticated form of exploitation in which the employing family grants small benefits in exchange for the typical demands of an employment relationship.

Even in households with formally employed staff, enslaved workers may perform similar tasks without rights or recognition, highlighting the need to affirm their status as workers entitled to legal protections.

5.8.5 Training and Awareness: training in racial diversity for labor judges

Knowledge of racism, discrimination, and racial insult – and of how these issues operate in the labor market - is essential for labor judges to act and adjudicate with a racial perspective. Understanding how occupational segregation, harassment, and the various forms of racial discrimination manifest in the workplace allows us to identify how Black workers are disproportionately affected. These impacts include denial of access to hiring, promotion, retention, and even workplace sociability, with consequences that extend beyond professional trajectories to personal and family relationships.

Recognizing the historical, social, and economic processes that shaped the racial and gender division of the labor market, as well as current statistics on income and employment distribution among Black people, is crucial to understanding that structural racial asymmetries are not accidental. Rather, they are the result of socio-historical constructions that systematically relegate Black people to lower-status occupations, reduced salaries, and diminished professional prestige when compared to white people - as though this were a natural outcome of merit and or individual effort. However, these supposedly neutral and objective criteria perpetuate inequality and vulnerability for the Black population in the labor market.

> **Attention**: for justice to be truly equitable, labor judges must interpret labor standards with attentions to the social and historical context of each case. Applying the law in a purely neutral or abstract manner, without recognizing how mechanisms of racism and racial discrimination operate, risks reinforcing discrimination and violence against Black workers and perpetuating their subordination in the labor market.

230 MIRAGLIA, Lívia Mendes Moreira. O perfil das trabalhadoras domésticas resgatadas de trabalho escravo no Brasil. Available at https://www.estadao.com.br/politica/gestao-politica-e-sociedade/o-perfil-das-trabalhadoras-domesticas-resgatadas-de-trabalho-escravo-no-brasil/. Accessed on June 20, 2024.

In line with the protocol's purpose as a guide for judicial practice, we outline below some reflections and guidelines to support case analysis through a racial lens.

Guidelines for judicial action

I. **The judge's stance** – When analyzing the case, the judge must identify the context and the parties involved, questioning whether structural racial inequalities may hinder procedural participation or compromise the fairness of proceedings. Judges should also reflect on their own understanding of nuances of racism, racial discrimination, and intolerance in labor relations, to prevent unconscious biases from shaping case analysis.

For this reason, racial literacy is essential. Only with such awareness can judges avoid interpretations compromised by biases and stereotypes unfavorable to the Black population. This perspective reveals that rules appearing neutral or objective may, in practice, restrict the access by Black workers to certain positions or contribute to their subordination and precarious working conditions, with race serving as the central element of discrimination, even when unconscious or covert.

II. **Production and assessment of evidence** – Judges must also assess whether employees have fair conditions to produce evidence and be attentive to circumstances that may hinder this process. Black workers often face greater obstacles in proving racism, racial discrimination, and racial insult at works, either because such practices are hidden or, when public, dismissed as jokes or naturalized institutional roles. Therefore, procedural investigations must be guided by a racial perspective and intersectional perspective[231].

In many cases, evidence is limited to testimonies, which are difficult to obtain since discriminatory acts typically occur in private or are masked by supposedly neutral corporate policies. Even when witnesses exist, they may be reluctant to testify due to employment ties or fear of reprisals. Moreover, witness accounts may themselves be shaped by unconscious racial biases.[232]

Thus, the testimony of Black victims must be given the same value and credibility as any other, and the vulnerabilities affecting access to justice for Black people must be recognized as indicators guiding evidentiary analysis.[233].

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231 Contributions to the Working Group submitted by Dione Almeida and Renato Cassio Soares de Barros. Proposal for the Labor Area: Valuation and Reversal of the Burden of Proof in Cases of Racism, Racial Discrimination, and Racial Insult in Employment Relations.

232 Ibid.

233 CRIOLA. Recomendações para o Protocolo de Julgamento com Perspectiva Racial do Conselho Nacional de Justiça. Lúcia Maria Xavier, 2024.

Even when companies maintain reporting channels, inertia or delays in their use may stem from lack of support, fear of retaliation[234], or the institutional context. Documentary evidence, when it exists, is usually scarce and rarely produced voluntarily.

Accordingly, judges may request documentation on reporting channels, grievance offices, or anti-harassment committees, including their structure, membership, and procedures, as well as statistics on the nature and number of cases handled. They may also require proof of training and awareness programs on racial diversity, including frequency, mandatory participation (especially for managers), and the content of such activities.

It is also important to examine whether discriminatory practices are recurrent within the company and whether previous judicial interventions have prompted institutional change. Merely citing the numerical presence of Black employees – or their occupation of high-ranking positions – is insufficient to demonstrate the absence of racism. What must be examined is the institutional culture and its approach to racial issues.

Given the subtle nature of discriminatory acts, proving racism is inherently difficult. Therefore, under Art. 765 of the CLT, which grants labor courts discretion in directing proceedings, judges may relax procedural rules related to the burden of proof to ensure substantive equality. This may include shifting the burden of proof, accepting circumstantial evidence, and recognizing patterns of behavior as indicators of racist practices and hostile work environments.

III. **Reversing the burden of proof**[235] – In cases of racism, racial discrimination and racial insult suffered by Black employees, reversing the burden of proof is the most effective way to reach the truth. Employers are in a better position to discharge this burden, not only through testimonial evidence but also by demonstrating that the work environment is structured to prevent discrimination. Examples include:

a) Adopting remuneration criteria for employee access and advancement, proving the absence of distinction between gender and race;

b) Career acceleration programs with a racial focus;

c) Proportionality of gender and race in promotions and award rankings;

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234 Contributions to the Working Group submitted by Dione Almeida and Renato Cassio Soares de Barros. Proposal for the Labor Area: Valuation and Reversal of the Burden of Proof in Cases of Racism, Racial Discrimination, and Racial Insult in Employment Relations.

235 Contributions to the Working Group submitted by Dione Almeida and Renato Cassio Soares de Barros. Proposal for the Labor Area: Valuation and Reversal of the Burden of Proof in Cases of Racism, Racial Discrimination, and Racial Insult in Employment Relations.

d) Combating harassment, creating or maintaining a reporting channel, and carrying out training and awareness-raising actions;

e) Expansion of initiatives focused on racial issues, such as lectures on equality and discrimination, awareness-raising events, and training to ensure that recruitment and selection processes are increasingly fair and inclusive, minimizing unconscious biases;

f) Training of the human resources department on gender and racial inequality, with proof of the plural composition of the sector mentioned above.

The Brazilian procedural system expressly supports the reversal of the burden of proof, as established in Articles 818 of the CLT, 373 of the CPC, and Article 6, Item VIII, of Law No. 8,078/1990 (Consumer Protection Code). Article 8 of the CLT and Articles 4 and 5 of Decree-Law No. 4,657/1942 (LINDB) also reinforce this interpretation.

IV. **Analysis of the workplace environment** – Failure to address racial discrimination adequately in the legal field perpetuates exclusion and marginalization, undermining social development and justice. Judges must therefore adopt an informed, intersectional, and careful approach when analyzing workplace discrimination.

The following steps help ensure decisions consider the inherent complexities in such cases:

a) **Value the victim's testimony:** Recognize the importance of victims' testimonies in discrimination cases, especially when other evidence is difficult to produce.

b) **Recognize stereotypes:** Critically evaluate the evidence presented, considering that racial and gender stereotypes (e.g. hyper sexualization of Black women) can influence interpretations and judicial decisions.

c) **Separate personal experiences:** Understand that the personal experiences and the judge's experiences may differ from those of the victim, and it is essential to separate these situations to ensure an impartial analysis.

d) **Apply substantial equality standards:** Rely on national and international standards that recognize indirect discrimination and disproportionate impacts on the victim.

e) **Adopt an intersectional perspective:** Consider overlapping factors of oppression in case analysis.

f) **Engage in transconstitutional dialogue:** Consider international jurisprudence, especially the Inter-American Court of Human Rights, and conduct conventionality checks to avoid reinforcing structural inequalities.

V. **Contemporary slave labor**[236] – in proceedings involving contemporary slavery, judges must act with vigilance and humanity. Key guidelines include:

a) **Assess victim vulnerability:** Account for racial, socioeconomic, and cultural factors when determining protective measures.

b) **Examine rescue and reception:** Ensure adequate housing, nutrition, and safety, and activate social assistance if necessary.

c) **Consider physical and mental conditions:** Promptly order medical and psychological care to safeguard the victim's well-being.

VI. **Domestic slave labor** – In cases involving domestic slave labor, judges must adopt a sensitive and informed approach, considering the peculiarities of this form of exploitation. Guidelines include:

a) **Analysis of professional specificities:** Recognize the patriarchal and slavery-rooted legacy of domestic work, often performed within the employer's home and in isolation.

b) **Acknowledge relationships of affection:** Such ties do not alter the contractual reality of domestic service, especially in cases of child labor.

c) **Examine remuneration:** Absence or insignificance of remuneration may itself constitute slave-like conditions, under Annex II of MTP Normative Instruction No. 2/2021.

d) **Identify degrading conditions:** Work that imposes unworthy living conditions violates the minimum national and international decent work standards.

e) **Recognize social isolation:** Isolation produces moral, psychological, and existential harm requiring judicial recognition and reparation.

f) **Address structural harassment:** Isolation increases vulnerability to harassment, including by the employer's family.

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236 Contributions to the Working Group forwarded by the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination in the Workplace of the Public Ministry of Labor, signed by labor prosecutors Danielle Olivares Corrêa and Fernanda Barreto Naves, on May 3, 2024.

g) **Combat sexual harassment:** Judges must analyze with a gender and racial perspective, applying ILO Recommendation 206 on reversing the burden of proof in gender-based violence cases.

h) **Adopt protective measures swiftly:** Authorize entry into homes when evidence exists, order protective measures, and ensure payment of wages in line with ILO Recommendation 206.

i) **Ensure accessible hearings:** Use clear, simple language and confirm understanding by the deponent.

j) **Avoid racist language:** Refrain from expressions that perpetuate stereotypes or subordination.

k) **Provide a welcoming environment:** Avoid re-victimization, promote dignity, and account for structural inequalities in all proceedings.

Recognizing indicators of contemporary domestic slave labor[237]:

a) **"Raised to be cared for" cases:** When girls are taken into homes under false promises of education and decent living conditions;

b) **Work for food and shelter:** When labor is exchanged for subsistence without fair pay, it must be analyzed in light of Art. 149 of the Penal Code;

c) **Physical, moral, or sexual assault:** Classify as degrading work under Art. 149 of the Penal Code.

d) **Excessive working hours:** Situations preventing rest and social life.

e) **Restricted mobility:** Lack of documents, cultural barriers of financial vulnerability preventing workers' free movement.

5.9 Diffuse and Collective Rights (Collective Actions)

According to estimate by the National Forum of Collective Actions, based on the National Registry of Collective Actions (CACOL)[238] and data from the National Database of the Judiciary (DATAJUD), at least 50,000 collective

237 Contributions to the Working Group forwarded by the National Coordination for the Promotion of Equal Opportunities and the Elimination of Discrimination in the Workplace of the Public Ministry of Labor, signed by labor prosecutors Danielle Olivares Corrêa and Fernanda Barreto Naves, on May 3, 2024.

238 Established by Joint Resolution CNJ/CNMP No. 2/2011 and regulated by Ordinance No. 187/2023 of the CNJ.

lawsuits are currently being processed in Brazil[239]. These lawsuits concern diffuse, collective, and/or homogeneous individual rights within the microsystem of protection of diffuse and collective rights. CACOL data also indicates that more than 72% of collective judicialization occurs through Public Civil Actions (Law 7,343/1985), designed to protect and redress diffuse and collective rights such as the environment, and cultural and historical heritage.

Similarly, the CNJ's environmental data panel (SIRENEJUD)[240], shows that most cases concerning environmental protection are processed as Public Civil Actions. The TRF-1 Collective Action Panel[241] confirms this pattern, with socio-environmental matters representing most collective lawsuits in that jurisdiction.

These findings reveal a reciprocal relationship: socio-environmental rights are significantly judicialized through collective actions, and collective actions in Brazil largely concern socio-environmental matters.

From the perspective of this Protocol, and without disregarding other matters, special attention must be given to collective actions involving diffuse and collective socio-environmental rights, considering both the data presented and the consequences of Environmental Racism.

In socio-environmental conflicts, whether judicial or extrajudicial, the first obstacle faced by racialized groups is often to be recognized as subjects of rights. This occurs either because of State or corporate resistance to acknowledging their ethnic and/or racial character (as in the case of quilombola, Indigenous, and traditional communities), or due to restrictive and arbitrary conceptions of who qualifies as "affected" and, therefore, entitled to redress. Both practices may violate ILO Convention No. 169 and exacerbate the effects of racism.

Each group and community's relationship with the environment is unique and must be respected. For example, in ancestral African-based religions, the environment transcends residence: it encompasses sacred spaces such as terreiros. Decision requiring proof of residence to access reparations may therefore unjustly exclude these groups.

To prevent invisibility, judges must follow **CNJ Recommendation No. 76/2020**, which directs them to identify and delimit the groups holding the collective rights at stake. For this purpose, sources such as the Palmares Cultural

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239 Currently, the National Forum for Collective Actions seeks to qualify the treatment of this data to accurately identify the number of collective proceedings since individual actions were also included in the database. The raw data from CACOL points to 300,000 proceedings.

240 The panel, provided for in Joint Resolution CNJ/CNMP No. 8 of June 25, 2021, was developed through a Cooperation Project between the National Council of Justice (CNJ) and the United Nations Development Programme (UNDP).

241 https://www.trf1.jus.br/trf1/noticias/versao-do-painel-de-bi-para-monitorar-acoes-coletivas-na-1-regiao-esta-disponivel-para-acesso-

Foundation (FCP), and the National Foundation for Indigenous Peoples (FUNAI), INCRA, the Chico Mendes Institute for Biodiversity (ICMBio), state agencies, and councils of traditional peoples and communities are essential. SIRENEJUD itself is also a valuable tool.

Collective socio-environmental conflicts often involve complex technical issues, which can overshadow the lived experiences of affected communities. Judicial hearings should be convened to guarantee participation and give voice to affected groups. This practice aligns with the Rio Declaration of 1992 (Principle 10)[242] and recent CNJ recommendations[243].

CNJ Resolution No. 433/2021 requires that judges consider the broad impacts of environmental damage, including climate change, diffuse harms to peoples and communities, and the deterrent effect of judicial decisions.

Evidence production must integrate traditional knowledge, anthropological expertise, and plain-language accessibility for affected groups. Communities must be able to challenge polluter-produced reports, with access to technical assistance.

A landmark step in this direction is Law No. 14,755, which institutes the National Policy on the Rights of Populations Affected by Dams and guarantees affected communities the right to independent, multidisciplinary technical advice at the expense of the polluter. This model, enabling counter-reports that reflect cultural and traditional perspectives, should be replicated across socio-environmental litigation.

Other CNJ initiatives, such as the Land Solutions Commissions and Resolution No. 510, implementing ADPF 828/STF, establish guidelines for technical visits to areas subject to land ownership disputes and eviction-related cases. These are particularly relevant because access to land in Brazil has historically been shaped by policies and laws that excluded d Black and Indigenous communities, perpetuating concentration of land and structural inequalities.

An anti-racist approach requires that commissions: uphold the constitutional rights of quilombo communities (Art. 68 of the ADCT), coordinating with INCRA for land regularization and protection; address the historical exclusion of Black urban populations, who were forced into peripheral areas, slums, or other vulnerable spaces, by prioritizing housing rights in the face of evictions, gentrification, and speculative projects; promote inter-institutional dialogue and active listening, with inclusive hearings and transparency ensuring

242 ONU. Declaração do Rio sobre o meio ambiente e o desenvolvimento, 1992.

243 Cf. https://www.cnj.jus.br/cnj-recomenda-que-tribunais-adotem-consultas-publicas-em-decisoes-de-grande-alcance-social/

communities are protagonists in the resolution process.

Finally, Article 15 of CNJ Resolution No. 510/2023 requires that "action plans for evictions or removals take into account the social vulnerabilities of the affected population and ensure access to public housing or social assistance programs."

PART V

Strategies for incorporating the guidelines

Part V - STRATEGIES FOR INCORPORATING THE GUIDELINES

6. Strategies for incorporating the guidelines

The publication of a Protocol for Judging with a Racial Perspective, although an important step, underscores the Judiciary's recognition that the extensive national and international legal framework prohibiting racism, discrimination, and racial abuse is insufficient to bring about profound change in the justice system. Brazilian society remains deeply shaped by the legacies of its colonial, patriarchal, and slaveholding past, which continue to marginalize and exclude the rights of the Black population. Achieving judicial decision-making genuinely free from racial bias and discrimination requires ongoing efforts to raise awareness and adapt judicial practices.

In this context, implementing mandatory training for all Judiciary staff, including members of the Superior Courts, is essential to embed the guidelines set out in this Protocol. This training should address the multiple forms of racism, discrimination, and racial defamation through continuing education, illustrating how racist practices operate across different sectors of society, including the justice system, and how they evolve, whether in response to social changes or through administrative and judicial precedents.

It is also necessary to conduct studies and applied research on procedural practices and case law that either promote or restrict the rights of Black people. Such studies must deliver critical, evidence-based analyses from an intersectional perspective, considering race, gender, class, and other factors, on the persistence of racism and strategies to confront it[244].

Oversight bodies must supervise and evaluate judges' work to identify behavioral patterns that perpetuate discriminatory practices and racial or gender stereotypes[245], whether in institutional settings or judicial activities.

Finally, the National Council of Justice (CNJ) should strengthen the National Forum of the Judiciary for Racial Equality (FONAER) and, when necessary, establish inter-institutional study groups with civil society participation to systematically produce diagnoses of judicial rulings in cases involving people of African descent. Even when based on samples, these diagnoses should identify

244 CRIOLA. Recomendações para o Protocolo de Julgamento com Perspectiva Racial do Conselho Nacional de Justiça. Lúcia Maria Xavier, 2024.

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and analyze decisions that reveal implicit biases, racial and gender stereotypes, as well as controlling images and narratives about people of African descent[246].

It is essential to guide judges so that, in cases of racial discrimination in the workplace, they make mandatory notifications to the Public Prosecutor's Office of Labor. This measure enables the investigation of complaints about discriminatory or restrictive practices in access to, or maintenance of, employment on grounds such as sex, origin, race, color, marital or family status, disability, professional rehabilitation, age, and other protected factors. Furthermore, official letters should be sent to the competent police authorities to ensure investigation of crimes resulting from the conduct identified.

Building a fair and equitable society requires coordinated and continuous efforts involving public institutions and all sectors of civil society. Within the Brazilian Judiciary, the National Judiciary Pact for Racial Equality represents this joint effort, fostering consensus and implementing programs, projects, and initiatives across all segments of the Judiciary and at every level of jurisdiction. These actions aim to combat and correct racial inequalities through affirmative, compensatory and reparatory measures to eliminate structural racism. The National Pact's main objective is to strengthen a culture of racial equality in the Judiciary based on conscious, intentional, and responsible action.

In this context, this Protocol stands as a fundamental normative and operational instrument for achieving the objectives of the Pact. It seeks to standardize and guide judicial, administrative, and procedural practices, ensuring the consistent implementation of measures that promote racial equity at every level of the Judiciary.

246 CRIOLA, op. cit.

7. Conclusion

The production of this Protocol for Judging with a Racial Perspective is aligned with the most relevant and up-to-date international instruments on the subject, including the Convention on the Elimination of All Forms of Racial Discrimination (Decree No. 65,810/1969) and the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance (Decree No. 10,932/2022).

It also reflects Resolution No. 47/2021 of the United Nations Human Rights Council, which urges States to advance the anti-racism agenda, prioritizing the achievement of racial equality and justice and accelerating efforts to implement the 2030 Agenda for Sustainable Development.

At the domestic level, it is important to recall the 1988 Citizen Constitution, which established the promotion of the well-being of all people, without prejudice based on origin, race, sex, color, age, or any other form of discrimination, as a fundamental objective of the Federative Republic of Brazil.

Together, these normative frameworks underpin the priority the National Council of Justice has assigned to the issue of racial equality, reflected in the creation of the Working Group responsible for drafting this Protocol.

With the presentation of the Protocol for Judging with a Racial Perspective, it is expected that the Brazilian Judiciary and each of its members, in all branches of justice, will be able to rely on a robust instrument to permanently combat racism in all its forms and to safeguard fundamental rights.

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Contributions received in public consultation for the preparation of the protocol

ANADEP National Association of Public Defenders

Women Lawyers' Commission, Racial Equality Commission, Commission to Combat Contemporary Slave Labor (OAB/MG) - Coordinator of the Commission to Combat Contemporary Slave Labor, Lawyer Arleam Dias

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Center for Studies on Labor Relations and Inequalities (CEERT) - Daniel Bento Teixeira

Clinic to Combat Slave Labor (PPGD/UFPA) Black Training and Employability Program - Professors Sandra Suely Moreira Martins Lurine Guimarães, Saulo Monteiro Marinho de Matos, and Breno Baia Magalhães

Commission for the Promotion of Racial Equality (TSE) - Sabrina de Paula Braga and Elder Maia Goltzman - Axis "Participation of Socially Minoritized Groups"

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Court of Justice of Alagoas (TJAL) - Human Rights Commission and Pact for Racial Equity - Judge Vinícius Augusto de Souza Araújo

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PNUD

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