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Recommended Citation

Tanya K. Hernandez, *Latin American Racial Equality Law as Criminal Law*, 14 *Latin Am. & Caribbean Ethnic St. J.* 348 (2019)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/1093

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Latin American Racial Equality Law as Criminal Law

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14 Latin American and Caribbean Ethnic Studies Journal 348 (2019)

When evaluating the usefulness of contemporary ethnoracial law for Afrodescendants in Latin America, it is not sufficient to examine court cases in isolation. While there is certainly great value in assessing the processual nature of the State as displayed in individual court cases as is done throughout this special volume, the systemic impact of those cases also requires a broader inquiry into how legal structures both constrain and enable the power of the State to respond to social movement demands for racial justice. For instance, despite the variation in the type of legal instruments that are available across Latin America dedicated to the eradication of racial discrimination (multi-cultural constitutional recognition, collective land titles, affirmative action programs, labor and consumer law protections, criminal sanction on discrimination, etc.), most pervasive across the region has been the deployment of anti-discrimination criminal law legal sanctions. Several articles in this special issue raise the challenges of housing anti-discrimination law within a penal code system (Busdiecker; Cotito-Noles; Rahier and Sánchez; Ruelle-Orihuela and Brito; Saura). In order to understand the Latin American focus on criminal law for addressing racial discrimination it is first important to describe the constitutional law backdrop against which social justice activists have had to contend.

Most countries in the region have traditionally relied upon broadly worded constitutional equality provisions as the confirmation that racial inequality has been adequately addressed. An example of the generally worded constitutional provisions that all

Latin American countries have with some variation can be seen in Nicaragua's equality provision, which states:

All people are equal before the law and have the right to equal protection.

There will be no discrimination on account of birth, nationality, political belief, race, sex, language, opinion, economic status or social position.

Yet the constitutional equality provisions are rarely applied to the context of racial discrimination. In fact, there is a region-wide phenomenon of denying the existence of racial discrimination because of the assertion that "the serious incidence of racism and racial discrimination" more accurately exists in the United States (Dulitzky 2005, 39). This observation is based upon an analysis of official nation state report responses to human rights violation claims before the United Nations Committee on the Elimination of Racial Discrimination. Despite evidence that racial discrimination permeates every realm in the region including social, political, education, labor, culture, and public health sectors, government responses downplay its significance as inconsequential compared to what they see as "the legal violence of the U.S. context."

Country specific studies note that racial discrimination claims are treated as lacking merit because of the belief that Latin America is not a region with "real racism." For instance, in the Brazilian context, Antonio Guimarães found that judges frequently dismiss claims based on the notion that Brazilian culture is immune from racial bias (Guimarães 1998). For instance, Guimarães quotes one representative case in which the judge explicitly stated: "We do not have the rigorous and cruel racism observed in other countries, where non-"whites" are segregated, separated and do not have the same rights. That is racism" (Guimarães 1998, 35).

While not all judges are so explicit about how a particular comparison to the United States confines the recognition of racism in Latin America, other country-specific studies have observed a similar refusal to acknowledge the existence of racism in the enforcement of equality laws. For instance, in the Justice Studies Center of the Americas' examination of Colombia, the Dominican Republic, and Peru, it was found that each of one of these countries suffered from a limited legal response to the issues of racial discrimination (Judicial Studies Center of the Americas 2004). Similarly, Carlos de la Torre's inquiry into the Ecuadorian legal system discovered that the Ecuadorian government had a constrained view of racism as solely a problem of isolated verbal expressions of infrequent individual bigotry (de la Torre 2005).

Even within seeming court victories that recognize that racial discrimination exists there can be embedded a problematic understanding of racism. For instance, in Jorge González Jácome's analysis of Colombian Constitutional Court case findings of discrimination, he concludes that the Court confines its understanding of racism to the acts of individuals with overtly manifested intent to discriminate in ways that problematically shields from consideration the operation of pervasive structural discrimination (Jácome 2006). The focus on individual intent is yet another articulation of the vision of discrimination as exceptional in Latin American spaces. Most problematic though has been the tendency to operationalize constitutional equality principles with enabling legislation located in the criminal law.

The vast majority of countries in Latin America have focused upon criminal law as the vehicle for addressing racial discrimination. César Rodríguez Garavito and Carlos Andrés Baquero Díaz, note that all Latin American countries except for Paraguay have passed laws to criminally punish acts of racial discrimination (Garavito and Díaz 2015, 68).

Given the long histories of ignoring the existence of racism and discrimination in Latin America, it is understandable that the strongest state sanction that criminal law provides would be sought as the symbol of the state's new commitment to recognizing societal discrimination. Consequently, criminal law sanctions are often the default anti-discrimination approach because of their strong normative message that the state condemns racism (Cottrol 2013, 290).

As a result, the few criminal prosecutions that have been brought since the social justice movement advocacy in the 1990s for recognition of racial discrimination have been noteworthy. Peru criminally convicted an individual for racial discrimination against an Afro-Peruvian for the first time in 2015 (Sentencia No. 479-2015-2JPL-PJ-CSJJU). Similarly, Ecuador issued its first prison sentence for racial discrimination against an Afro-Ecuadorian only in 2016 (Proceso No. 17124-2014-0585, see also Rahier's and Antón's article in this issue).

Unfortunately, other motivations behind the public focus on criminal law conflict with fully addressing the sources of racial inequality. For instance, further entrenching the focus on criminal law provisions has been the notion that Latin American nation-states have been innocent of racial wrongdoing. Given the absence of state-mandated Jim Crow segregation in the region, the legal stance toward racism has been to view it as an aberration rather than a systemic part of a national culture (Hernández 2013, 104). As a result, the legal response has been to treat racism as the work of isolated individuals, who are presumably abnormal in their prejudices. In short, racists are criminals rather than representatives of longstanding racist cultural norms. Garavito and Díaz conclude that the use of criminal law individualizes racism and fails to challenge the structural causes of racial inequality (Garavito and Díaz 2015, 92).

This also helps to explain why the large majority of hate speech laws in Latin America are part of the criminal codes. Unfortunately, limiting the idea of racism to biased words uttered by those labeled as aberrant racists overlooks the operation of structural and institutional discrimination. Carlos de la Torre notes with respect to the plight of Afro-Ecuadorians that:

[r]educing racism to the hostile words and actions of ignorant, ethnocentric, and parochial individuals, a view that was dominant in American sociology until recently, does not take into account power relations (de la Torre, 2005).

Some countries in Latin America maintain a singular criminal approach to discrimination (Hernández 2013). For example, in the Dominican Republic, the 1997 *Ley contra la Violencia Intrafamiliar* (Law against Intrafamily Violence) makes it a crime to inflict unequal or humiliating treatment based on race or ethnicity. Persons found guilty of the crime of discrimination can be imprisoned for a year and one month and imposed a fine of two to three times the minimum wage (Ley No. 24-97). In Nicaragua, the Criminal Code penalizes the obstruction of a constitutional right because of race or ethnicity (Ley No. 641). The penalty is six months to one year of imprisonment. If the racially motivated obstruction of a constitutional right is found to have been publicly promoted, an additional fine can be imposed. The Criminal Code also authorizes the augmentation of a penalty for other crimes when they are racially motivated (Criminal Code Art 36.5).

While criminal sanctions suggest a strong normative commitment to the eradication of discrimination, it may, as a practical matter, have had the ironic effect of making the legal system less capable of dealing with the problems of inequality and discrimination. Criminal cases require stronger evidence and a higher burden of proof than civil cases. For instance, in an analysis of Peruvian grievances regarding the experience of filing a criminal complaint of

discrimination, it was found that the evidentiary standard for discrimination cases was high and that it is often difficult for a victim to prove that he/she has experienced discrimination (Defensoría del Pueblo, República Del Perú 2007, 119). An illustrative case described in the report is that of an individual who lodged a complaint against the police department alleging discrimination for the inappropriate issuance of a traffic ticket because of his race. The public prosecutor indicated that this complaint did not merit a criminal investigation or action because the evidence presented was not enough: the complainant had submitted an affidavit and that of a family member who witnessed the incident. It is difficult to fathom what more the complainant could have submitted to support his allegations. The demand for more is thus emblematic of the Latin American resistance to considering racial discrimination a viable criminal complaint. In fact, in one comprehensive study of all electronically available racial discrimination criminal cases in Brazil from 1998 through 2010, over forty percent of the cases that reached a judicial decision resulted in criminal acquittals (Machado, Lima and Neris, 2016). Importantly, the study noted that acquittals were often based on the failure to prove a criminal intent to discriminate. A more recent study of racial discrimination cases brought before the Justice Tribunal of the State of São Paulo in Brazil from the years 2012-2016, also concluded that in the criminal prosecution of discrimination, judges tend to be dismissive of the allegations because they examine the question of criminal intent to discriminate through the lens of racialized social teasing and jokes that judges do not equate with criminal intent (Fernandes, Sanches and Dias 2019). Commentators often identify the judiciary's narrow interpretation of criminal intent to discriminate, as the main obstacle in having the criminal laws effectively applied (De Castro and Da Silva 2016). This has led to some commentators as concluding that the criminal laws do more harm than good inasmuch

as they sustain institutionalized race discrimination with their inefficacy while portending to be a means to address it (Rodrigues 2012).

Underscoring the assessment of criminal anti-discrimination law as ineffective because of narrow judicial application, is a case brought against Brazilian President Jair Bolsonaro when he was a Congressman (Inquérito 4,694, 2018). Bolsonaro was sued for his reference to the Black communities descended from fugitive slave societies (“Quilombos”) as lazy and useless and like animals “[not] even for breeding [do] they serve anymore.” Yet the court asserted that because Bolsonaro’s statements did not call for the suppression or elimination of the group, that it was not racial discrimination as understood under the criminal statute. In short, the court transformed the criminal prohibition against the practice of discrimination and prejudice based on race, into a standard practically equivalent to incitement to genocide that few victims of discrimination can prove.

Even cases where lower courts initially conclude that racism has been committed, are at a high risk for being vacated later by courts of appeal. For example, in Colombia when a councilmember in Marsella municipality, Department of Risaralda, was prosecuted for the crime of harassment on the basis of race, as he used the word “cancer” to describe certain social groups—such as Afrodescendants, indigenous peoples and peoples in situation of displacement—during a debate in the city council involving an indigenous community’s occupancy of one of the town’s sports’ court. The lower court initially convicted the accused to 16 months of imprisonment and a fine. However, the court of appeals vacated the judgement as it concluded that the words of the councilmember did not constitute harassment in the terms of the statute and, therefore, his actions were not covered by the law (Revista Semana 2014).

Specifically, the court of appeals found that article 134B of the Penal Code did not prohibit the actions of the councilmember. That provision states:

Whoever promotes or incentivizes acts, conducts or behaviors that constitute harassment, oriented towards causing physical or moral injury to a person, group of persons, community or people, because of their race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation or disability and other reasons for discrimination, will incur in prison from twelve (12) to thirty six (36) months and a fine from ten (10) to fifteen (15) current legal monthly minimum wages, unless the conduct constitutes a felony punishable with a harsher sentence.

The court of appeals found that although the expressions of the councilman were unfortunate, they were not intentionally trying to instigate other people or the members of the council to harass the indigenous community that was occupying the sports' court or any other marginalized group and, therefore, his actions were not covered by the statute. Nor is the disposition of this Colombian case an unusual occurrence, in a Latin American context in which the legal system tends to decontextualize racialized commentary with ahistorical analyses that deny the racism of conflicts (Lima e Silva and Lopes 2016).

In addition to the reluctance of prosecutors to proceed with racial discrimination cases, judges are reluctant to impose criminal sanctions. Latin American criminal justice systems are overloaded with traditional crimes of violence and property crimes. In a system plagued with such problems and systemic inefficiencies, the crimes of racism and racial discrimination have and are likely to continue to be a low priority.

Moreover, entrusting the enforcement of the criminal law to public authorities risks having the law undermined by the complacent inaction of public officials who may harbor the

same racial bias as the agents of discrimination. Indeed, commentators have noted that Latin American police officers are often the perpetrators of racial violence against persons of African descent because they see their role as protecting society from “marginal elements” by any means necessary without regard to the rule of law (Pineiro 1999, 1-16). This is a particular danger in Latin America, where police officers are consistently found to discourage Afrodescendants from filing racial discrimination complaints (Brinks 2008, 49-54; Santos 2009; Mitchell and Wood 1999, 1001-20).

In fact, the statistical data that does exist, illustrates the inadequacy of criminal law structures for fully addressing issues of racial discrimination. For instance, in the case of Bolivia, the Anti-racism Committee, which is a governmental entity dependent upon the Vice-Ministry of Decolonization, has expressed to the media that since the adoption of the Law Against Racism and All Forms of Discrimination (Law 045) in 2010 (see Sara Busdiecker’s article in this issue), the committee has had notice of 1,394 cases of discrimination. In 2017 alone, there were 219 administrative and criminal complaints of discrimination—on the basis of race, gender and other characteristics—of those, 20 have ended up in a criminal sentences (La Razón 2018). Of the 210 cases of discrimination registered in Bolivia, only ten of them were cases of discrimination based on color (racism). Only 44 of the total of cases of that year have been resolved (Ministerio de Culturas y Turismo 2017).

Seth Racusen notes that a civil framework can provide broader theories of discrimination and less burdensome evidentiary standards (Racusen 2002, 87-8; Racusen 2004). In addition, the civil context carries less risk of selective enforcement whereby vulnerable populations are disproportionately targeted for prosecution. This is because, unlike in criminal prosecutions, the state needs not be the primary enforcer of the legislation.

Empirical studies of racial discrimination cases in Latin America comparing outcomes in civil and criminal contexts, all note that discrimination victims are better able to resolve their legal complaints within the civil context (Hernández 2018; Lima e Silva and Ribeiro 2016; Monteiro 2011; Perissini da Silva 2017). What makes these empirical studies particularly noteworthy, is that the community of judges drawn from white elite social spheres for both the criminal and civil courts, would suggest a similar cautious reception to claims of discrimination regardless of a civil or criminal context. Yet, that is not the case. While it is true that recalcitrant judges can act in response to social movement mobilization and persuasion and even identify themselves as progressive (Helmke and Rios-Figueroa 2011), the data suggests that the criminal context is a structure that hinders full consideration of the manifestation of racial discrimination. For instance, in an empirical review of Brazilian racial discrimination cases filed in the civil Labor Courts, claimants were able to win at least 70 percent of the time, in contrast to the estimated 30 percent win rate for racial discrimination claims filed in criminal court, despite the fact that the legal provisions have parallel language prohibiting discrimination (Hernández 2018).

The contrast between the civil and criminal contexts is best illustrated by the case study of the Brazilian lawsuit of *Tiririca*, in which the same fact pattern of hate speech yielded success for the plaintiffs in the civil court but not in the criminal court. Francisco Everado Oliveira Silva, whose stage name is Tiririca, is a Brazilian congressman and former entertainer who released a song with the Sony Music company entitled “*Veja os Cabelos Dela*” (“Look at Her Hair”) in 1996. The song was in essence a long tirade against what it calls the inherent distasteful animal smell of black women and the ugliness of their natural hair. The lyrics stated in significant part,

When she passes she calls my attention, but her hair, there's no way no. Her *catinga* [African] (body odor) almost caused me to faint. Look, I cannot stand her odor. Look, look, look at her hair! It looks like a scouring pad for cleaning pans. I already told her to wash herself. But she insisted and didn't want to listen to me. This smelly *negra* (Black woman) ... Stinking animal that smells worse than a skunk.

The black feminist NGO Criola, in conjunction with the NGO CEAP (Centro de Articulação de Populações Marginalizadas), and a number of other social justice organizations filed lawsuits against the singer and Sony Music company in both criminal and civil courts. In the criminal court action, the plaintiff filed a complaint of racism. The plaintiff lost because the judge found that there was no criminal intent to offend black women. The criminal law standard was too high to overcome given the infrequency with which individuals overtly state their intent to discriminate before nonparty witnesses. As a result, the song remained in circulation for commercial sale.

In contrast, the civil court action was successful. The civil public action was filed pursuant to Article 3 of the Constitution, which states that the national objective is “to promote the well-being of all without prejudice as to origin, race, sex, color, age, and any other form of discrimination.” The case sought to protect the diffuse and collective rights of black women to be free of discrimination. Diffuse rights are a category of legal rights that provide guarantees to a group of individuals who have common legal interests despite being dispersed within the political community (Lei No. 7.347, de 24 Julho 1985). Free of the criminal context, which requires a finding of intent to discriminate, the civil court held that the defendant's authorship of the lyrics was discriminatory itself because the words inherently provoke feelings of humiliation in black women (T.J.R.J., Embargos Infringentes

No. 2005.005.00060). The court took note that because the singer, Tiririca, was also a popular entertainer for children (who was often nationally televised in a clown costume), the insulting and injurious content of the song was also prejudicial to the formation of black youth.

As compensation for the moral damages of collective emotional harm to dignity, in 2008, the court ordered payment of 300,000 reais in addition to attorney's fees and costs. In 2012, the court revised the monetary judgment to include sums retroactive to the date the case was filed in 1997, thereby raising the judgment to 1.2 million reais. In civil law legal systems like Brazil's, moral damages are nonpecuniary damages that compensate for the injury of emotional distress from harm to one's honor or reputation (Litvinoff 1977; Vargas 2004). Often, moral damages are not available for every sort of tort action, but only for those that create dignitary harm. The monetary payment for the damage to the collective equality interest of black women was paid to the Federal Ministry of Justice's Fund for the Defense of Diffuse Rights, for the creation of educational antiracism youth programs disseminated through radio, television, film, and printed materials for elementary schools in the state.

What the *Tiririca* case demonstrates is that in the civil context, the absence of the imprisonment feature enables a judge to consider more nuanced perspectives about racial equality when deciding whether the discrimination that has been historically prevalent in Latin America but invisible as "culture" should be actionable. A civil framework can provide broader theories of discrimination and less burdensome evidentiary standards (Racusen, 2002). In addition, the civil context carries less risk of selective enforcement whereby vulnerable populations are disproportionately targeted for prosecution. This is because, unlike in criminal prosecutions, the state needs not be the primary enforcer of the legislation. Yet, because of the prevalent notion that criminal laws against discrimination show how serious

the state is about racism, the development of civil law measures across the region has been slow and their reach has been modest.

The few criminal law racial discrimination cases that have been successful have had extreme factual allegations that even the most reticent of courts would find hard to ignore. For instance, in Ecuador, where Afro-Ecuadorians are often ignored and viewed as not inherently Ecuadorian, only the most extreme of racial discrimination actions will be understood as appropriate for criminal enforcement. It was not until July 5, 2016, that Ecuador imposed its first prison sentence for the crime of racial discrimination. In *Michael Arce Mendez v. Fernando Encalada Parrales*, a prison sentence of five months and twenty-four days was issued for the racial hate which an armed forces lieutenant committed against a former cadet at a military school (Proceso No. 17124-2014-0585). Mr. Arce Méndez, who dreamed of becoming Ecuador's first Afro-Ecuadorian General, started military school in October, 2011, after successfully completing admissions examinations. Mr. Arce Méndez and other witnesses described the unfair, cruel treatment he received under his instructor, Lt. Encalada Parrales. Lt. Encalada Parrales told Mr. Arce Méndez that no "black" person would become a military official, and then proceeded to harass him until he would resign from the school. The harassment took the form of not allowing cadet Méndez to sleep, forcing him to jog while other cadets were sleeping, not allowing him to eat with the other cadets, not giving him enough time to eat, forcing him to eat on the floor, in addition to many other physical forms of harassment while he was called a "lazy black" and other derogatory race-related terms. Cadet Méndez eventually resigned from the school and made a claim with the Public Defender's Office.

Given the outrageous conduct of a public figure like Lt. Encalada Parrales, it is understandable why the court did not hesitate to make a finding of racial discrimination

worthy of imposing a criminal sentence along with payment of psychological treatment, damages and litigation costs. Not only was the victim's physical well-being under assault, a psychological examination also found that cadet Méndez had suffered psychologically as well with a lingering post-traumatic disorder. Other victims of racial discrimination that have been denied opportunities because of their race but absent the physical violence have not been as successful in deploying the criminal law to vindicate their equality rights.

Absent physical violence, the racial discrimination allegations must be close to extraordinarily outrageous to be warranted justiciable. For instance, in Peru's first successful prosecution for racial discrimination, the Afro-Peruvian victim was targeted with outright fraud. In the 2015 case of *Azucena Asuncion Algendones v. Luis Alberto Perez Peralta*, Azucena Asuncion Algendones, secretary at the Municipal Water and Sewer Services Company of Huancayo, which is known as Sedam Huancato S.A., was engaging in her regular conduct of business when co-worker Judith Perez Huaynate alluded to Algendones as a "negra cocodrilo" (black crocodile) while also making insulting gestures towards her. When Algendones asked that Huaynate apologize to her, Huaynate stated that her comment was more of an insult to a crocodile than to Algendones (Sentencia No. 479-2015-2JPL-PJ-CSJJU). Algendones alerted both her general manager, Luis Perez Peralta, and subsequently Humans Resources manager, Augusto Santisteban Garcia, about the occurrence with co-worker Huaynate. Despite these supervisors noting that Huaynate had committed a racist act against Algendones, not only was Huaynate not punished, but the supervisors also dismissed the case, thus failing to resolve the issue. Sedam officials then attempted to punish Algendones for reporting this racist occurrence by framing her for multiple thefts within the company and subsequently firing her in 2013. This was done after Algendones had contacted

government authorities about the 2012 incident which had led to an investigation of the facilities.

In turn, Algendones filed charges against officials Peralta and Garcia pursuant to Peruvian racial discrimination statutes. She did this by reporting this incident to the Alert Against Racism website, a government site that investigates instances of racial discrimination, to which she was given legal assistance by the Center for Development of Black Peruvian Women. On November 13, 2015, the controlling federal court in Junin state ruled in Algendones's favor, and in turn sentenced Peralta and Garcia to serve three years in prison as well as pay fines of \$1,500. In addition, both officials were barred from holding public office for two years.

Even the socialist context of Cuba that decreed the end of discrimination when Fidel Castro ascended to power in 1959, did not have its first criminal racial discrimination filed until 2017 (Clealand 2017). The case arose when an Afro-Cuban law student Yanay Aguirre Calderín, was thrown out of a taxicab before her final destination because the driver did not want Blacks in his cab, after becoming angry about the passenger's request for a change in destination (Valdés 2017). After the law student brought her claim to the police station and alerted the press about the incident, the claim was processed and the driver was obligated to pay an administrative fine and make a direct apology to the victim (Bustamante 2017).

Yet not all incidents of racial discrimination are either able to garner media attention like Calderín's case or are embedded in extreme scenarios of fraud like the Algendones case, that can override a judge's default skepticism regarding the credibility of allegations of racism. What this chapter's review of Latin American racial discrimination jurisprudence suggests is that the disproportionate reliance upon the criminal law model may not adequately address the ubiquity of racial discrimination. Rather than relying primarily upon the criminal

law system, nation-states might consider incorporating a greater diversity of legal tools for pursuing racial justice. According to victims of discrimination the legal right to bring their own claims with a civil lawsuit is one way to amplify the effort to make the legal system more responsive and address systemic forms of discrimination. While no single law can realistically eradicate racism, it is well worth the effort to explore broader forms of relief that exist beyond the narrow confines of the criminal law context.

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