THE JUDICIAL SYSTEM AND RACISM AGAINST PEOPLE OF AFRICAN DESCENT

THE CASES OF BRAZIL, COLOMBIA, THE DOMINICAN REPUBLIC AND PERU

Justice Studies Center of the Americas
March 2004

INDEX

INTRODUCTION 3

BRAZIL 5

- Background Information 5
- Legal Norms and Institutions 7
- Racism and the Judicial System 13
- Conclusions 25

COLOMBIA 26

- Background Information 26
- Legal Norms and Institutions 31
- The Judicial System and the Prison System 34
- Racism and the Judicial System 36
- Conclusions 44

THE DOMINICAN REPUBLIC 46

- Background Information 46
- Legal Norms and Institutions 48
- Racism and the Judicial System 49
- Conclusions 58

PERU 60

- Background Information 60
- Legal Norms and Institutions 62
- Racism and the Judicial System 65
- Conclusions 73

INTRODUCTION

This report was prepared by the Justice Studies Center of the Americas (JSCA)[1] [2] [3] at the request of the General Assembly of the Organization of American States (OAS) through the resolution called "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention."[4] The report discusses the way in which the judicial systems of several countries in Continental America address racist practices in general, and those that affect people of African descent in particular. JSCA was commissioned with the preparation of this report as part of OAS efforts that might eventually lead to the preparation of an Inter-American Convention for the Prevention of Racism and All Forms of Discrimination and Intolerance.

The countries selected for this report are Brazil, Colombia, Peru, and the Dominican Republic. This is due to the fact that these nations represent different geographic zones in the Americas and have significant Afro-descendent populations. During the visits that the authors made to the four countries, interviews were conducted with government officials, judicial system operators, organizations representing people of African descent, academic centers, non-governmental organizations, and other important actors who work in this area. Researchers collected information on racist practices in each country, and special attention was paid to the role of the judicial system.

The methodology that was initially proposed for this project changed over the course of the study. Originally, local institutions in each of the four countries were asked to generate a country report containing a review of the most significant legal norms associated with combating racism, as well as an exhaustive survey of existing jurisprudence. JSCA was to prepare the comparative report on the

---

1 This report was prepared by professors Felipe González Morales and Jorge Contesse Singh. Professor González, who coordinated the report, is Director of the Human Rights Program and Professor of International Human Rights Law and Constitutional Law at the Universidad Diego Portales Law School, in Santiago, Chile. He has extensive experience in international human rights initiatives, including his participation in the preparation of a series of international instruments and the presentation of cases before the Commission and the InterAmerican Court. He served as the Latin American representative of the Human Rights Law Group for more than a decade, and has been a visiting professor at American University, University Wisconsin, Universidad Carlos III in Madrid, and Universidad de Alcalá de Henares, where he offered courses on International Human Rights Law. Professor Contesse teaches Constitutional Law and Legal Theory at the Universidad Diego Portales Law School and is the main editor of the Annual Report on Human Rights in Chile, which is published by the same institution. He has also participated in JSCA projects on justice administration.

2 The authors would like to express their special thanks for the contributions of the following individuals, both before and during their visits to the countries studied: Jacqueline Signoretto (Instituto Brasileiro de Ciências Criminais, IBCCRIM), Raquel Cesar (Universidade Federal do Estado do Rio de Janeiro, UNIRIO), Catalina Díaz (Comisión Colombiana de Juristas), Fernando O'Phelan (Projusticia, Peru) and Paula Quiroga (Servicio Jesuita a Refugiados y Migrantes, SJRM, Dominican Republic). The authors would also like to thank Cristián Varela for his collaboration in gathering complementary data.

3 The Justice Studies Center of the Americas would like to thank the Government of Brazil for the financial support that it contributed for this project.

4 AG/Res. 1930 (XXXIII-O/03), June 10 2003.

basis of the country reports submitted by said organizations.

However, in each case the organizations contacted replied that they would be unable to carry out this work within the timeframe established due to the lack of previous studies. Furthermore, they stated that in some areas the issue of access to justice for members of the African American population is at least as important if not more important than an examination of existing jurisprudence, which made the preparation of the report a more complex process.

These developments led JSCA to rethink the methodology, and in the end the present method was considered the most appropriate course of action for preparing the report. This adjustment also implied revisiting the reach of the study, as the country reports would not be as exhaustive as originally expected but would instead offer a general but up-to-date view of the subject.

While it is important to acknowledge the indispensable contribution made by local institutions to the project under the new methodology, the circumstances described above –in particular the lack of previous in-depth research - were themselves a reflection of the current state of affairs and demonstrated the low priority that the societies and governments in question assigned to the fight against racism. This report contains analyses of the judicial treatment of racist practices in Brazil, Colombia, Peru, and the Dominican Republic followed by general observations.

In closing, it is important to mention that the terms “people of African descent,” “Afro-descendents” and “blacks” are used in this report just as they are used in Latin America and the Caribbean by members of those communities, with no pejorative connotation. The same is true for the expression “negritude,” which is used by Afro-descendant communities in various countries in the region to denote blackness or black consciousness.

Background Information

Approximately 45% of those who responded to Brazil's last census, which was carried out in 2000, identified themselves either as "*parda*" (brown) or as black.[5]

Brazil received more slaves from Africa than any other country in Continental America. Begun during the Colonial period, the practice of slave trading lasted from Independence until the creation of the Republic in 1888, making Brazil the last American country to abolish slavery. Brazil's population is thus a mixture of Afro-descendants, indigenous peoples and Euro-descendants.

Unlike the most studied case in Continental America, the United States, Brazil did not institute racial segregation policies when slavery ended. While these laws remained in effect despite the abolition of slavery in the late 19th century in the U.S., in Brazil, the lack of segregation and racially mixed population produced a very different outcome.

The differences between Brazil's history and that of the United States have made it seem that racist practices do not exist in the former, or that these are isolated incidents resulting from foreign influences, specifically the introduction of a capitalist economy heavily influenced by North America. This social vision is also reflected in the State's approach to the issue of racial discrimination against Afro-descendants, which until recently consisted of completely ignoring it.

The vision that predominates, called "racial democracy," maintains that Brazilian society is completely integrated and that the discriminatory practices that do exist are due to social or class differences and not racial ones. Following this argument, poor black people are discriminated against because they are poor, and not because they are black.

The racial democracy perspective has also frequently included the practice of accusing those who denounce racist practices of being racists themselves because they call attention to an issue that no one else recognizes –supposedly because it is racist to do so.

The many levels of relationships among people of different races in Brazil are also used to deny the existence of racist practices: those accused of racism tend to argue that they cannot be called racist because they have relationships with black people.

Until just a few decades ago, the concept of racial democracy was virtually unquestioned within the Social Sciences. The Black Movement's call for awareness of racism did not garner much support and its efforts remained marginal, having

[5] See the Demographic Census for 2000, published by IBGE at www.ibge.br.

practically no influence over public actors. The passage of a law against racial discrimination in 1951 did not dispel the idea that this referred to isolated incidents that social scientists attributed to the influence of foreign capital in Brazil rather than to the structure of Brazilian society. As a result, the legislation was aimed at punishing acts of racial segregation similar to those found in the southern U.S. rather than homegrown types of racism.

In the 1960s, the Social Sciences began to articulate the first new approaches to this issue, though these were still infrequent. Antonio Sérgio Guimaraes, one of the most renowned specialists in this area today, has stated that the issue took a long time to mature. One of the first problems was the inability to envision Brazilian society as one that was founded upon closed groups with limited social mobility. For example, Thales de Azevedo (1966[1956]) used Tönnies' concept of *prestigious groups* to refer to the *color groups*, in which family group status and birth were more important than status acquired through conflicts or market competition. In the same way, by viewing the structural situation as a "metamorphosis of the slave," Florestan Fernandes (1965) and Otávio Ianni (1962) convincingly demonstrated that the structural division between whites and blacks corresponded to a redefinition of the distances separating *society* from the *plebe* in the Empire and the *elite* from the *people* in the Republic.[6]

Beginning in the 1970s, the Black Movement in Brazil, which was composed of Afro-descendants, began to denounce the concept of racial democracy as a myth whose only purpose was to hide the racism that existed in Brazilian society. However, these complaints did not immediately resonate within society, both because of how deeply rooted the vision of the "racial democracy" was in Brazilian society, and the fact that Brazil was being ruled by a dictator.[7]

It was only during the 1980's that this new perspective on racism was expanded in the Social Sciences. Scholars began to argue that the "racial democracy" would continue to be a myth due to the highly hierarchical nature of Brazilian government and society, which had a specifically racial element in addition to the existing social and economic forms of discrimination. However, this process has not been accompanied by a corresponding change in the perception of the general public in Brazil.

At the end of that decade, and with the dictatorship now over, change began to manifest itself in the judicial system. This process increased during the second half of the 1990s and received an additional boost from the Global Conference on Racism. However, as the following discussion shall

---

6 See Antonio Sérgio Guimaraes, Preconceito e discriminaçao: queixas de ofensas e tratamento desigual dos negros no Brasil, Universidade Federal da Bahia. Ed. Novos Toques (1998), pp.20-21. Translators' note: In this chapter, quotes from the Portuguese are either paraphrased (without quotation marks), or translated directly (within quotation marks).

7 See Luciana Jaccoud and Nathalie Beghin, Desigualdades Sociais no Brasil: un balanço da intervençao gubernamental, Instittuto de Pesquisa Econômica Aplicada (IPEA), 2002, p.13.

show, this process of change is still in the initial stages of design and implementation.

Statistical studies clearly reveal the serious inequities faced by Brazil's African American population. For example, the average income of black households is only 43% that of white households and there are almost twice as many poor Afro-descendants as compared to poor whites (46.8% versus 22.4%). In terms of the indigent, 21.8% are black and 8.4% are white. The infant mortality rate for children under the age of five is 76.1 per thousand for Afro-descendants and 45.7 per thousand among the white population, and illiteracy is 18.2% and 7.7%, respectively. While blacks attend school for an average of 4.7 years, whites study for 6.9 years. Among blacks over the age of 25, only 2.5% have between 15 and 17 years of education (which reveals a very poor access to higher education), while 10.2% of whites have. Access to basic services such as electricity and drinking water reveal similar disparities.

It is worth noting that comparing these statistics to data from the previous decade shows that progress has been made at all levels. However, these advances have no diminished the level of inequality between blacks and whites.[8]

[8] All of these statistics were taken from the *Rede Feminista de Saúde* publication *Assimetrias Raciais no Brasil* (2003), which in turn cites the work carried out by the *Instituto de Pesquisa Econômica Aplicada* (IPEA/DISOC) on the basis of data from the *Instituto Brasileiro de Geografia e Estatística* (IBGE). These numbers exclude the rural population of Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

Legal Norms and Institutions

Brazil's successive Federal Constitutions have consistently enshrined the principle of equal treatment under the law. As mentioned above, slavery was abolished in 1888, after which time former slaves were considered legally equal to other members of the population, and no racial segregation or legal apartheid mechanisms were established.

Under the prevailing concept of "racial democracy," racism was seen to be insignificant; as a result, it was not thought necessary to adopt legislative measures to prevent and punish it.

The anti-racism law (Law 1.390) passed in 1951 was not actually the result of a shift in consciousness. In effect, this law was dictated in response to a discriminatory act committed against a black artist from the United States while he was in Brazil, and was explicitly described by its proponents as a mechanism to prevent essentially foreign practices, which were defined as the result of the growing influence of the U.S. capitalist system in Brazil. The law was therefore not designed to recognize the existence of autochthonous racist practices, which, according to the prevalent belief, were isolated episodes that did not require judicial or political intervention. As a result, Law 1.390 limited its focus to sanctioning certain segregationist practices that, strictly speaking, were more characteristic of the U.S. (during that period) than Brazil, where

racism manifested itself in different ways not covered by law.

During Brazil's military dictatorship (1964-1986) there were no changes in this ambit, and the issue of racism was not taken seriously in governmental public policies. It is only important to note that during that period (more specifically, in 1968), Brazil became a signatory to the International Convention on the Eradication of All Forms of Racial Discrimination, which came into force the following year. During this period, which basically began in the 1970s and gathered force through the 1980s, the Black Movement acquired a greater –though still limited- public profile.

This increased public presence was felt once the dictatorship ended and the new Federal Constitution was being formulated: The Federal Constitution that was finally adopted in 1988 included different clauses related to racial discrimination.

In Title 1, entitled "Of Fundamental Principles," the Constitution establishes as one of the bases of the Rule of Democratic Law in Brazil "the promotion of the well-being of all people, without prejudice on the basis of origin, race, sex, color, age, or any other form of discrimination." (Art. 1. IV) The same Title establishes that international relationships of the Government of Brazil are governed, among other principles, by the rejection of racism (Art. 4 VIII).

For its part, Title II of the Federal Constitution, which refers to fundamental rights and guarantees, establishes in Article 5 Section 1 the equality of all persons before the law. Number XLII of the same article states, "The practice of racism constitutes an undeniable crime that cannot be defended and is subject to a punishment in the form of incarceration as provided for by law."

Further on, the Constitution establishes that "the State will protect manifestations of popular, indigenous, and Afro-Brazilian culture, as well as those of other participants in the process of national civilization." (Art. 215, paragraph 1) Article 216, paragraph 5 gives protection to all documents and places with historic meaning for the *quilombos* (communities created by escaped slaves during the period of slavery).

Lastly, transitory disposition 68 recognizes all remaining *quilombos* as the definitive owners of that land that they occupy.

Notably, international human rights instruments are also recognized. The Federal Constitution of 1988 establishes that "the rights and guarantees expressed in this Constitution do not exclude others derived from the regime or the principles it adopts, or those contained in international agreements signed by the Federal Republic of Brazil." (Art. 5.2)

The Constitutional provision mentioned above prompted the enactment of Law 7716 on racism, passed in 1989. In its original text, the law criminalizes a series of actions that are the result of racial or color-oriented prejudice, including acts such as impeding access to public administration or public service agencies; denying or blocking employment in a private company; refusing or impeding access to commercial establishments in general; failing to serve a client, or similar behavior in access to hotels, restaurants, public transportation, sports arenas, hair salons, etc.; impeding entrance to buildings or to elevators; and impeding access to the armed forces, educational establishments, etc.; impeding or blocking, in any manner, marriage or family and social life.

Punishments for these offenses involve imprisonment for one to three years for some crimes, from two to four years for others, and from three to five years for a third group.

In 1990, Law 8081 modified Law 7716, passed the year before, adding a new crime, which consisted of "practicing, inducing or inciting, by means of public communication or publications of any nature, discrimination or prejudice on the basis of race, religion, ethnicity, or national origin." A penalty of two to five years in prison was the punishment for this behavior.

Later, in 1997, additional modifications were made to Law 7716; these were mostly procedural changes that reduced the sentence for the crime of racist expressions to a range of one to three years in prison, and reformed the Criminal Procedure Code's definition of slander to include the figure of qualified slander for expressions that make reference to the race, color, ethnicity, religion, or national origin of the victim. Although in this case the maximum sentence is also one to three years, the main difference is that unlike the crime of racist expressions, qualified slander is a victim-actionable crime that is both defendable and deniable.

According to some authors, "this change presents the problem that the verbal offense materialized by racial offence contains features of the crime described in Art. 20 of Law 7716/89 on qualified slander for prejudice [incorporated into the Criminal Procedure Code]."[9] The judicial system's treatment of this problem will be discussed in greater detail below.

In the civil sphere, general civil laws of responsibility for moral damages may be applied in cases of racial discrimination. Article 5 of the Federal Constitution guarantees compensation for material damage, moral damages or damage to one's image. In addition, Article 159 of the Civil Code states that "any person who violates a right or prejudices another person is obligated to repair the damage, be it a voluntary act or one of omission, negligence or carelessness." These provisions can be related to the effects of racial discrimination, as regulated under the

[9] Hédio Silva Jr., *Direito de Igualdade Racial*, p.67.

United Nations International Convention on the Eradication of All Forms of Racial Violence, of which Brazil is a signatory. Article 6 of the Convention states that "Member states will ensure all people under their jurisdiction protection and effective recourse in competent national courts and other State institutions against any act of racial discrimination contemplated in this Convention, (…) the right to request that those [national] courts satisfy or compensate all damages to which they may be subjected as a result of that discrimination in a just and adequate manner."

Following the World Conference against Racism in 2001, Brazil began to introduce affirmative action laws for racial criteria. Affirmative action refers to a series of mechanisms that are assumed to be temporary and are oriented towards allowing historically discriminated groups to improve their position in society. These programs can take the form of mechanisms for promotion, special funding for sectors of the population, and, in special circumstances, quotas that ensure that members of these communities are represented in certain agencies and institutions. Diverse international human rights instruments legitimize affirmative action programs, including the International Convention on the Elimination of All Forms of Racial Discrimination. Article 1 Section 4 of the convention establishes that "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

Affirmative action programs and quota systems had been implemented before in Brazil, though these had not been directed towards the black population but were designed instead for farmers' children, the disabled, and women. In the first case, Law 5465 of 1968 established quotas for providing access to education to farmers' children.[10] For the disabled, the Federal Constitution of 1988, Article 37 VIII, sets out that "the law reserves a percentage of public positions and jobs for people with disabilities and will define the criteria for their admission." The implementation of this clause has led to various laws that establish quotas for people with disabilities in the public service (Law 8112 of 1990) and in the private sector (Law 8213 of 1991). Lastly, party-based quotas for women were established for political candidacies (Law 9504 of 1997). Notably, these affirmative action programs and quota systems did not engender public

[10] Although, according to information gathered, in practice this legislation benefited the children of plantation owners. See Raquel Cesar, Açoes afirmativas no Brasil: e agora, doutor? in Ciencia Hoje, vol.33 N°195, pp.26-32. The citation is from p.28.

debate, as have the measures established to benefit Afro-descendents.

Over the last few years, different legal instruments establishing affirmative actions and, in some cases, quotas for the Afro-descendent population have been passed in Brazil. These include the Ministry of Justice's Affirmative Action program, which sets out that 20% of supervisory and upper-level advisory positions shall go to Afro-Brazilians; a Rio Branco Institute Program aimed at educating diplomats, with special scholarships for members of the black community; the National Affirmative Action Program, established by the Federal Public Administration, that establishes percentage-based goals for Afro-descendents' participation on professional teams; and the Federal Supreme Court's Affirmative Action Program, which set a quota of 20% for Afro-descendents in the Court's third-party contractors.[11]

In the university system, Law 10.558, passed at the end of 2002, created the University Diversity Program under the Ministry of Education. This program aims to "implement and evaluate strategies for promoting access to higher education to people who belong to socially disadvantaged groups, particularly Afro-descendents and members of Brazilian indigenous communities." The program includes funding for public and private non-profit entities working towards the program goals. More recently, the *Universidad del Estado de Río de Janeiro* (UERJ) established a 40% entry quota for Afro-descendents, a measure that has been the most controversial to date, with a significant number of judicial challenges currently pending.

The complaints expressed by the Black Movement, beginning in the latter half of the 1990s and reemerging with renewed vigor after the World Conference against Racism have prompted the creation of bodies and actions within the State apparatus (at the federal and State levels) focused on the situation of Afro-descendents. A large march organized by the Black Movement in 1995 resulted in the creation of an Inter-Ministerial Working Group on the Valorization of the Black Population, which was linked to the Ministry of Justice. This mixed group, which includes both Afro-Brazilians representing civil organizations and government officials, has created a series of public policy proposals for combating racism.

Simultaneously the Ministry of Labor and Employment adopted a series of initiatives aimed at combating racial discrimination in the labor market, after a complaint was presented by union organizations before the International Labor Organization (ILO) alleging racial discrimination in this sector. The Ministry of Labor and Employment agreed to follow-up on the ILO's Convention 111, and other actions also followed.

[11] Raquel Cesar, op cit., p.28.

The Public Ministry of Labor has also incorporated the elimination of all forms of racial discrimination as one of its five key goals. Working alongside the Ministry of Labor and Employment and the Ministry of Justice-based Human Rights Secretariat, the initiative aims to orient employers and employees in this area, establishing links to civil society organizations, and presenting complaints in the courts.

In 2000 the federal government created the National Committee for Brazilian Participation in the Durban racism conference, which was composed of both government representatives and members of Afro-descendents organizations. Conferences were held throughout the country, culminating in a National Conference against Racism and Intolerance in July 2001. Various state institutions took this opportunity to adopt the affirmative action programs mentioned above.

Following the World Conference, a National Council to Combat Discrimination was created as part of the Ministry of Justice Human Rights Secretariat. Among the Council's objectives are "the creation of affirmative public policies that promote equality and the protection of the rights of individuals, social groups and ethnicities affected by racial discrimination and other forms of intolerance."[12]

In May 2003, Law 10.678 was passed, bringing into being the Special Secretariat for Policies Promoting Racial Equality under the Presidency of the Republic. This agency reports directly to the President and coordinates all governmental policies in this area, with an emphasis on the Afro-descendent population. Its actions include coordinating affirmative action policies throughout the public administration, as well as defining public actions aimed at fulfilling Brazil's international commitments to fight racial discrimination.

Shortly after, in June 2003, Brazil recognized the competence of the International Committee for the Elimination of Racial Discrimination, thus empowering this body to receive and analyze complaints of violations of the International Convention.

Also worth mentioning in this context is the federal government's launching of the first and second National Plan for Human Rights to address the issue of race, in 1996 and 2002, respectively.

Other efforts have been observed that complement the above initiatives,[13] though some of these have not lasted long; in general, however, over the last few years one sees that the Brazilian government has begun to acknowledge the problem of

[12] Jaccoud and Beghin, op. cit., p.23.

[13] For a complete list of these initiatives published by the Federal Government for 1995-2002, see Jaccoud and Beghin, op.cit., pp. 55-64 and pp.107-148 (appendix). The documents dated earlier than 2002 were taken from the Secretariat of Information of the Federal Senate Website: wwwt.senado.gov.br

racism. The complexity of the problem in a country such as Brazil-- given the size of its territory and population, its diverse racial composition, the delayed reaction by the State to this problem, the distribution of powers (between federal and state levels), and the deeply-rooted idea of the "racial democracy" concept in Brazilian society-- these government initiatives may be seen as the first steps of a long process, in which the Brazilian State is only just beginning to appreciate the seriousness of the problem, and the resultant need for a systematic approach to racism.

Racism and the Judicial System

The legal, institutional and social context of racism in Brazil described above has clearly had an impact in the judicial system. During the time when the traditional view of the "racial democracy" went virtually unquestioned, Brazilian courts did not refer to general clauses of equal protection under the law, established in the successive Federal Constitutions to address the question of racism. Moreover, the almost total absence of anti-racism legislation made judicial activity based on legal provisions practically unheard of.

Additional historical factors contributed to this situation. These include the absence of education racism-awareness training for judges and other judicial system operators, the almost complete absence of judicial literature on this issue, and the lack of access to justice for presenting racial discrimination actions. Additionally, sitting judges showed an almost total lack of interest in referring to the norms of International Law in this area.

Nevertheless, developments observed over the past few years have shown that this situation is beginning to change as part of the general tendency referred to above, which was first produced at the academic (Social Sciences) level and then at the political one. However, this process has been much slower within the judicial system, as will shortly be shown. Although slight changes have been observed in the historical factors mentioned above, these limitations are far from being overcome. At any rate, the judicial system first became familiar with the issue of race essentially as a result of Law 7716, referred to above.

In a report filed by the *Instituto Brasileiro de Ciências Criminais* (Brazilian Institute for the Criminal Sciences, IBCCRIM) with the Justice Studies Center of the Americas (JSCA), the Institute explains why it was unable to collect information rapidly and systematically, making mention of the difficulties associated with a systematic approach to this issue: The IBCCRIM noted that "having had its Research Area evaluate the possibilities of submitting a report to JSCA commenting on the area in question, the organization came to the conclusion that, with the exception of isolated statistics, it could not access the results of research projects on this issue."[14] After mentioning

[14] Document submitted via email by the IBCCRIM on August 26 2003, p.1. (The authors of this report

some of the studies upon which this report is based –including the work of the *Núcleo de Estudos da Violença* and the IBCCRIM itself- the institution indicated that "to date, the treatment that the justice administration system has given to problems of racial discrimination has not been the specific object of studies with national reach," adding that "a project of this nature requires elevated resources, to which regional [Brazilian] research centers do not generally have access."[15] The Directorship of IBCCRIM added that "given that a census of the justice administration system in Brazil has not been carried out to date, there is no information on the composition of the judicial operators in regard to racial origin. A study of jurisprudence on the system's treatment of cases with discriminatory components has not been carried out either. The 'exhaustive analysis' that JSCA proposes on the bases of existing sentences would require a careful collection that would require time and financial resources that far exceed those that we have to hire an adequately trained technical team (...). As if this weren't enough, the limited jurisprudence existing on this issue could not be compensated for by a 'comparison between coverage by the press in cases with a racial component and the volume of existing jurisprudence,' given that Brazil does not have an information system that includes articles published by the press in regard to this issue."[16]

A general profile of the situation may be taken from two occurrences in 2003 (the second of which happened during the authors' visit to Brazil in preparing this report).

The first refers to the decision adopted by the Federal Supreme Court (Brazil's highest judicial body) in a case where an editor repeatedly published and circulated anti-Semitic texts.[17] The case elicited a variety of opinions and led to a highly visible public debate. The most telling aspect of the case is the debate engendered around aspects that have long ago been confronted in Comparative and International Law. The first of these aspects was whether or not the Jewish community constitutes a race or ethnicity (in order to determine whether or not anti-racist legislation could be applied), while the second, related issue was whether race and ethnicity are biological or cultural.

were furnished with a copy of the document, which was originally sent to JSCA).

15 Idem, p.3.

16 Ibid, p.4.

17 Siegfried Ellwanger published the books "O judeu internacional," by Henry Ford; "A história secreta do Brasil" and "Brasil colonia de banqueiros," by Gustavo Barroso; "Os protocolos dos sabios do Siao"; "Hitler,culpado ou inocente?", by Sérgio Oliveira; "Os conquistadores do mundo –os verdadeiros criminosos de guerra", by Louis Marschalko; and "Nos bastidores da mentira do século," by the editor himself, which was published under the pseudonym S.E.Castan. The accused was found innocent in the first instance because there was no incitement to ethnic discrimination against the Jewish community, but was convicted in the second instance. Later, the accused presented a writ of habeas corpus without disputing the existence of a discriminatory act but stating that the fact itself did not constitute a racist practice. The argument was thrown out and the writ rejected by the Supremo Tribunal de Justicia del Estado de Rio Grande do Sul, and was then taken to the Supremo Tribunal Federal.

The controversy was unleashed by the first opinion issued from the Federal Supreme Court by the Rapporteur in the case, former Justice Mr. Moreira Alves, who stated that Jews could not be considered a race because they lack common physical features such as skin color, eye shape or hair texture that would distinguish from others. Following this logic, they could only be considered a community. Accordingly, the anti-Semitic books in question would not constitute an example of racist expression. This led to the conclusion that the editor's responsibility was ruled out once the crime for which he could have been processed, slander, was prescribed.

Following this, the members of the Federal Supreme Court –including its Chief Justice, Minister Maurício Correa- reached the opposite conclusion, finding that anti-Semitic expressions can constitute a form of racism. The report presented to the Court by Celso Lafer is illustrative in this regard, as it points out that while it is true that racism "cannot be justified on the basis of biological fundaments, it persists, however, as a social phenomenon. This social phenomenon and not 'race' [as a biological element], is the judicial object of the punishment mentioned in Article 5, LXII of the Constitution of 1988 and its respective infra-Constitutional legislation." He added that "the judicial content of the crime of racism is based on theories and ideologies and on the dissemination of theories and ideologies that discriminate against groups and individuals, attributing to them the characteristics of an inferior 'race.'"

The decision of the Federal Supreme Court follows more modern criteria and establishes that the cultural factor is, in fact, central, an undoubted sign of progress in Brazil. However, even more important than the content of the decision itself is the fact that Brazilian jurisprudence is only now- on the eve of the twenty-first century and more than 100 years after the nation abolished slavery - developing these basic concepts in fighting racism, amidst strong public debate, as though this were uncharted territory. It is noteworthy that this discussion, which is well established at the comparative and international levels,[18] has not taken place earlier, given Brazil's Afro-descendent population. It is true that the Court's ruling was merely a response to arguments by the editor accused of racism; however, the eagerness with which the decision was awaited and its novelty for

[18] In his report to the Federal Supreme Court, Celso Lafer notes the developments in Comparative Law in this area, indicating that "both the case Shaara Tefila Congregation v. Cobb, which was decided by the U.S. Supreme Court in 1987 and Mandla and Other v. Dowell Lee and Other, decided by the House of Lords of England in 1983, interpret and apply legislation of the respective countries in the area of racial discrimination. The case decided by the U.S. Supreme Court refers to racist practices against Jews. The case decided in the House of Lords concerns the practice of racism against Sikhs. In both cases, the Courts decided that irrespective of similar allegations presented by inmates and in spite of the fact that neither Jews nor Sikhs belong to a 'race' [in the biological sense], both were victims of racist practices and were protected by legislation against racial discrimination established in the US in 1982 and in England in 1976. In these two cases racial discrimination refers to the cultural-historical dimension of racism, from which discriminatory practices arise."

Brazilian jurisprudence eloquently expresses the nascent nature of the judicial treatment of racism in Brazil.

The second event referred to was the visit to Brazil of Asma Jahangir, Rapporteur of the United Nations Human Rights Commission on Extrajudicial, Summary or Arbitrary Executions, to investigate the actions of extermination groups. The Rapporteur found that the Brazilian judicial system had responded inadequately to this situation, which affected Afro-descendents significantly. The Rapporteur also stated his intention to recommend that the United Nations commission visit Brazil to evaluate the system more closely. These declarations were supported by the federal government but openly rejected by a number of important judicial authorities, not to mention several attorneys, who expressed their opposition in the press. However, contrary to what one might expect, the debate focused not on whether or not the Brazilian judicial system adequately confronts the serious situation of executions, but on the supposedly undue international interference in what should have been an internal matter. This argument maintained that a visit for the stated objectives represented a threat to national sovereignty. This type of reaction, which is more prevalent in an authoritarian context than in a democratic one- demonstrates a lack of awareness of the function of the International Human Rights system, whose monitoring of the internal situation of countries is upheld by numerous conventions signed by Brazil and that include supervision of policies and practices aimed at combating racism.

Nevertheless, the opposition described above is not surprising given how infrequently Brazilian jurisprudence refers to International Human Rights Law. Brazil is a signatory to some of the most important instruments in this area, as noted, including the International Convention for the Elimination of All Forms of Racial Discrimination. The operability of these instruments, however, is minimal in Brazilian jurisprudence.

The last few years have seen judicial decisions on cases of discrimination against the Afro-descendent population in a variety of areas, including criminal and civilian complaints and judicial reviews of affirmative action norms. In addition, for the first time exploratory studies of the judicial treatment of defendants in criminal cases are being carried out, as are investigations of the situation of black women in the same context.

According to the information collected for this report from government, academic and non-governmental sources (including organizations that represent Afro-descendents), the volume of cases that reach the courts is very low in relation to the number of racist incidents that occur in Brazil. In some cases, those involved have the means to hire an attorney, though for most victims this is not possible, and there are very few opportunities to obtain legal aid.

As an example, the *Instituto do Negro Padre Batista* in the state of Sao Paulo was created through an agreement with the *Procuraduría General del Estado* (Attorney General's Office), to bring actions of racism in the criminal courts. Under the agreement, the *Procuraduría* will hand over to this body all cases of racism and slander (with racist content) occurring in the state of Sao Paulo. The Institute reports approximately 100 cases currently pending, quite a low number considering the size of the Afro-Brazilian population in that state. Only a few other non-governmental organizations that represent Afro-descendents process judicial cases, one of which is the *Instituto da Mulher Negra Geledés.* At any rate, the low volume of judicial cases gives a clear idea of just how underrepresented the Afro-Brazilian population really is.

Factors that contribute to this situation include the lack of public awareness that would allow these problems to be addressed and the scant confidence in the judicial system's ability to adequately resolve them. Another factor that was mentioned by some Institute members and attorneys interviewed was that police delegations- where victims must initially turn to in reporting crimes- frequently fail to take reports of racism seriously or fail to adequately inform victims of how to proceed. In this context the Institute's attorneys noted the notoriously different volume of cases submitted by some police delegations compared to others, which they attribute to uneven criteria and the lack of a common approach.

The actions of police delegations show that the application of anti-racist laws has encountered serious problems since enactment. One empirical study[19] demonstrates serious deficiencies in delegations' response to complaints of racism, which they tend to view as simple questions of honor, even though these may involve prohibiting access to transportation, labor rights, and consumer protection. The author of the study stated that "as a result, black attorneys rightly complain about the real swelling of cases of crimes against honor reported against the police."[20]

Importantly, there is no special program designed to ensure that Afro-Brazilian defendants have adequate legal representation in criminal cases.

In Rio de Janeiro State, with a population of 5 million people self-described either as "parda" ("brown") or as "black" according to the last census, judicial cases are handled by the public agency *Programa Disque Racismo*.[21] This program was established at the end of the 1990s and currently has approximately 50 cases involving racial issues in the courts.

Many of the situations observed in Sao Paulo are also seen in Rio de Janeiro. For example, members of *Disque Racismo* highlighted the difficulty associated with obtaining favorable outcomes in criminal racism cases. In the four years since the

[19] Guimaraes, op. cit., p.47.
[20] Idem, p.47.

program was launched in 1999, the organization has obtained three convictions in the first instance, all of which are still pending in higher instances. They have, however, had some favorable results in cases of slander (on the basis of racist connotations). This has also been the case for civil suits for damages arising from racist statements. The body has also handled cases of labor discrimination, specifically for people fired because of racial prejudice. Another noteworthy case was a favorable result in the area of education, where the father of one student made racist statements against another student. Representatives of *Disque Racismo* also pointed out that there are uneven criteria among judges when deciding whether to try a case in civil jurisdiction. While some judges believe in waiting until the criminal investigation has ended, others think that both actions may be processed simultaneously, a position that clearly favors expeditious civil procedures.

Overall, members of *Disque Racismo* feel that they deal with a very low percentage of racist incidents that actually take place, and underscore the difficulties encountered in bringing these cases before the courts, which are found on various levels. They note that police delegations frequently fail to take the complaints seriously, do not carry out preliminary investigations ("*inquéritos*") and often fail to forward evidence to the public prosecutor's office or other respective bodies. They also point out the tendency of the prosecutor's office to make deals that, strictly speaking, are no more than symbolic gestures that fail to establish the economic compensations that could help to prevent or deter future racist actions. In general, the interviews carried out in Rio de Janeiro revealed information similar to that gathered in Sao Paulo, with respect to the lack of training for judicial operators on the subject of racism.

Lastly, as in the state of Sao Paulo, Rio de Janeiro has no specialized unit or program designed to provide legal defense for Afro-descendents accused of crimes.

In his general overview of the public prosecutor's role in the fight against racism in Brazil, Joaquim Barbosa Gomes, the first Afro-Brazilian to serve on the Federal Supreme Court (appointed in 2003), pointed out the serious problems that exist, noting that the prosecutor's office had done very little in the past few years to defend oppressed groups such as Afro-descendants, in spite of their wide-ranging Constitutional powers. The Justice refers to numerous legal texts that the public prosecutor's office could use to present public actions to defend the collective or individual interests of Afro-descendents. This has seriously impeded adequate access to justice for this segment of the population. Barbosa also makes reference to the structural deficiencies in the public prosecutor's office, noting that "in spite of the receptiveness to this topic observed in the federal ambit in some sectors of the federal public prosecutor's office and the *Procuraduría Federal de los*

[21] Centro de Referência Nazareth Cerqueira Contra o Racismo e o Anti-semitismo.

Derechos del Ciudadano and its regional offices in particular, it is important to note that very little has been done."[22] For Barbosa, the public prosecutor's office lack of involvement has been encouraged by the courts and the Brazilian judicial system in general, and is reflected in "the exacerbated individualism, extreme formalism, lack of rationality or practicality in the great majority of instruments for action, etc." He adds that "it is not surprising given this context that the overall situation of public civil suits is so squalid that there is nothing to analyze in the column referring to protection of minorities' rights by the public prosecutor's office!"[23]

The gender variable in racism complaints is addressed in the Guimareas study mentioned above, which notes that in the period covered by the study (1993-1997), of all complaints registered in the Sao Paolo Police Unit on Racial Crimes, women's complaints outnumber those of men. This number increased notably when crimes against honor and discrimination against clients and users of services were included. Interpreting the data, Guimaraes states that this likely indicates the "overrepresentation of two underprivileged groups–that of women and that of blacks-and the fact that racial discrimination in Brazil tends to occur between people of different classes or in different positions of power."[24]

In addition to the serious deficiencies in accessing justice mentioned above, jurisprudence for racism is still at an incipient stage and has yet to define criteria for a range of areas. In spite of the nominal existence of a legal instrument to prosecute certain cases of racism since 1951, in practice there were very few cases processed and sentenced under this instrument.[25] A new law passed in 1989 spurred the emergence of a body of jurisprudence. On the surface, the criminal focus of the 1951 and 1989 laws would seem to reflect a serious new awareness of racist practices by the federal government and Brazilian society. This impression is strengthened in light of the fact that the 1989 Law established racism as an imprescriptible crime for which bail cannot be allowed. However, it seems that this law was actually implemented to defend against such practices as attacks against "the Brazilian nation," based on the assumption that Brazil is not a racist country and that racist behavior was due to foreign influences and "imported" segregationist practices. In other words, it was understood that discriminatory practices were not rooted in Brazil.[26]

---

22 Joaquim B. Barbosa Gomes, O Ministério Público e os efeitos da discriminaçao racial no Brasil: Da Indiferença à Inércia; in: Boletim dos Procuradores da República, Ano II Nº15, July 1999, pp.15-25; citation from p.21.

23 Ibid.

24 Ibid, p.57 (footnote eliminated). Guimaraes adds that as a result "it is not a matter of correcting the status of an inferior class invoking race, but, on the contrary, of invoking race in order to balance a symmetrical situation of class status." (Ibid)

25 Interview with Hédio Silva Jr., an attorney who specializes in this area.

26 See Seth Racusen, The Ideology of the Brazilian Nation and the Brazilian Legal Theory of Racial Discrimination, paper presented at the Latin American Studies Association (LASA) conference in March 2003.

The interviews conducted and information obtained from the various studies consulted for this report suggest that this view also permeates judges' mentality. For example, in many cases the exculpatory argument is accepted; in other words, those accused of racism are absolved of responsibility if no evidence of racism is found in their private lives (family relationships, friendships, etc.). This introduces a certain ambiguity with regard to how the issue is treated, leading in many cases to a finding of not guilty. In a context such as Brazil, where manifestations of racism are quite different from the segregationist practices used in the U.S. up to the 1960s or those of South Africa during apartheid, it is relatively easy for defendants to demonstrate that they have some kind of relationship with people of other races, making it much easier to present this type of argument in court.

Of course, the dictation of absolutory rulings is not in itself problematic, however, it may cause real problems by responding to criteria that make the issue invisible, leading to the violation of human rights. This is true where society ignores the racism that exists and, on the basis of this claim, does not punish racist behavior.

Another argument that tends to be used by the defense in court consists in declaring the defendant himself to be non-white. Given the wide racial variety existing in Brazil it is possible for the defendant to present himself as "a person of color," a tactic that has been used successfully on more than a few occasions to obtain a verdict of not-guilty, based on the argument that a person of color cannot be racist against himself.

The successive changes mentioned above that have been made to the 1989 Law, coupled with the efforts of the Black Movement and other political actors over the last few years, have gradually changed the existing perception. As a result, there is currently no single criterion used at the judicial level to deal with racism, though some decisions passed down by the courts reveal a greater awareness of racist practices in Brazil than others. This situation is slowly evolving; however, some feel that the specific features of the instrument chosen (criminal norms that are imprescriptible and not eligible for bail) are counterproductive, with the seriousness of the charges leading judges to seek out alternatives in some cases. One crime that is substituted is slander, which creates a problem as it puts the question of racism on a second level.

Civil justice, specifically compensation for damages, has been more productive for plaintiffs, though one could not characterize the general situation as positive, for several reasons. In general, the cases are long and drawn out, few attorneys are willing to represent the affected parties free of charge, and the number of sentences dictated is still low. Moreover, apart from whether the plaintiff's argument is accepted, rulings frequently leave the existing racial problem hidden, making only

general references to the effect of the action on the dignity of the victim, without explicitly noting that it is the result of a racist practice.

Another concern is related to the criteria for presenting evidence in court. Past experiences in comparative law have shown that this aspect is crucial, and is frequently the point at which complaints regarding discrimination in general and racial discrimination in particular fail. In this context the distinction between direct and indirect discrimination plays a central role.

Information gathered in preparing this report indicates that the majority of Brazilian judicial decisions are based on direct discrimination. This criterion requires a higher standard of proof, which makes it more difficult to win the case. In effect, under direct discrimination the plaintiff must basically demonstrate the existence of three separate elements: the discriminatory act, prejudice (racial prejudice, in the case of this study) by the accused towards the plaintiff, and a causal relationship between the racial prejudice and the discriminatory act. This therefore requires that the accused make explicit his or her intention to discriminate.

This requirement is extremely difficult to satisfy in a society that is aware of the criminalization of racism, at that at the same time openly denies its racist motivations. As a result, racial discrimination is usually not manifested explicitly and is therefore not subject to judicial prosecution.

The restrictive or formalist interpretation of the law also impedes the presentation of direct discrimination actions in court. On occasion, judges have required that a certain behavior or expression may only be directed toward a person of African descent in order for it to qualify as criminally admissible. In this sense, for example, the court has found that characterizing someone as a prostitute, a bum or as monkey-like does not constitute racism given that white or yellow (sic) people could also be described in this manner. The same ruling manifests the myth of "racial democracy" by stating that "[In Brazil] people with darker skin can even be the idols of people with lighter skin in sports and music, and women who are popularly referred to as '*mulatas*' would seem to be proud of that condition and are exhibited with great success in many famous and popular places. In Brazil 'white' people normally marry 'black' people and have children (...). 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."[27]

In some cases involving an action or expression directed at a specific person of African descent, the courts have ruled that this does not represent behavior consistent with racism, because it does not prove that the prejudice or discriminatory

[27] Guimaraes, op. cit., p.35.

intent was directed against the Afro-descendent population as a whole. For example, in the state of Sao Paulo the existence of the crime of racism was not accepted by the court in one case in which the accused, a mayor, said to an employee upon his dismissal from the municipality, "marginal people and dirty blacks won't work here anymore during my tenure." The sentence establishes that "[s]aying that a particular person is a 'dirty black' or that the municipal administration will not allow them any more does not represent the crime [of racism]." The court adds that "[d]iscriminating, according to the meaning of the verb itself, involves prohibiting certain races or persons from certain religions or of certain colors from making use of some rights or opportunities that are conferred on some segment of the population. It does not involve removing someone from their job (in a place in which many other blacks most certainly continue to work) under the rude statement that he or she is a 'dirty black,' at least in order to satisfy the crime established in Article 20 of the special law in question [Law 7716 against racism]." The finding also states that "as a result, there is no evidence of general opposition to the black race in the statement of the accused, but instead a verbal attack that was exclusive to the victim, and nothing more because, it is important to note, many blacks continue to serve in the municipality [in question]." The court concludes that at most there may have been slander involved; this, however, was ruled out in the case in question, as a result of which the case was closed.[28]

Brazilian courts have made little use of the criterion of indirect discrimination, under which the discriminatory character of a behavior can be determined from the presence of certain elements. Specifically, the prosecution must prove that the victim is part of a certain group (racial in this case) and that he or she receives different (inferior) treatment than that received by a person outside of that group, independent of the existence of explicit manifestations of racist intent.

For indirect discrimination, comparative law shows that this principle has been applied most often around discrimination in the workplace. Statistics are used to infer discriminatory conduct, by comparing the treatment received by a person who belongs to a "suspicious category" (one that has historically been the object of discrimination) with that received by a non-member of that group. In cases of hiring, a frequently seen scenario is that an applicant is denied employment despite being qualified and although the company continues to search for candidates.

The principle of indirect discrimination seems to be applied somewhat frequently, though only for racism linked to consumers' rights. This criterion has been used to sanction discrimination in access to social clubs or treatment received by Afro-descendants in

[28] Tribunal de Justiça do Estado de Sao Paulo, 2ª. Câmara Criminal; Proceso Nº 272.907, 20 September 1999.

banks. In an example of the first case, a court ruled that discrimination had occurred in a nightclub: the locale had two lines, one supposedly for members and one for non-members, though in effect the non-whites from the first line were admitted to the locale while Afro-descendents from the other were not allowed to purchase tickets. The case concluded that there had been discriminatory treatment against members of that group.[29] In the area of consumer rights, a well-known case referred to by those interviewed in Brazil involved a black client who, when he attempted to transfer a small amount of money from his bank account to his wife's, was subjected to long and complex interrogations that far exceeded normal banking practices for white clients. The court found this behavior to be racially motivated.[30]

Another aspect worth reviewing, especially as very few empirical studies have been carried out in this area in Brazil, is the degree to which the racial variable influences the development and result of criminal procedures for defendants. The study most frequently cited during our visit to Brazil was carried out several years ago by Professor Sérgio Adorno in the city of Sao Paulo.[31] The study used a stratified and representative sample of all criminal actions for robbery that were resolved in the first instance in 1990. According to the author, "[t]his study proved that the arbitrariness of inquisitory proceedings prejudices black inmates more than white inmates. In the same sense, black inmates tend to confront greater barriers in accessing their rights."[32] Adorno bases this conclusion on the results of the study, including the percentage of defendants released on bail, which indicate that almost twice as many whites are granted this benefit thank blacks (27% versus 15%). Another revealing result is the percentage of defendants that present witnesses: while 42.3% of white defendants do so, only 25.2% of blacks present witnesses in their defense. The author suggests that this may be related to black defendants' dependence on public legal aid, which frequently does not emphasize this aspect as much as private attorneys; it also may be linked to the extreme marginality of many black defendants, many of whom lack a social network that could find others to testify on their behalf.

With regard to the definitive first instance sentence, the study found a conviction rate of 59.4% for white defendants, and 68.8% for blacks. The study also explored a possible relationship between the presentation of witnesses and the number of not-guilty verdicts, and found that for white defendants, the impact of said witnesses is much greater than in for black defendants. In effect, white defendants who failed to present witnesses were convicted 70% of the time, though the conviction rate was much lower

[29] Apelación Criminal Nº294.084, 4ª. Câmara Criminal del Tribunal de Alzada, Río Grande do Sul; cited by Racusen, Op cit., p.9.

[30] Cited by Racusen, ibid.

[31] Sérgio Adorno, Discriminaçao Racial e Justiça Criminal em Sao Paulo, in: Novos Estudos Nº43, CEBRAP, November 1995, pp.45-63.

(52%) where witnesses were presented. For blacks, the presentation of witnesses had a much lower effect on conviction rates, dropping from 71.8% without to 68% with witnesses.

In his conclusions, Adorno notes that "black prisoners tend to be more persecuted by police guards, face more obstacles regarding access to criminal justice and greater difficulties related to enjoying the right to adequate defense, which is guaranteed in the Constitution (1988). As a result, they tend to receive more severe criminal treatment, as represented by the greater probability that they will be convicted, compared to white inmates." Adorno adds "As has been demonstrated, the convictions tend to focus on robberies committed by black inmates. Everything seems to indicate that color is a powerful instrument of discrimination in the distribution of justice. The principle of equality under the law independent of social differences and inequalities seems to be compromised by the prejudicial functioning of the criminal justice system."[33]

One recent study published in 2003 by the IBCCRIM confirms this tendency and reveals that the severity of the criminal justice system is even greater in the case of black women. The study considered all cases of robbery regarding which an "*inquérito*" (police investigation) was opened between 1991 and 1998 in the state of Sao Paulo.

The study's conclusions section states that, in general and irrespective of gender "in the course of the stages [of the criminal procedure], blacks increase their representation in relation to whites in the system, a situation that is configured inversely for the latter."[34]

Regarding males, the study found that "in regard to the percentage of those accused [that is, at the beginning of the procedure], black men represented 43.5% of the total, reaching 46.6% of those convicted in criminal cases. Meanwhile, white men represented 55.1% of those accused of robbery, and 52.4% of those convicted, which represents an antagonistic movement among the two races: ascending for blacks and descending for whites."[35]

Nevertheless, when the variable of gender is incorporated the disparity is even stronger. The study indicates that: "the discrepancy between races is even more evident between women: they move from 42.2% of those accused of committing robbery to 49.7% of those convicted (the largest increase observed); meanwhile, the inverse occurs with white women: representing 55% of those accused, they are only 49.4% of those convicted (the largest decrease observed)."[36]

The study concludes that "the results of the investigation are irrefutable

[32] Ibid, p.53.
[33] Ibid, p.63.
[34] Renato Sêrgio de Lima, Alessandra Teixeira and Jacqueline Signoretto, Mulheres Negras: as mais punidas nos crimes de roubo; in: Boletín del Núcleo de Pesquisas IBCCRIM Nº125, April 2003, p.3.
[35] Ibid.
[36] Ibid.

and point to the greater punishment of blacks, both in terms of their capture and maintenance by the system (more convicted than initiated) and taking into account their imprisonment during the procedure," given that this is also applied more frequently to blacks. "But the two-way street of discrimination is alarming in regard to black women," the authors continue, as whites are moving in the opposite direction, showing less presence in the system as complaints are not filed against them or result in acquittals in the first or second instance."[37]

Conclusions

Brazilian government and society have historically failed to accept the existence of racist practices against people of African descent. The information gathered and synthesized in this chapter on the treatment of the problem of racism in Brazil, particularly in the judicial system, shows that there is an incipient process of change toward a growing awareness of these practices, and the need to prioritize their elimination.

This process has moved forward more slowly in the judicial system for reasons mentioned above, as observed in several aspects including the limited presence of Afro-descendants in said system, the serious barriers in accessing justice that are experienced by members of this community, and the lack of consistent jurisprudence on this topic.

The final chapter of this report presents suggestions regarding actions that will pave the way for progress in this problematic area.

[37] Ibid, p.4.

COLOMBIA

Background Information

Despite an observable level of organization in Colombia's Afro-descendant communities, the situation of these groups is clearly precarious. Like their counterparts in Peru, though perhaps to a somewhat lesser degree, the available literature and interviews conducted for this study refer repeatedly to the social invisibility of Afro-Colombians.

Colombia has a sizeable Afro-descendant population, though official figures have been questioned both by civil society actors and government officials themselves, partly because of the information gap caused by a lack of ethnic variables in the 1993 Census, but also because there is a widespread tendency among citizens to disassociate themselves from the black race. The Colombian State itself acknowledges these disparities, reporting inconsistencies in information used to determine the Afro-Colombian population base and for quality of life indicators. The 1993 census calculated a population of 502,343. However, the *Plan Nacional de Desarrollo de la Población Afro-Colombiana* (National Development Project for the Afro-Colombian Population) estimates this population as closer to 10.5 million people, a figure arrived at employing a variable percentage applied to municipalities with black communities.[38]

Estimates of the percentage of the total population that is of African descent range from between 16% and 26%, or between 6 and 10.5 million inhabitants,[39] making the Afro-Colombian population the largest of all ethnic minorities recognized by the Colombian State. Nevertheless, it is not Afro-descendants but the indigenous population, which totals 640 thousand or 2% of the national population,[40] that has received the most attention, both from the State (through public policies and in the courts), and from civil society (academic centers and non-governmental organizations, among others).[41]

---

[38] *Comisión de Estudios para el Plan de Desarrollo Afrocolombiano*, "Plan Nacional de Desarrollo para las Comunidades Negras 2002-2006," mimeographed document, p. 1.

[39] Significantly different viewpoints were observed both among those interviewed and in the literature. For example, one official document from the Ministry of the Interior –which ignores official government figures from the population census organization- indicates that the Afro-Colombian population "is estimated at around five million inhabitants, not including the populations of large cities such as Santa Marta, Cali, Barranquilla, Cartagena, Medellín, Pereira, Florencia, Villavicencio, Santa Fe de Bogotá, among others." (Translator's note: unless otherwise specified, all citations in this text have been translated from the Spanish original.) See Ministry of the Interior, *Visión, Gestión y Proyección de la Dirección de Asuntos para las Comunidades Negras – DACN – Dos Años Después 1995-1996*, Santa Fe de Bogotá, January 1997, p. 14. A summary document of conclusions from a meeting of State officials indicates that "People of African origin represent approximately 26% of the total population of Colombia" -*Primer Encuentro de Jefes de Oficinas de Derechos Humanos de la Fuerza Pública Colombiana*," Cartagena de Indias, 9-12 February 2003, p. 37.

[40] Ester Sánchez Botero, *La aplicación práctica de la política de reconocimiento a la diversidad étnica y cultural*, Ministerio de Salud / Instituto Colombiano de Bienestar Familiar, Bogotá, Second edition, 2002, Volume I, p. 23.

[41] The Colombian Constitutional Court has dealt with matters related to indigenous rights on more than 35 occasions by means of protective, unifying and constitutional sentences, making declarations that

For many, the origins of this disproportionate response by civil and public actors are historic. In the beginning of the Colonial period, the Spanish conquistadors granted the indigenous populations token legal recognition and named an official of the Crown (the so-called "*corregidor de indios*") to oversee dealings with these groups. The native population was also *educated* via their induction into Christianity, which, though involuntary, at least obliged the Spanish to take some interest in their welfare. The situation of Afro-Colombians was different, as the prevailing belief among the Spanish was that these slaves, who were brought untrained and without representation from Africa, had no souls to convert. It is estimated that the slave trade brought more than 40 million people into the country between the 17th and 19th centuries and that this practice continued even after the abolition of slavery in 1851. Social classes were established and the African population placed on the bottom rung of the ladder, a situation that has persisted up to the present.

The present geographical distribution of Afro-descendant populations in Colombia is the result of historical internal migrations. Africans and their descendants "were exploited in what was then called colonial Santa Fe –capital of the Viceroyalty of New Granada- in various economic activities, the main ones being agricultural work, domestic service (servants were considered status symbols by slave owners), or as town criers, governesses and in some craftwork activities."[42] Afro-descendant groups were later forced to migrate to urban settlements due to "the process of expansion and consolidation of national capitalism, which instigated a policy to clear the lands." Today, climate and existing natural resources have drawn the Afro-Colombian population mainly to the Pacific coast (for example, the department of Chocó houses approximately 85% of all Afro-Colombians) and Colombia's Caribbean coast, specifically the Archipelago of San Andrés, Providencia and Santa Catalina islands (home to the *Raizal* native population, whose culture is similar to other Caribbean groups in Costa Rica, Honduras, Haiti, Jamaica and the Dominican Republic, and who are notably different from the rest of the Afro-Colombian community).[43] Afro-descendant populations have also settled in the countries' large cities. Thus, Afro-Colombians may be found throughout the mainland and islands.

While mass migration of Afro-Colombians to large urban centers has occurred for a variety of reasons, one of these—the internal armed conflict—is of particular importance due to its many and

have led to the realization of specialized studies which have simply not been carried out with regard to the Afro-Colombian community. See Esther Sánchez Botero, *Política de reconocimiento a la diversidad étnica y cultural y de protección al menor. Jurisprudencia de la Corte Constitucional de Colombia*, Ministerio de Salud / Instituto Colombiano de Bienestar Familiar, Bogotá, Second Edition, 2002, Volume III.

[42] *Ibid.*

[43] Further information about the *Raizal* population may be found near the end of this chapter.

horrific consequences for this population. It is well known that Colombia has been embroiled in an internal conflict for a number of decades that has led to the displacement of thousands of people who have had to abandon their homes and families in the face of intense violence in certain areas.[44] Though this situation is somewhat generalized in Colombia, the Afro-Colombian population has suffered the consequences of this cycle of violence as perhaps no other group. It is estimated that "the (total) number of persons affected by forced internal displacement in Colombia is the fourth highest in the world, (representing) the biggest humanitarian crisis in the Western Hemisphere."[45] This crisis, which is the result of serious human rights infringements such as massacres, murders, kidnappings, extortion and paybacks, among others,[46] has in turn caused serious social problems that have mainly affected women (and specifically Afro-Colombian women), who are forced assume the role of family providers.[47]

Black communities have felt the effects of displacement particularly strongly because of their concentration along the Pacific coast, an area that is considered strategic not only for its richness in natural resources, but also due to its importance as an exportation area for legal or illegal merchandise, including the drugs that are moved through this particular corridor. According to one writer, this sector is the object of "great works of infrastructure are in the planning which will have a huge impact on the region, both at environmental and socio-cultural levels; the Colombian Pacific is considered to be a limitless source of natural resources, dominated by the idea of an extractive economy and enclave, that is non-sustainable, and which has characterized the development model implemented throughout the countries (*sic*) of Latin

---

[44] According to information supplied by the *Comisión Colombiana de Juristas*, forced displacement due to the armed conflict has involved more than two million people over the last six years, with women having to face most of the consequences. In spite of the discrepancy in figures, it is clear that the trauma produced in Afro-Colombians by this systematic violation of people's rights is even more acute in women. According to the *Defensoría del Pueblo (Ombudsman's Office)*, 10.78% of the displaced population is of African decent, while the Conferencia Episcopal de Colombia assures us that this figure is much closer to 22.66%: Comisión Colombiana de Juristas, *Situación de Derechos Humanos y Derechos Humanitario en Colombia*, Bogotá, March 2003, p. 46.

[45] Carlos Rosero, "Situación de la Población Afrodescendiente en Colombia" (mimeo), Bogotá, 2000, quoted in *ibid*, p. 47.

[46] One of the most tragic acts of political violence to have affected the Afro-Colombian community is the massacre at Bojayá on May 2 2002. Located in the district of Chocó (which, as mentioned in the text, contains 85% of the Colombian black population), the town was the scene of a heavy skirmish between the Revolutionary Armed Forces of Colombia (FARC) and paramilitary groups, which killed 119 civilians sheltering in a church when it was hit by an explosive cylinder launched by the FARC. An attorney working for the Public Defense Office who was interviewed during the authors' visit to Colombia pointed out that none of the official reports or those issued by NGOs mention 119 Afro-Colombians, but refer only to 119 individuals.

[47] In Cartagena, accompanied by Doudou Dièn, U.N. Special Rapporteur against Racism, Racial Discrimination, Xenophobia and other Connected forms of Intolerance, it was possible to witness the extreme and degrading conditions faced by displaced women, living on swampland, without drinking water or electricity, highly vulnerable to violence, undesired pregnancies, and afraid of publicizing their situation because of possible retaliation ("El Posón", El León district). Those women who have grouped together to deal with the problems derived from forced displacement indicate that they are often the victims of abuse, persecution and harassment (even by the police).

America since the days of independence. In spite of all the negative analysis we make of these mega-projects proposed in development plans, it is the Afro-Colombian population who will have to deal with the effects that such projects create."[48]

In relation to the living conditions of Afro-Colombians, it is generally agreed that this group is the most disadvantaged in the country. Official data for 1997 reports that "in 80% of black communities, inhabitants are unable to satisfy their basic needs and live in extreme poverty, while per capita income oscillates between 500 and 600 dollars, compared to a national average of 1,500. 74% of the Afro-Colombian population earns less than the legal minimum wage, and life expectancy is 55 years compared to a national average of 65."[49] This government document also reports that close to 60% of Afro-Colombians has no access to health care, and that "while a the national level there are 7 doctors per 10,000 inhabitants, in the Pacific region (where the majority of this population lives) this ratio is only 1.6 doctors, spread among the approximately ten hospitals and 137 health centers with mid-level infrastructure."

In addition, educational coverage in the Pacific zone is reportedly low, meaning that "for every 100 thousand students of African decent who finish secondary school, only two enter university;"[50] this number does not take into account that almost none of these actually finish their university education.[51] Other factors that contribute to making Afro-Colombians the most disadvantaged segment of the country's population include the lack of a proper water supply system, barriers to regularizing ownership of farmland and lots (especially in urban areas), and poor electricity and telecommunications services in Afro-Colombian communities.

"Raizal" Peoples

The *Raizal* Afro-Colombian population bears special mention as a group with unique characteristics. The *Raizal* are an ethnic group located in the Archipelago of San Andrés, Providencia and Santa Catalina, 770 kilometers from continental Colombia. Native languages spoken in the Archipelago include Creole, English and *Vendee* (in San Andrés), though inhabitants have been forced to "Colombianize" themselves (their

---

[48] Elder Viafara Valverde, *Aspectos Políticos y Sociales de la Ley 70/1993 en el Municipio de Guapi*, 70/1993 in the Guapi Municipality, *Cauca (1993-2001)*, Thesis for the diploma of political analyst, available at: http://axe-cali.tripod.com/viafara.htm.

[49] Ministry of the Interior, *op. cit.*, p.15.

[50] Documents from the *Comisiones Temáticas* 2861, Planeta Paz, Comisiones Temáticas, 6, 7, 8, *Conflicto Armado y Solución Política Negociada*, Bogotá, Planeta Paz, 2002, p. 49.

[51] In part due to lobbying by Afro-Colombian communities, the Government fulfilled the mandate established in Article 39 of Law 70 of 1993, and set up an "Afro-Colombian Study Course," the aim of which is to reinstate Afro-oriented issues in schools, thus achieving real integration of this sector within the wider population. See: *Cátedra de Estudios Afrocolombianos. Lineamientos Curriculares*, Ministry of Education, May 2001. Regrettably, according to people interviewed for this study, this program is not a priority for the present government: only a third of the action plan has been implemented and there are no new initiatives in the pipeline.

description) in response to the persistent actions of the government to colonize the islands of the Archipelago.

In 1822, the *Raizal* population itself decided to become part of "Greater Colombia" (Ecuador, Venezuela and Colombia), though unfortunately its good relations with the mainland population didn't last long. At the turn of the twentieth century, "the government began to pass legislation in the National Congress in Bogotá with the aim of occupying the *Raizal* territories. This was how the central government turned the territories into a region of the country, allowing the president seated in the capital to appoint the governor, who was generally selected from the higher ranks of the armed forces."[52]

Many years later, in 1953, the island of San Andrés was converted into a duty free port, with the Colombian State promoting the mass migration of "mainlanders" to the islands. This action was doubtless the most important factor in creating the present-day problems faced by the *Raizal:* it is estimated that of the total population inhabiting San Andrés, almost 75% are non-natives; in other words, one in four individuals is a *Raizal.* (This can be compared to the 1960s, when almost 90% of the population belonged to this ethnic group.) Among other effects, this massive influx –mainly of Colombians from the Bolívar region (Cartagena) - influenced long-established practices among the islanders, such as the coconut trade. Before the arrival of the first continental settlers, trade with other Caribbean islands was based on an informal exchange system (which was not particularly inefficient, according to locals). Nevertheless, the new arrivals brought with them bureaucratic practices for exporting merchandise and goods, leading to the (commercial) ruin of a significant number of *Raizal*, who were unfamiliar with the rigorous formalities demanded of them.

After numerous interviews with attorneys, defense lawyers and representatives of social organizations on the island of San Andrés, as well as consideration of documents to which the authors had direct access, it is clear that the reiterated demand of this population is none other than their right to self-determination.[53] The consequences of (what islanders call) the "mainlander" invasion have been significant, and include a native unemployment rate of almost 80%. Another effect is the justice system's

[52] Archipelago Movement for Ethnic Native Self-Determination (AMEN-SD), "Complaints of the Indigenous Raizal People of the Archipelago of San Andrés, Providence & Santa Catalina", document presented to the UN Special Rapporteur against Racism, Racial Discrimination, Xenophobia and other Connected forms of Intolerance, October 2003, p.1 (JSCA translation). In 1991 this regional government was elevated to *Departamento* (Article 309 of the Constitution).

[53] "In the case of the Archipelago of San Andrés, Providencia and Santa Catalina, we know that the *Raizal* population has no access to essential services such as refuse disposal and a sewage system, and also has to put up with high levels of unemployment and environmental degradation as a result of the unrestrained immigration of Colombian mainland inhabitants, which has had a detrimental effect on the local standard of living." *Cátedra de Estudios Afrocolombianos.*, p. 32.

treatment of members of this ethnic group.[54]

[54] To illustrate this point the following passage taken from a pronouncement of the Constitutional Court on the constitutionality of Decree 2762/91, which establishes a special regulation for the rights of circulation and residence, with the aim of protecting the natural resources of San Andrés (C-530/93). Within this text, the *"Sons of the Soil"* movement maintained that "the environmental and ethno-cultural (*sic*) state of the islands, is a direct consequence of omissions and errors of those who exercised the power and authority to protect, conserve, improve and fundamentally promote (*these lands and peoples*). Those who drafted the 1886 Constitution, excluded from it all ethno-cultural (*sic*) minorities who have lived and still inhabit the national territory, by defining a nationality based on the Spanish language and the Catholic faith…this constitutional omission led to political leaders and state officials carrying out their duties oblivious of the particular situation of each region, such as that pertaining to our archipelago, destroying all that was deemed not to represent the national culture, and imposing that which for them was supposedly representative. Many were the abuses committed against ethno-cultural (*sic*) minorities in our country. It was said that the inhabitants of San Andrés were unaware of God and didn't speak Spanish, thus they were not Colombian. A recommendation was made to "Colombianize" the people, and that was what they did. The people were subjected to a concordat regime; schools were closed; bibles were burnt; names were changed to Spanish; spoken English was forbidden in schools and colleges; Spanish-speaking teachers and academics were imposed on the population; non-Catholic marriages were invalidated; by means of Law 54 dated 1912 and the creation of a duty free port, "true Colombian" residents were imposed on the islanders, which did not have a beneficial effect, rather leading to detrimental changes that have been taking place ever since…because of these errors, today both Raizales and mainland residents must suffer the consequences. Our ecological system has suffered serious consequences which may well be irreversible, and our social and economic environment is every day more rundown, illustrated by some of the following indicators: inefficient public services; expanding slum conditions; reversal of universally excepted moral values pertaining to the *Raizal*; displacement of the *Raizal* from their lands (by direct and indirect means); labor discrimination of the *Raizal* and older generations of continental residents by recently or newly arrived investors and companies; the cultural deterioration of the *Raizal*; prostitution; begging; robbery; and drug and vote trafficking as alternative economic practices.".

Legal Norms and Institutions

Colombia's 1991 Constitution, inspired by a spirit of advancement of fundamental rights, recognizes and protects "the ethnic and cultural diversity of the Colombian Nation" (Article 7), adding that "the languages and dialects of ethnic groups are also official in their territories. The education instructed in communities with their own traditional language shall be bilingual" (Article 10).[55]

Additionally, as a general protection clause, the Constitutional Charter's Article 13 holds that "all people are born free and equal before the law, shall receive the same protection and treatment by the authorities, and shall enjoy the same rights, freedoms and opportunities without discrimination due to sex, *race*, national origin or family, language, religion, political views or philosophy." Other legislation, specifically the Criminal Code, includes as an aggravating circumstance in criminal responsibility "punishable acts that are inspired by *intolerance and discrimination* motivated by *race, ethnic origin,* ideology, religion, beliefs, sex or sexual orientation, or some illness or disability of the victim" (Article 58, No. 3; italics added).

Despite certain progress made by the State in highlighting "black issues" in Colombia –such as the establishment of *Afro-Colombian Day* on 21 May (beginning

[55] As previously discussed in relation the *Raizales*, the State did not show any respect for their linguistic traditions (as opposed to those of indigenous communities, in spite of their own particular problems).

in 2002),[56] and the creation in 1995 of the *Dirección General para las Comunidades Negras, Minorías Étnicas y Culturales del Ministerio del Interior* (Interior Ministry's General Office for Black, Minority, Ethnic and Cultural Communities),[57] the 1991 Constitution reflects the differential treatment of indigenous and Afro-Colombian populations, expressed in the fact that various provisions only refer to ethnic peoples, or at most, may include a reference to the *Raizal* peoples, and not specifically to Afro-Colombians.

Examples of these Constitutional provisions include: the "additional number of two specially elected senators for indigenous communities" (Art. 171); powers for "indigenous authorities to exercise jurisdictional functions within their territorial area, in accordance with their own laws and procedures," as long as this does not contravene the Constitution (Art. 246); and provisions that place indigenous territories on the same level as departments, districts and municipal authorities, converting them into legal territorial entities (Art. 286) and consequently granting them administrative autonomy (Art. 287) with special administrative status (Art. 330).

As mentioned above, within the Afro-descendant population in Colombia, only the *Raizal* receive a similar level of recognition. In addition to raising the administrative status of the Archipelago from regional government to *departamento*, the Constitution empowers its legislators to oversee administrative matters, prosecutors, foreign trade, economic growth, immigration, and the adoption of measures to "limit movement and residence of inhabitants, establish population density controls, regulate the use of land and submit the transfer of property to special conditions with the aim of protecting the cultural identity of native communities and preserving the environment and natural resources of the Archipelago" (Art. 310). Law No. 47/93 arose from the past precept, making a series of measures available to preserve the cultural identity of the islanders, as well as to protect the archipelago's natural resources, together with reaffirming its autonomous self-government envisaged in the 1991 Constitution.[58] [59]

---

[56] Article 1 of Law 725, 2001.

[57] In accordance with decree 2248 of 1995 (Art. 15), the Office is responsible for implementing a single national register of black community grassroots organizations (that is, of those organizations which, according to Article 20-1 of the quoted decree, "*act at the local level, demanding and promoting territorial, cultural, economic, political, social and environmental rights and the autonomous participation and decision making of this ethnic group*").

[58] By means of sentence C-086/94, the Constitutional Court examined a complaint of unconstitutionality that had been made against certain aspects of this law, such as the instruction for public employees to speak both English as well as Spanish, and the requirement that candidates for Governor should have been born within the departmental territory (or been resident for more than ten years) among other things. In its sentence, the Court considered that such provisions did not conflict with the Colombian Constitution (a decision confirmed in sentence for unconstitutionality No. C-321/94).

[59] In addition to this Law, others have been issued which make direct reference to the situation of the *Raizal*, although it is said that "the majority (…) have only been written and are never enacted" (Dulph W. Mitchell, of The Archipelago Movement for Ethnic Native Self Determination -AMEN-SD- , in a personal note).

The Constitution also makes available a special mechanism for political representation of black communities, guaranteeing them the political right to elect representatives.[60]

In contrast to the focus on indigenous communities, the Constitution only includes references to Afro-Colombians in a transitory (not permanent) provision that directed legislators to establish mechanisms and legal norms in favor of this minority in the near future. Transitory Article 55 states that:

> Within the two years following the entering into force of the present Constitution, Congress shall, after first conducting a study in a special commission formed by the government for this purpose, draft a law recognizing the rights of black communities occupying uncultivated lands in the areas adjacent to waterways throughout the Pacific Basin, in accordance with their traditional production practices, to collective ownership in the areas that shall be demarcated by the same law.
>
> In the special commission referred to above, elected representatives of the communities involved shall take part in each case to be treated.
>
> Property so recognized shall only be transferred according to the terms set out by law.
>
> The same law shall establish mechanisms for the protection of the cultural identity and rights of these communities, and for the advancement of their economic and social development (…)."

Law 70/93, which sought to recognize Afro-Colombians as an ethnic community within Colombia, establishing mechanisms for the protection of their cultural identity and their social and economic development, as well as regulating the collective ownership of lands by community councils, was passed in August 1993. The implementation of this process of collective ownership has been slow, and many fell that the State is reluctant to hand over to the black minority lands for collective ownership. However, it is expected that this process in the Pacific region (Chocó), with the largest Afro-Colombian community, will have the greatest effect, although problems associated with the armed conflict in the region have impeded the timely transfer of such lands.

Together with the above, Law 70/93 establishes an important norm in the area of discrimination against Afro-Colombians. Article 33 states:

> "The State will sanction and discourage all acts of intimidation, segregation, discrimination or racism against black communities at different social levels, within public administration at the highest decision-making levels, and particularly in the mass media and the educational system, and will safeguard the principals of equality and respect for ethnic and cultural diversity.

[60] Article 176 of the Constitution, which prescribes, in the pertinent section, that "the law may establish a special circumscription so as to ensure the participation of a Chamber of Representatives of ethnic groups (…)." This Article was regulated by Law 649/2001, which states that black communities have the right to two elected representatives.

> For this purpose, the competent authorities will apply the corresponding sanctions in accordance with those established by the National Police Code, in the provisions regulating the mass media and the educational system, and in all other norms that are so applicable."

It is clear that this is an important legal norm designed to punish any act of racial discrimination specifically directed towards Afro-descendants. Nonetheless, according to public defense attorney Darcio Serna, this article has not been implemented through regular legislation, and there is a mere declaration of good intentions on the part of legislators (as was previously mentioned, Article 58 of the Criminal Code only refers to generic aggravating circumstances).

The Judicial and the Prison System

In spite of the progress made by the Colombian system, access to required information for the correct adoption and application of public policies is still deficient. One clear example of such gaps is the lack of data on the prison situation of Afro-Colombians in the country.[61] This is obviously another example of the lack of interest shown by the Colombian State in the Afro-descendant population. Again, this type of information does exist to some degree for the indigenous population.[62]

In 2001, a special mission of the Colombian office of the UN High Commission for Human Rights studied the general condition of the country's prisons in a comprehensive information project that took into account the problems previously mentioned. The document reports that, due to lack of time and limited collaboration from corresponding authorities, it was not possible to build a judicial profile of prisoners because of the lack of available data on such topics as the type of crime that led to the custodial sentence, the average length of sentences, and the number of imprisoned persons who receive judicial and penitentiary benefits, among other information.[63]

This same report, which dedicates the bulk of its pages to the indigenous population, also records that "particular attention was drawn to the discrimination suffered by Afro-Colombians as a group. In penitentiary centers such as the district prison "La Modelo" [located in Bogota, blacks] lack even places to sleep and, as the poorest of the poor, have had to stay in the space between two wings (with the water

---

[61] In the Public Defense office, an attorney requested from the authors of this report to forward any statistical information we might obtain on the number of people of African descent actually in prison as such information was not currently available (both at the official level as well as within civil society).

[62] According to the Instituto Nacional Penitenciario y Carcelario-INPEC, in 2001 close to 1% of the prison population was indigenous, although no data was available regarding Afro-Colombians.

[63] International Human Rights Mission and Prison Situation, *Report: Centros de Reclusión en Colombia: un estado de cosas inconstitucional y de flagrante violación de derechos fundamentales*, prepared by F. Marcos Martínez, M. Tidball-Binz and R. Yrigoyen Fajardo, October 2001, available at: http://www.hchr.org.co/documentoseinformes/informes/tematicos/informe%20 carceles.htm.

pipes and electrical cables) which they call the 'tunnel or cavern."[64] The report reveals how the Afro-Colombian prison population is even more invisible than other individuals or groups:

> "Indeed, some Afro-Colombians indicted for minor crimes have been in prison for various years, a situation that underlines the lack of qualified legal defense. Moreover, the level of discrimination suffered by this population does not appear to be of concern at a judicial level; neither is it monitored by the judges who implement prison sentences."[65]

The Colombian Constitutional Court itself has touched on the prison situation, commenting that some of its common characteristics are "unconstitutional" (overcrowding, violence, unlawful harassment, lack of sanitary facilities and hygienic conditions, among others).[66] At the same time, concern is shown for the prison situation of indigenous peoples (one example is Ruling C-394/95, in which the court stated that "the imprisonment of indigenous peoples in such penitentiary establishments is a threat against the values of the indigenous culture, (values) which are recognized by the Constitution"). As previously mentioned, there is little awareness of the problems faced by Afro-Colombians.

During our visit, it was possible to gather statistical information –not normally available- about the number of *Raizal* people held in the judicial circuit prison on the island of San Andrés. In October 2003, of a total of 190 prisoners, 30 were under house arrest, 13 were female, 102 had received a custodial sentence, and 58 were charged and in preventive custody. There were 58 prisoners of *Raizal* origin (43 had been sentenced and 15 charged). In summary, of the total prison population in the aforementioned penitentiary establishment, 30.5% belonged to the *Raizal* ethnic group.

On the other side of the system, no record exists of the number of people of African descent working within the justice administration system. Some observers believe that this is due to the belief that such a cataloging would itself constitute or at least contribute to racial discrimination. It is worth pointing out that during the preparatory visit for this report, the Colombian Public Defense office, aware of the need to provide such statistical information, drafted letter to be sent to all judicial, legislative and administrative state agencies requesting information on the number of Afro-Colombians working in each institution.[67] All those interviewed agreed that there are no black people in posts of relative importance, either in the

---

64 Ibid.

65 Ibid.

66 Tutela (a protective measure) T-153, Constitutional Court of Colombia, 28 of April 1998, pronouncing by magistrate Eduardo Cifuentes.

67 In the document, information was requested on: i) type of affirmative actions and projects under development, ii) quantity and quality of Afro-Colombian officials, and iii) (only for determined bodies) the reasons for which the population census did not include ethnic variables.

justice administration system, or within any other state body.

Nevertheless, thanks to the efforts of an attorney working in San Andrés' Public defense department, information was obtained that to some extent illustrated the presence of Afro-descendants working within the judicial system (at least in this important Afro-Colombian settlement): on the island, of a total of eight judges (with common jurisdiction) and six magistrates (with special or appeals jurisdiction), one can only find in San Andrés' Municipal Court a half-native woman (on her father's side). Also, not one of the seven prosecutors working on the island was of *Raizal* origin. Finally, in the Center for Technical Investigation (CTI –a Prosecutor agency that carries out judicial investigations) from a total staff of approximately five people, only one was *Raizal*.

Racism and the Judicial System

In forming a picture of the racial discrimination experienced by Afro-Colombians at the hands of the justice system, can be seen through judicial rulings (jurisprudence) in different jurisdictions. It is well known that the Constitutional Court of Colombia enjoys particular prestige within the national judiciary, and this is reflected in this body's treatment of Afro-Colombians. In effect, the Court has issued important rulings in favor of the rights of the black community although, it must be said, such rulings have not had the expected repercussions as on many occasions the government has simply not paid them any heed.

District Courts, for their part, do not appear to have the same level of awareness, as evidenced in the (few) cases they have had to deal with. This can especially be observed in cases brought before the courts in the Archipelago of San Andrés, Providencia and Santa Catalina.[68]

Promoting Social Participation

In 1995, leaders of the Afro-Colombian CIMARRON organization asked the mayor of Santa Marta to designate a specific person, Alexis Varela Esguiso, as representative of black communities before the Santa Marta district education board. This request was in accordance with Law 115 (or General Education Law), the aim of which is to promote the equal status of all people in district education boards. The objectives of these boards include setting goals, plans and educational policies, and "a representative of black communities, if one exists" should always be nominated.

After no response was received from the mayoral authorities, a communication was sent, in the form of a petition of rights, to the Director of the

[68] Before examining certain cases it is worth pointing out the lack of systematic information on the subject of this report. Everyone we spoke to agreed that research on the judicial treatment of Afro-Colombians (as opposed to those of indigenous origin) was scant, and there was no shortage of people who commented on the urgent need to carry out such research.

District Education Administration Department, requesting the naming of the previously mentioned representative. This request was answered in 1996, rejecting the Afro organization's request, arguing that "in the city of Santa Marta there are no racial groups of black characteristics, thus making enactment of the Law [115] unjustified, while at the same time the District Education Board has no place for a representative from the indigenous or farm workers communities, although it is historically well known that in the City of Santa Marta indigenous groups have been established since before the beginning of the century. For this reason, in the act of creation of the District Education Board preference was given to indigenous communities, for there is no historical background information in this city indicating that black communities have established themselves here."[69]

In response, CIMARRON lodged a protection action against the administrative body, considering that their rights to equality, freedom of conscience, right of association and the right to culture had been violated. The NGO's main strategy was to contest the ethnographic competence of the Educational Services Administration Department (DASED) for considering that in Santa Marta there were no black communities, and so ignoring the minority's past and present history.

The Labor Chamber of the High Court of the Judicial District of Santa Marta, after consulting with various State officials, rejected the action of protection, ruling that without ignoring "the presence of *human elements with Negroid ethnic characteristics*, [these people] are not exclusively found in determined sectors or legally organized, rather the opposite, they take an active part in community life (…) with all others who shared indications of mixed-blood descent.[70] This ruling was subsequently confirmed by the Labor Court of the Supreme Court, which added the argument that the action of legal protection could not be used to protect the basic rights of legal entities.

Obviously the conduct of the courts has explicitly aided the needs and demands of the indigenous community in detriment to the rights of Afro-Colombians, even though, in this case, a human rights delegate and the governor of the Magdalena district declared in court that black communities do exist in Santa Marta.

At this point the case was brought before the Constitutional Court, which reversed the decisions of all lower instances, establishing, among other things, that "a racial act of discrimination damages not only the individual rights of a person, in many cases, it can also compromise the rights of a community or ethnic group; that legal entities may claim protection for their fundamental rights, when the association is

[69] Tutela (a protective measure) T-422/96, Constitutional Court of Colombia, 10 of September 1996, pronouncing magistrate Eduardo Cifuentes.

[70] Italics added.

formed with the objective of fighting racial discrimination, which judicially (channels) the actions of constitutional rights that may be appropriate to defend the fundamental rights of its members." For the Constitutional Court, the way in which the lower courts had reached their conclusions –basically, through court visits, as well as by reading of documents requested from State bodies - was not sufficient. Lastly, the Court considered that:

> "If the law uses the racial criteria enshrined in the Constitution, it shall do so with the sole purpose of introducing a positive differentiation which, in the court's judgment, is admissible. The participation of a sector of the population that has traditionally been removed from real decision-making power, within the government education system contributes to the full integration of society, and respects and perpetuates this valuable cultural contribution.
>
> (…)
>
> "This is not an attempt to stir up racism. On the contrary, black participation in the indicated body will stimulate social integration and cultural pluralism, and it is to these ends that (*sic*) the law is fully directed. The omission of the local administration obstructed the proper operation of a legislative measure for positive discrimination and, as a consequence, incurred a clear and flagrant violation of article 13 [of the political constitution]."

Cases Involving the *Raizal* Population

As anticipated, the different response to actions brought to the courts by Afro-Colombians at different levels of the judicial system can be confirmed by examining specific cases related to the rights of the *Raizal* population. The Constitutional Court has been an important guarantor of this population's fundamental rights, declaring admissible – which is to say, in accordance with the Constitution- norms that tend to promote and protect the Archipelago's cultural traditions.[71] [72] However, the protective spirit of the Constitutional Court is not mirrored in the island's district courts, according to local attorneys (both private and Public Defenders) interviewed for this report.

According to these accounts, the discrimination shown by the judicial system against the native population dates back to the period when mass migrations to the islands first began (in the 1950s). At that time, as this report has mentioned, the State decreed the archipelago a duty-free zone, thus encouraging the movement of thousands of mainland residents into the islands with major demographic and ethno-cultural consequences. It was only in the 1990s when the new Constitution was being drafted that steps were taken to mitigate the situation affecting the original islanders. However, these events had had a strong impact not only on the cultural and social life of the *Raizal*; the attitude of the

---

[71] For example, sentences C-086/94 and C-321/94. See footnote 21.

[72] For some, a notable exception to this was sentence T-111/95, via which the Constitutional Court confirmed the reversal of a second-instance ruling (of Superior Civil Tribunal of the Judicial District of Cartagena) addressing a ruling of the Civil Court of the San Andrés, Providencia and Santa Catalina district, regarding the sale of the "El Isleño" hotel and surrounding lands. The first instance tribunal accepted the suit presented by the Sons of the Soil (S.O.S.) Foundation, ordering all sale processes suspended while no law existed for the special transfer of property, with the aim of protecting the cultural identity of the native communities of San Andrés.

Colombian State also was manifest in a judicial treatment of the natives that was particularly adverse to the group's interests.

In this respect, the authors have become aware of numerous situations and cases that demonstrate the aforementioned acts of judicial discrimination.[73] The great cultural clash that occurred with the arrival of continental settlers to the island was most apparent in linguistic and customary differences between natives and continentals, as well as being reflected in the way disputes were settled. The rulings related to the payment of social security contributions are one example: the *Raizal* were sanctioned for following their traditional practice of not formalizing work contracts offered to continental newcomers. An example of this situation is described below.

There are no public bus companies linking the different towns and settlements on the island of San Andrés. Traditionally, locals who had their own vehicle would perform taxi service by "hiring" another (local) person to drive their car. According to *Raizal* customs, the driver himself established the amount that should be paid to the owner of the vehicle. This amount was not calculated in any formal manner, but was reached according to criteria firmly rooted in local social relationships. When payment was made, both parties understood that all obligations between employer and employee (the driver of the vehicle) were satisfied, without deductions made for social welfare benefits, as required under ordinary Colombian legislation.

Many continental immigrants were hired as drivers of such vehicles, according to island labor customs, i.e., receiving the car and handing back the profits that "legally" corresponded to the owners of the cars who had hired them. However, these practices did not last long, for the new employees gradually started to demand the payment of social security benefits to which they were entitled under Colombian law, but which were irrelevant for the *Raizal* population. The ensuing conflict was eventually brought before the courts of justice where attorneys representing the vehicle owners made repeated and unsuccessful requests that judges take into account certain unique circumstances. These included the existence of a special law (oriented toward the *Raizal* population) and the special nature of labor contracts among the *Raizales*, which were different to those found elsewhere in Colombia. Despite the attorney's efforts, the ruling favored the driver-plaintiffs, and included considerable amounts of back-payment. Beyond the economic consequences this implied for the *Raizal*, they felt heavily betrayed by the local courts, who had demonstrated extreme disregard for the common law pertaining to the island,

[73] In general, there are no records of cases because of the *Raizal* culture's tradition of transmitting information orally. Only in the last few years have representatives of some social organizations begun to maintain written records of cases and significant events, with the objective of following-up on State policies and presenting suits.

which had until that time successfully regulated relationships among islanders.

A similar story is told of land ownership on the island. The *Raizal* were not accustomed to recording land ownership, although there was a land registry office on San Andrés. Land use was organized in a manner similar to the system used to hire drivers: landowners granted use of uncultivated areas to others in exchange for a previously agreed price or, more commonly, payment in kind. In the beginning, continental settlers who arrived on the island began working the locally owned lands under the traditional system with the owners' consent, and sharing, albeit with some problems, the fruits of their labors. However, they did respect the ownership of the lands being exploited.

This changed with new legislation passed after 1965, when the land registry office suffered an arson attack, destroying all records within the building. A few years later decrees were promulgated that aimed to regularize property ownership on the island, and the mainland settlers claimed ownership of a large number of farmsteads that in fact did not belong to them. When locals protested against this situation, many continental settlers claimed that they had acquired ownership of the land by *prescription*, because, according to the new civil legislation, native owners had not registered their lands within the time period established by the new civil legislation. The *Raizales* complained that it was unjust that continental settlers harbored under the protection of legislation that had never been applicable for the *Raizal.* As before, these claims were rejected, resulting in a widespread transfer of property on San Andrés that had begun with the expropriations undertaken by the government of General Rojas Pinilla during the 1950s. Once more, local courts turned their backs on this population, which began to rapidly disappear (while the flow of Colombian mainland settlers increased), by refusing to value the traditional customs and practices of the *Raizal.*

In a document prepared for the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the *Raizal* organization AMEN-SD highlighted two cases in which racial discrimination was also perceived. The first of these, which occurred in 2001, concerned Mr. Ernesto Steele, a *Raizal* native who sold beverages and coconuts in a stand on a narrow beach in Sound Bay (on San Andrés). The Colombian Navy reportedly wanted to remove Mr. Steele and presented an accusation against him before the State Council, which then ordered the stand closed. When Mr. Steele refused to abandon his workplace, the Police received orders permitting the use of force to make him comply with the court order. Locals began to perceive the situation as an abuse of judicial power, and were preparing to come to Mr. Steele's defense. "Just when an unpleasant confrontation seemed inevitable, one night, at the beginning of 2003, someone set fire to the small establishment that Mr. Steele had built using dry coconut palms and which had

formed a harmonious part of its surroundings."[74]

For the native *Raizal* organization, there is no real justice that takes account of the culture, customs and lifestyle of this ethnic group and the Constitutional clause on respecting the multi-ethnic and multicultural nature of the Colombian nation does not seem to be applied concretely in benefit of Afro-Colombians.[75]

La Negra "Nieves"

The Cali newspaper *El País* first published the comic strip "Nieves," or "la Negra Nieves" (black snow) in March 1968. The main character, Nieves, was a domestic servant (up to 1997) who commented on all sorts of "silly and funny things" while doing her housework; this character was to become something of a Cauca Valley personality.[76] In 1997, local university lecturer and attorney Pascual Charrupí lodged a complaint on behalf of the *Fundación Profesional para el Avance de la Raza Negra* (Professional Foundation for the Advancement of the Black Race, FEDEPRAN), arguing that the caricature demeaned the black race by repeating cultural and social stereotypes, such as that black people are only apt for sports and manual labor –in the case of men- or domestic work - in the case of women.

This case is not only noteworthy because the court rejected the requested judicial action on the grounds that the comic strip contained no traces of racial discrimination, but is also worth considering because of the social context surrounding the episode. First, the case did not receive any significant support from the local Afro-Colombian community even though Cali is home to one-third of Colombia's Afro-descendant population (according to one professional sociological study). In fact, many felt that the presentation of the protection order itself stirred or created racist feelings by highlighting the issue and accentuating the differences and divisions between blacks and whites, which was undesirable.

Although the judicial action was not successful, Consuelo Lago, the creator of "Nieves," did change in her caricature. Lago said that she removed Nieves' apron because she didn't want to hurt anyone's feelings and because she felt that the complaint filed had a lot to do with the

---

74 Archipelago Movement for Ethnic Native Self-Determination (AMEN-SD), "Complaints of the Indigenous Raizal People of the Archipelago of San Andrés, Providence & Katleena," document presented to the U.N. Special Rapporteur against Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, October 2003, p. 3.

75 According to the document, "Justice is designated and applied according to the master's will of Bogotá. The worst aspect of this problem is that when speaking about human rights and justice, the first thing they should say is that here, justice is denied to our people, and the formalities that they demand are a flagrant violation of our human and linguistic rights. For example, continental settlers who have been appointed judges, magistrates and other officials who enforce the rule of law, apply the law and the Constitution in their own language but in our country, and from their own perspective, be it cultural, linguistic, political, economic, administrative or social." *Ibid,* p.6.

76 Interview with Consuelo Lago, creator of "La Negra Nieves," 20 March 2003, in *El País.* See http://elpais-cali.terra.com.co/paisonline/notas/Marzo202003/A1020N1.html.

character's position as a domestic worker. She goes on to say that she sent the character to university to study philosophy, which gives her a chance to keep expressing herself, though without an apron.[77]

As mentioned, the court did not consider that the link between being a servant and being a black woman constituted an act of racial discrimination. In its ruling, the following was stated:

> "Said caricature expresses the charismatic nature of our simple, modest, sincere and forthright people: with her extroverted and simple way of seeing things, whatever their color (…) there is nothing that the *Nieves* caricature says which is pejorative of the black race; on the contrary, she exalts them with her ingenuity, naughtiness, wit and intelligence, and especially with her way of considering daily and non-daily events (…) the *Nieves* caricature does more good than bad, and rather than trampling on the rights of blacks she in fact extols her race."[78]

When appealed before the Superior Court of El Valle the ruling was simply confirmed, without additional observations or dissenting votes. In response, attorney Charrupí requested that the case be reviewed by the Constitutional Court and the Ombudsman, but both requests were denied. The Constitutional Court excused itself with a simple formal statement, reiterating *"the discretional faculty enshrined in Article 23 of Decree 2591 of 1991, which states that 'the Constitutional Court will designate two of its magistrates to select, without need for justification and based on their own criteria, those protection sentences that need to be reviewed.'"*

There was general agreement among those interviewed for this study that this case was the most significant case of racism to have reached the courts. As observed above, other cases have involved individuals of African descent, which would seem to inspire a less than enthusiastic response from the judiciary. In the case of "Nieves," however, there was a direct accusation of racial discrimination, and the limited support that it received (numerous letters against the action were published in the local press) is one more example of the lack of awareness that exists in Colombia regarding racism.[79]

Other cases of racial discrimination against Afro-descendents were reported to the authors, though these were either confined to reports in the press or, usually, to the records of Afro-Colombian associations. These included occurrences in Cartagena, where blacks were denied access to nightclubs or discotheques on the excuse that they did not have a VIP card, though they were accompanied by tourists. There is also the campaign in Cali against the 'Exito' supermarket chain for not employing anyone with black skin, in spite of the large number of people of African descent living in the city.

During visits to Colombia, the authors were frequently told that people do not report abuses even when they know an

[77] *Ibid*., p. 16.

[78] Ruling handed down by Judge Guillermo Arias Blanco, Eighth Civil Court of the Cali jurisdiction.

[79] According to Juan de Dios Mosquera, in *Ibid.*, p.24.

injustice has taken place because they do not trust the institutions and/or authorities they must turn to for support. Even at the level of the Constitutional Court, the justice system appears far removed from the interests and disputes of this segregated population. Moreover, those who have made public accusations have frequently suffered harassment and threats, eventually needing to move to other cities for their and their families' safety.[80]

Chocó: A Complaint Presented before the Inter-American Commission on Human Rights

In July 2003 the *Corporación Jurídica Libertad*, together with the Diocese of Quibdo and the Spanish organization *Paz y Tercer Mundo*, accused the Colombian State of "serious abuse of human rights in the Medio Atrato region. First, because the victims are predominantly Afro-Colombians, revealing a significant component of ethnic and racial discrimination, and; second, because one can discern a systematic plan of extermination perpetrated by paramilitary death squads in collusion with State agents, which have caused hundreds of violations of the right to life, personal integrity, freedom, and the forced migration of thousands of inhabitants, who up to that time had practiced collective ownership of their lands. All in all, we are dealing with a situation of massive and systematic violations of human rights in the region of Medio Atrato Chocoano."[81]

This collective accusation exposed the cruelty and brutality of political violence taking place in Colombia against Afro-descendants, who make up a large part of the population. In the document in question, which runs to more than a hundred pages, there are accounts of extra-judicial executions, torture, forced displacement and violence that jeopardize the international credibility of the State.

The common thread that runs through all of the cases mentioned above is impunity. Most of these situations have been reported to the authorities, but there has been no response on the part of the State. There are records of investigations being initiated in criminal courts and other State agencies, such as the *Procuraduría Delegada para la Defensa de los Derechos Humanos* (Delegated Fiscal for the Defense of Human Rights), but such actions are short lived. This situation led to the complaint that was filed against the State before the IACHR.

While it is important to recognize that Afro-Colombians are not the only victims of political violence, they are the most vulnerable group. This is due in part to the special characteristics of the region, including its strategic geopolitical location and predominantly black population

[80] A coordinator of one of the most important Afro-Colombian organizations in the country described how he was forced to abandon the city, where he taught classes and took part in a local radio program, because of the threats and intimidation suffered –especially from paramilitary groups. There were even times when he arrived at his classes to find coffins and crucifixes painted on the walls.

[81] Complaint presented before the IACHR (Inter-American Commission on Human Rights), p. 1.

(accounting for 80-85% of inhabitants). The role that the State's lack of response has had in contributing to this situation is described in the IACHR complaint and is also clearly visible in cities such as Quibdo and the very precarious situation of Afro-descendants in the Department of Chocó.

Conclusions

The situation faced by people of African descent in Colombia shares a great deal with those observed in the other countries included in this study, which suggests that this ethnic group is particularly underprivileged despite the fact that it represents an important percentage of the national population. The non-presence of Afro-Colombians at the social level continues to be an important impediment for the progress of policies and measures designed to protect the fundamental rights of members of this group.

Additionally, the Afro-Colombian community has been one of the social actors that have suffered the most as a result of forced displacement as a consequence of the country's armed conflict. This is mostly due to the fact that they have chosen to settle in the Pacific coastal region, a strategic zone in the conflict that is currently raging between the State, paramilitary death squads and insurgent forces. The situation of this group, which is characterized by high levels of social exclusion and segregation, is worsened by the treatment that its members receive from the judicial system.

Since the drafting of the 1991 Constitution, which recognized the multicultural and multiethnic nature of the Colombian State, special regulations have been created that favor this ethnic group (even though this has been done to a lesser extent than the indigenous peoples of Colombia). In regard to the necessary regulations for constitutional decrees, various laws were passed in favor of Afro-Colombians during the 1990s, a decade that also saw the creation or strengthening of existing institutions. The most important legal body concerning the regularization of collective ownership of Afro-Colombian community lands is Law 70, which was passed in 1993.

But in spite of such progress, there is still a lack of official information regarding the situation of Afro-Colombians in terms of both general matters and issues linked to the judicial system, which is the focus of this study. For example, there is a shortage of information about the percentage of Afro-Colombians in prison and the crimes for which they tend to receive custodial sentences, along with other fundamental data. There is also a lack of statistical information on the number of Afro-Colombians working in the justice administration system (Judicial Branch, Public Defense Service, Public Prosecutor's Office, etc.).

In regard to the judicial treatment of Afro-Colombians, members of this community clearly continue to have fairly limited access to justice. Social organizations have not made a systematic

attempt to obtain judicial protection in order to protect their rights; rather, the cases that we have heard about are more likely to be linked to secondary strategies related to the inaction of the State to find a solution to a diverse range of conflicts.

The differential treatment dispensed by first instance courts and the Constitutional courts are noteworthy and have opened up significant areas for this sector of the population. This disparity is even more notorious in the case of the *Raizal* population, which is located in the Archipelago of San Andrés. Members of this community maintain a culture that is very different from that of the inhabitants of mainland Colombia, which has had the consequent effects on the way that the justice administration system deals with native people. It is possible to observe, in this respect, the limited response to special conditions which the Constitution looked to establish in relation to the *Raizal*, a perception which, in general, has not benefited from the work developed by the Constitutional Court (essentially, in relation to areas of affirmative action offered by the law which have been contested judicially).

Together with the above, it is important to point out the isolated use of the inter-American system for the protection of human rights –i.e. the case of the Chocó massacre- and the racism case against Afro-Americans caused by a popular cartoon strip in Cali. Though these cases did receive media coverage, the daily occurrence of racial discrimination receives only limited coverage in the local media in an effort to create a collective awareness of the scope of racism (although not always successfully). As a result, the judicial branch's efforts can still be considered to have a moderate influence when it comes to overcoming the conditions in which Afro-Colombians currently live.

THE DOMINICAN REPUBLIC

Background Information

Racism against Afro-descendants in the Dominican Republic has a unique component that is not observed in the other countries studied in this report: xenophobia, which in this case is directed toward people of Haitian descent. As a result of racial discrimination against Haitian nationals (or Dominicans with supposedly Haitian features), "being black" is linked to being Haitian even though few people in the Dominican Republic are not of African descent.

It is important to consider the history that these two nations share, including the fact that they are the only pair of countries situated on the same island. Additionally, the Dominican Republic, unlike other Latin American countries, initially declared its independence not from the Spanish Empire but from its own neighbor, who had occupied its territory from 1822 to 1844. Taking advantage of the fact that Spain was occupied with the wars for independence in South America, and also of the fervor caused at the beginning of the century by the Revolution on the "Western side of the island," Dominicans ended their neighbor's rule, proclaiming independence during a period of strong anti-Haitian sentiment. Many believe that this initial stage of Dominican national identity was marked more by a feeling against rather than in favor of something. This suggests that the anti-Haitian sentiment found in the country has been the rallying point for the Dominican ethos, an identity formed on the basis of exclusion rather than inclusion.

As a result, *negritude* or blackness –an expression that has no inherent pejorative character- is associated with being Haitian. Spurred on by the intellectual support of Joaquín Balaguer (who would later become President), the concept accentuated the current of nationalism observed during the regime of dictator Rafael Trujillo.[82] In fact, this period saw one of the bloodiest manifestations of anti-Haitian sentiment ever in the Dominican Republic: the massacre of '37. Trujillo's approach to targeting Haitians in Dominican territory was to force them to pronounce words like "*perejil*" (parsley), which, naturally, was impossible for the French-speaking Haitians. As a result, thousands of Haitians –no one knows exactly how many, though some estimates run as high as 35,000- were rounded up and executed. (Among the numerous atrocities committed during this massacre, there are reports that children were thrown up in the air to land on the bayonets of Trujillo supporters.)

[82] One example of the anti-Haitian sentiment promoted by powerful sectors is summed up in the following quote from Balaguer: "[t]he Haitian immigrant has also generated laziness in Santo Domingo. The Ethiopian race is naturally indolent and does not apply effort to anything useful... blacks that immigrate to Santo Domingo are damaged by horrible physical defects." (Cited in Movimiento de Mujeres Dominico-Haitianas (MUDHA), *Solidaridad con la lucha de la minoría dominicana de ascendencia haitiana por la ciudadanía y la justicia*, MUDHA, Working Paper, n/d, p. 5). Translated from the original Spanish.

The infamous dictator's dogma held that the Dominican Republic was completely composed of the white heirs to the Spanish heritage to whom Dominicans owed all of their positive qualities. "Blacks," identified as Haitians, were viewed as uncivilized savages with strange customs who practiced quasi-satanic rites (Voodoo) and had to be distanced from the purity of Dominicans.[83]

Although many Dominicans still hold these sentiments to some degree–for they are found in all strata of Dominican society, although some identify them more with the country's intellectual, economic and political elite- poor living conditions continue to force thousands of Haitians to emigrate to the eastern side of the island. To many citizens of the Dominican Republic, Haitians are seen as a threat to the country's sovereignty and national security, as well as usurpers who take the few jobs available, all of which may be synthesized in the concept of a "pacific invasion." As Haitians are willing to work for low wages, they tend to find precarious jobs–working in sugarcane, coffee and rice plantations and other agricultural sectors, as well as in service and construction jobs in urban centers- that only allow for subsistence without the advancement that could integrate them into the society in which they live. (Still, these jobs provide them with a better economic situation than in their home country). In addition, the seasonal migration of Haitians to and from the Dominican Republic is not only self-motivated, but is also affected by the Dominican government's changing anti-immigration policies. The State carries out mass summary deportations that often include beatings and other abuses when the need for cheap labor subsides.

There are no uniform statistics regarding the number of Haitians living in Dominican territory. In fact, the Census conducted in late 2002 did not include a racial or ethnic variable. Statistics from the International Immigration Office's Dominican branch report 650,000 Haitians with irregular immigration status; those with regular status number approximately 60,000, while the number of "Dominican-Haitians" (people of Haitian descent born in the Dominican Republic) is around 10,000. These numbers allow for estimating that the Haitian presence in the Dominican Republic totals more than 800,000,[84] or almost 10% of the total population.

Given this large number, it is not surprising that many Haitians live under extremely bad conditions. The uncertainty created by mass and summary deportations is exacerbated by the conditions of the *bateyes*,[85] which lack basic services and have serious problems in public health, housing and education, making it difficult for these vulnerable groups to achieve an acceptable

[83] This anti-Haitian sentiment is still observed today in the identity cards of thousands of Dominicans, which contain the term "Indian" in spite of their evident African features.

[84] Projections based on the 2003 International Immigration Office Survey.

[85] A type of settlement generally found on the outskirts of sugar cane plantations that tends to be inhabited by Haitians and Dominico-Haitians.

quality of life. Ample evidence of this may be found in the lack of hospitals in the *bateyes*; the fact that most inhabitants are illiterate, the lack of drinking water in almost 90% of homes[86] and the dangerous levels of illnesses such as HIV/AIDS, even for such an exposed population as the Caribbean.[87] Living conditions such as these contribute to the extreme vulnerability of Haitians (and/or Dominicans of Haitian descent) in the Dominican Republic. Furthermore, as will be explained below, these disadvantages are also manifested in the judicial system.

Legal Norms and Institutions

The Dominican Republic stands out because of its lack of a solid institutional structure for addressing the problem of racism. In fact, as the following section will show, one of the most widespread types of discrimination involves the State itself. In addition, there is no awareness of *negritude* in the country; in other words, it is supposedly racist to try to establish institutions or policies focused on race. For many, this justifies the absence of racial variables in the censuses and reinforces the Dominican government's official position that given that there is no racial discrimination of any kind in the country,[88] gathering information on the black population would constitute an attempt to segregate. It is therefore not surprising that the government's agenda does not include taking action to advance the struggle against racism through special policies, measures or institutions (as seen in countries such as Brazil and, to a lesser extent, Colombia over the past few years).

The Constitution of the Dominican Republic does not specifically address the issue of racial discrimination. Rather, it contains general norms that establish equality under the law and the prohibition of all differences that are not based on people's abilities. Article 8.5 states that "*[t]he law is equal for all, and may not be used for purposes which are unfair or do not serve society, and neither be used to prohibit actions that do not prejudice said society.*" Article 100 goes on to state that "*[t]he Republic condemns all privileges or situations that could infringe upon the equality of all citizens, among whom only distinctions may exist that result from one's talents or virtues and, in consequence, no entity of the Republic may confer titles of nobility or inherited distinctions.*"

In spite of the force and weight of the Dominican Constitution, these clauses have not produced the kind of legal or institutional developments that would allow people to effectively enjoy the

---

86 Centro de Estudios Sociales Padre Juan Montalvo, *El mercado mundial del azúcar y su impacto en las comunidades bayeteras de la República Dominicana*. *Resumen Ejecutivo*, unpublished document, n/d, p. 10.

87 According to official statistics, while 1.5% of the national population is infected with the virus, 5% of the population in the *bateyes* lives with HIV/AIDS. Centro de Estudios Sociales y Demográficos *et al.*, *Encuesta Demográfica y de Salud. Informe Preliminar sobre VIH/SIDA*, Abril 2003, pp. 12-13. For general indicators, see http://www.unicef.org/infobycountry/domrepublic_statistics.html.

88 See Comittee for the Eliminaton of Racial Discrimination, 55th period of sessions, *Final Observations of the Committee for the Elimination of Racial Discrimination: Dominican Republic. 12/04/2001*, CERD/C/304/Add.74, paragraph 5.

protection and rights contemplated in the Constitution. As stated, the State's inaction plays a part in the problem, as does the position of the political, economical and cultural elite that the "black question" is not a specific type of problem linked to racism and xenophobia, but is merely a point of conflict around the pacific invasion of Haitians who steal Dominicans' jobs. Some Dominicans, including authorities interviewed for this report, believe that some Haitian immigrants have received military training and that the progressive build-up of foreigners constitutes "a real threat to national security," fearing that the Haitians may organize to destabilize the Dominican regime.

Since the fundamental problem of racism in the Dominican Republic is associated with the treatment of Haitian immigrants, it is important to understand the legal norms that regulate this area.

First of all, the Dominican Constitution enshrines the principle of *jus solis* for the determination of nationality (Art. 11, No. 1), which grants Dominican nationality to anyone born on Dominican soil. This rule only allows for two exceptions: the children of foreign diplomats and the children of those who are "in transit." As the following section will show, the exception for those "in transit" has led (and continues to lead) to the most emblematic conflicts in the courts.

For its part, the current Immigration Law (Nº 95, passed during the Trujillo dictatorship) states that foreigners are to be considered "in transit" when they "attempt to enter the Republic with the principal aim of traveling through the country to a foreign destination." In other words, the term applies to those not intending to reside in the country. Finally, it is important to note that Immigration Regulation N° 279 (12 May 1939, Section V) establishes a maximum period of ten days for foreign nationals in transit. The limits set out in these norms are significant, as there have been cases of individuals who have lived in the Dominican Republic for months, years or, in many cases, decades, but who still face problems in legalizing their situation.

Racism and the Judicial System

The following sections review the institutional manifestations of racism in justice administration in the Dominican Republic. To this end the situation of Haitians or Dominico-Haitians in the prison system will be examined, as well as the circumstances facing defendants or a subject appearing before the court (in any capacity).

The Prison Situation

Law No. 224 creating the Dominican Penitentiary System was passed in June 1984 and led to the formation of a prison institution directed by the General Prison Directorate. The judicial reform initiated in the mid-1990s allowed institutions to use computerized systems to obtain empirical information. This development was important for the present report in that, unlike the other countries under study, it allowed the authors to determine with some degree of accuracy the situation of these individuals in the nation's prisons.

First, one must consider the issue of overpopulation in Dominican prisons. A specialized study has indicated that while the country's prison installations were originally built to hold a total of 7,800 inmates, they currently house over 16,000.[89] Nevertheless, it is important to note that the number of foreigners held in custody does not exceed 5 or 6% of the total prison population, although Haitians constitute the majority (61%) of these. Within the Haitian prison population, 91% are men and 9% women.[90]

The most common crimes that Haitians are charged with (both men and women- figures are not broken down by sex) are drug trafficking (22%), murder (21%), and crimes against property, generally robbery (31%).

The legal situation of imprisoned Haitians is as follows: 69% are in pretrial detention, 21% have been convicted, and 10% have an appeal pending. The condition of those awaiting resolution of appeals is extremely difficult: they are judged in a language that they do not speak (as the reader knows, Haitians speak French and Creole), they generally cannot afford legal defense and, in many cases, they have no relatives or loved ones to visit them and/or to attempt to speed up slow, complicated judicial procedures and formalities. The situation of the 69% that are in pretrial detention is worsened by the fact that these individuals are often held in provincial prisons far from the jurisdiction in which the crime was committed, and are unable to attend hearings simply because there are no vehicles available to transport them, or for some other unjustified reason.

According to some interviewees, one of the most important aspects of the prison situation is the need to raise awareness among Haitians of certain benefits to which the prison population is entitled. In many cases, knowledge of those benefits has allowed inmates to secure their release rather than, as occurs in many cases, spending years in prison accused of minor crimes such as robbing a salami, a chicken and a "banana hand" (clearly all edible

---

89 Centro Cultural Dominico-Haitiano (CCDH), *Los reclusos haitianos en las cárceles dominicanas*, CCDH, Santo Domingo, Novemebr 2003, p. 9.

90 These statistics were generated by the authors of this report on the basis of a document cited above (*Los reclusos haitianos…*) and official statistics provided by the General Prison Directorate ("Estadística Carcelaria Diaria", 9 December 2003) and the National Public Prosecutor's Office ("Sistema de Prisiones", 10 December 2003).

items). This aspect will be discussed in more detail below.

The last issue that bears mention in regard to the prison situation of Haitians and Dominico-Haitians,[91] and one that was raised by several of the organizations consulted, is that the figures themselves do not adequately represent the level of discrimination suffered by Haitians at the hands of the Dominican government. In many cases the xenophobic nature of racial discrimination in the Dominican Republic leads authorities to prefer to simply deport those accused of committing crimes rather than sending them to prison. It is known that the State carries out summary and mass deportations and that Haitians and Dominico-Haitians suspected of being involved in crimes (generally petty thefts) are the most common targets. According to some, this explains why the percentage of Haitians (and Dominico-Haitians) imprisoned is not very high in proportion to the strong discrimination to which they are subjected.[92]

The Judicial System

Dominicans often describe their country's racial composition as a true mosaic, an observation that was heard repeatedly during the authors' visit to the country. In this context, no one asks if there are Afro-descendents in the justice administration system. It was possible to find both judges and prosecutors from this group, though this does not go a long way towards clarifying the issue or helping to identify the nature of the racism that members of this social group experience. The presence of two black Supreme Court justices (Luperón Vásquez and Romero Confesor) could lead one to the erroneous conclusion that racism is not present in the judicial branch. However, a review of cases involving Haitian citizens quickly corrects this perception. The harshness observed in some criminal cases was not proportional to the crimes in question, and also not equal to that shown in cases involving Dominican citizens.

Before analyzing some emblematic cases of racism, it is important to discuss an initial (and very serious) obstacle to access to justice for those who are subjected to racial discrimination in the Dominican Republic: As many members of this group are in the country illegally, they prefer to suffer private abuses or even those of the State itself than to appear in court or ask the police for help, as they know this will put them at risk of being blacklisted for deportation (this has been called a "subjective impediment").[93] As a result, Haitians and Dominico-Haitians who have not completed the residency process or secured nationality live in ongoing marginality. Not knowing the

---

91 A careful review of the list provided by the Attorney General's Office revealed that names listed under the category "Haitians" are not clearly of French origin. This was also observed in other areas and confirms various organizations' argument that those vulnerable to these practices are not exclusively Haitians, but also those who seem to be Haitian, including Dominican nationals.

92 The Dominico-Haitian Cultural Center reported more than 25,000 repatriations between August 2001 and October 2003. CCDH, *op. cit.*, p. 25.

93 MUDHA, *Solidaridad…*, pp. 15-16.

language (in the case of Haitians) and working for miserable pay under conditions lacking any form of social protection makes them feel that they cannot speak out when they are the victims of robbery- a situation that occurs frequently in urban areas- or some other type of crime. But, not surprisingly given its size, this group is slowly making some of its problems visible, though only partially, as the many daily conflicts that would normally referred to the justice system do not even reach front-line agents such as the police.

Another aspect that must be recognized is the lack of confidence in the Dominican justice system. Even though this has improved slightly in the past few years, it continues to have a strong presence in the collective consciousness.[94] The judicial branch is seen as far removed from the most pressing social problems, and closer to those who enjoy political and economic power than to ordinary citizens. In short, one could say that there is a lack of civic awareness in the Dominican Republic that would make effective those rights even nominally enjoyed by citizens. Procedures are slow and costly- averaging $320 per month-[95] meaning that, from a cost-benefit perspective, people simply cannot afford to exercise their rights as citizens. Added to this is the fact that free legal aid is limited to criminal defense, even though, according to documents consulted and those interviewed for this report, the great majority of cases involve labor law, civil matters (recognition of nationality) and, of course, matters focused on the protection of fundamental rights in the face of discrimination and unjustified deportation.[96]

As mentioned above, the first cases that have acquired visibility (beyond the organizations that have systematically focused their efforts on the issue of Haitian migrants) are those in which the State has denied nationality to children born in the Dominican Republic to Haitian parents. Although the discrimination suffered by those of Haitian origin takes many forms in varied in aspects of social life, this issue has without doubt received the most attention, due to the ramifications. Those whose legitimate right to nationality is not recognized are in a particularly vulnerable situation, as they form a sort of caste that the Dominican government has been trying to eliminate for decades in a more or less explicit manner and with varying degrees of intensity.

Under Article 11 No. 1 of the Dominican Constitution, "*all people born in Dominican territory are nationals with the exception of the legitimate children of foreign residents who are in the country for the purposes of diplomatic representation or those who are in*

---

94 According to a recent study in which different social organizations were asked about their perceptions of Dominican justice, about 83% stated that they "feel that if works poorly, 11.54% stated that they felt that it worked well, and 5.77% felt that it worked adequately." Fundación Institucionalidad y Justicia (FINJUS), *Las necesidades judiciales desde la Perspectiva de las Organizaciones Comunitarias. Diagnóstico y Consulta*, FINJUS, Santo Domingo, November 2003, p. 15.

95 MUDHA, *Solidaridad…*, p. 15.

96 Ibid.

transit." This rule, called *jus solis*, states that those who are born on Dominican soil have that nationality (with the exception of children of foreign diplomats and people who are in transit) irrespective of the origin or status of the parents.[97] With the large number of undocumented people living in the country, this produces a problem, and many of these children are not legally registered, due to a variety of causes, ranging from "illiteracy to lack of resources to negligence on the part of fathers and mothers, *obstacles imposed by the state agencies charged with protecting this right* (...), a lack of adequate information on the part of parturient mothers upon leaving medical centers."[98] In addition, the authors were told that it is not unusual for authorities to assume that people without documents are Haitians or Dominico-Haitians and, as a result, to deport them.[99] [100]

Cases challenging obstacles to child registration practiced by State agencies are perhaps the most serious of all racial discrimination cases that have been brought before the courts (international instances first and later local courts) given their generalized nature and repercussions.[101]

There are two emblematic cases in which suits have been filed for the Civil Registry's refusal to register as citizens those individuals born in the Dominican Republic.[102] The first was heard in the first instance court of Santiago city judicial district in November 2002, and ended in a negative ruling for the Haitian plaintiffs, a decision that was upheld by a Court of Appeal ruling in the same district on 25 February 2003. In his decision, the Appeals Court judge argued a lack of evidence that

---

97 According to Immigration Regulation 279, passed May 12 1939 (Section V), the maximum period of transit for foreign nationals is 10 days, an important fact, as it has been a source of disagreement that has allowed the Civil Registry to refuse to register people.

98 Centro Dominicano de Asesoría e Investigaciones Legales (CEDAIL), *Los operativos de declaración de nacimientos*, n/d. Italics added.

99 Movimiento de Mujeres Dominico-Haitianas (MUDHA), *Camino a construir un sueño*, MUDHA, 2001, pp. 24-25.

100 According to some of those interviewed, this is one of the main reasons why Haitians account for such a low percentage of prisoners, in addition to their low inclination to commit crimes. Their tendency to migrate to look for work (and, given how cheap their labor is, their tendency to find it easily, even in very difficult conditions), has meant that government authorities prefer to expel them from the country when they are detained.

101 In October 1998 a girl and a young woman of Haitian descent, after having presented a request for protective measures as they were in immediate danger of being summarily expelled from the country, presented a complaint before the Inter-American Human Rights Commission for the violation of various human rights associated with the situation described in this report. In March 2003 the Commission issued a report on the case (IAHRC, Report 30/03, Case 12,189, Dilcia Yean and Violeta Bosica with the Dominican Republic), finding that the Dominican State had violated the right to nationality (Article 20), the right to equal treatment and non-discrimination under the law (Articles 1.1 and 24), the right to judicial guarantees (Article 8), the right to legal protection (Article 25), the rights of the child (Article 19), the right to legal identity (Article 3), and the right to education. The case has been submitted to the Inter-American Human Rights Court (IAHRC Case 12,189).
No local procedure motivated these international actions, as all internal processes were carried out in administrative agencies without the intervention of the judicial branch (although the refusal to register the individual in question was confirmed by the prosecutor). At that time there was still no protective request which, as we will see below, has been used as a procedural tool to protest State actions.

102 The attorneys, social organizations and authorities interviewed during the authors' visit to the Dominican Republic agreed that these were *the* cases of racial discrimination in the country.

the official involved had really refused to register the children in question, and that, given the civil law principle of burden of proof it was the plaintiff's responsibility to prove that "the children's presence in the country at the time of their birth was legal," which they had not, in his opinion. In effect, the court upheld the contention of the Central Electoral Board –which oversees the municipal Civil Registry offices- that

> Article 11 [of the Dominican Constitution] in its exclusions of non-benefit of nationality under *jus solis*, sets the conditions that (*sic*) the children in question be legitimate, clarifying that temporary residents or the children of foreign diplomats that are not the product of a marriage only enjoy the right to nationality of one of their parents (*jus sanguini*). As a result of the failure to prove that the mother's stay in the country was legal at the moment of the births –the sentence goes on to state- [her children] are given the same status as foreigners in transit.

Among the arguments presented by the Central Electoral Board there was an allusion to the Haitian Constitution, which establishes the rule of *jus sanguinis* for the determination of nationality (Article 11).[103] This reasoning, which was supported by the Dominican government through the Central Electoral Board and confirmed by the Court of Appeal, has been impugned by the Supreme Court through a cassation of judgment.

Despite the fact that the situation in the second case was identical, the ruling pronounced by the Santo Domingo jurisdiction favored the plaintiffs in both first and second instance (in the latter, the Civil Chamber of the Court of Appeal of the National District). The court found that the parents of two children, ages 7 and 5, were entitled to protection given that the Office of the Civil State and Central Electoral Board had not allowed them to register the births after the normal period had ended. The reasons presented by the state agency were 1) again, that the plaintiffs –the children's parents- were in the country illegally; 2) that they were immigrants who were illegally in transit in Dominican territory; and 3) that Article 11 of the Haitian Constitution and Article 20 No. 2 of the American Convention on Human Rights stipulated that the minors should have Haitian nationality.

Clearly, although the State's arguments are similar to those presented in the Santiago city case, in this case the court granted precedence to local judicial ordinance, arguing that the principle of *jus solis* established in Article 11 No. 1 of the Dominican Constitution "does not differentiate on the basis of the legality or illegality of the parents' situation, be they nationals or foreigners, given that it is a right not of the parents but to all persons born on Dominican soil," with the exception of those born in the situations outlined in the Constitution, which could not be applied to the case in question. In regard to the State's contention that the Haitian Constitution take precedence over

[103] That is, allowing the children of Haitian nationals to acquire that nationality regardless of their place of birth.

these children, the ruling stated that "under the principles of international public law (...), one must recall the principle of effective nationality, defined as a real and effective link between the minors and the Dominican State, on the basis of their permanence and development, including education, in Dominican territory." In response to the State's claim regarding Article 20 No. 2 of the American Convention, the court stated that that norm "only makes *jus solis* even more solid and, in terms of the exception (where [the individual] does not have the right to another [nationality]), it is precisely on the basis of international public law that we may deduce that while governments are certainly free to establish and regulate the acquisition and loss of nationality, it is also true that the State does not have the right to determine or limit the conditions of the acquisition or loss of a foreign nationality."

This decision was later upheld by the Court of Appeal in a ruling that delves even more deeply into the *pro homine* interpretation of the case, using doctrinal references to sustain arguments on the application of international legal principles and citing civil legislation that reinforces the plaintiffs' position (Article 9 of the nation's Civil Code, which establishes that all persons born in Dominican territory are Dominicans, and Article 55 of the same legal text, which states that all births must be reported).

Notwithstanding the courts' protection in this particular case, the executive branch freely and flagrantly disobeyed the decision, refusing to allow the children to be registered. This disregard for a judicial ruling is especially serious in light of the first instance ruling (which was not revoked by the Court's decision), which states that the decision is "fully executable, notwithstanding a motion to appeal, and shall be ordered by the judge immediately upon receiving the request." In other words, even though the sentence was to be appealed, the judge was able to order the children registered immediately. However, as mentioned above, the Civil Registry did not comply with the judicial order. The most interesting aspect is that the State has filed an action for cassation of the sentence through the Central Electoral Board. As a result, it will fall to the Supreme Court to pronounce on the contradictions of jurisdictional criteria in a decision that will be highly important for all children born to Haitian parents in the Dominican Republic.

The Massacre at Guayubín

On June 18, 2000 at approximately 3 a.m., seven people- one Dominican and six Haitians- were murdered at the hands of a patrol from the Border Intelligence and Operations detachment in the section of El Guayo, in the province of Montecristi. The victims were traveling illegally in a truck that was to take them to Santiago city. According to the case file to which the authors of this report were granted access, the police patrol opened fire when the driver of the truck refused to stop his vehicle, causing it to flip over, killing two of the occupants. The other

occupants were then fired upon when they exited the vehicle, terrified and pleading for mercy. According to the police, their agents had detected the presence of numerous armed Haitians that night, and they had therefore mounted a special monitoring operation, consisting of the group responsible for the detention (and death) of the people in question. Some police officers implicated in the shooting claim to have believed that drug trafficking was involved and that they were completely unaware of the illegal Haitian immigrants.

As the incident involved members of the military, an investigation was launched by military justice that after a lengthy process determined that a crime had been committed and identified those responsible, but did not establish effective sentences due to legal loopholes that have prolonged the case, which is still pending. Moreover, information submitted by Antonio Pol Emil, an attorney representing the victims' families, the officer in charge of the patrol that was responsible for the massacre had been sent to Israel for training while others had been promoted within the military hierarchy.

Simultaneously to the military investigation, criminal complaints were filed before the ordinary courts. The information gathered by the authors indicates that the case initially advanced substantially (in spite of the refusal of military officials to appear in court, stating that they had already done so in the military jurisdiction), but over time the criminal investigation judge gradually lost momentum. One attorney interviewed reported that a high-ranking military officer had (successfully) pressured investigators to discontinue the investigation. In spite of these impediments, the plaintiffs obtained a certificate that the case was also being heard in common jurisdiction, thus allowing their attorneys to appeal to the Supreme Court to settle the competence dispute.

Notably, this case has attracted the attention of many actors, in addition to those that defend the rights of Haitians and Dominico-Haitians. These include members of political organizations, intellectuals, academics, and a group known as the "Nationalist Union,"[104] made up of those who defend Dominican sovereignty and the country's right to close its borders to the Haitians' "pacific invasion." The level of interest is such that the group has retained attorneys to represent the soldiers accused of committing the murders, has had its members sit in court (in an evident effort to pressure the judges), and has issued declarations justifying the killings for reasons of national security.

[104] In 2002 one of its members, Pedro Manuel Casals Victoria, stated his intention to file legal action against Dominican chancellor Hugo Tolentino Dipp for treason, because he felt that the Chancellor had accepted the condemnations of Inter-American human rights organizations without sufficiently defending the nation's right to sovereignty and national security (see Perspectiva Ciudadana.com, 21 March 2002, http://www.perspectivaciudadana.com/020323/gobiernonacional13.html).

10 Years for 3 Salamis

A recurring theme in the interviews held during the authors' visit to the Dominican Republic is the fact that Haitians receive disproportionately severe treatment compared to Dominicans when accused of the same crimes. While this is not necessarily an extensive or systematic practice, there are ample cases of people who have been convicted or simply sent to prison preventively for minor infractions. Such is the case of Haitians who, under the orders of their (Dominican) bosses, cut down trees protected by the forestry law, which their employers are aware of but which they are not. The same is true for men who, for urinating in public, are placed at the disposition of the immigration authority or sent to prison (under the conditions described above).

One emblematic case garnered special attention, though it is similar to many others.

In 2002 a local court in the Province of Elías Piña heard the case of a young man of Haitian origin who had been accused of robbing three salamis and a radio. Despite the petty nature of the crime involved, the court sentenced the defendant to serve 10 years in prison. Some attorneys interviewed stated that this was a very strange procedure: the accused had been detained by a night watchman (commonly called a "wachiman") who went to the young man's house and accused him. The police are said to have based the case solely on the watchman's testimony and did not investigate further. The investigating judge sent the case to the criminal court solely on the basis of this testimony. The scandal caused by the excessive sentence resulted in the Court of Appeal of San Juan de la Maguana reducing it to one year in prison. In light of the new ruling, the San Juan Bar Association, local academics and political figures voiced their concern and anger over the situation, which seemed to be a clear case of abuse of authority (and not the first).[105]

In a similar vein, we were told of the case of a Haitian man in San Juan who was condemned to 5 years in prison and a fine for "punches and wounds." Unable to pay the fine (after having completed the prison term), his sentence was extended by another five years, and no one –not even the man himself- was notified. The accused had no family in the Dominican Republic, did not speak Spanish, and had no knowledge of the crime for which he was being held. A former cellmate reported the situation to a television producer when he was released, and a writ of *habeas corpus* was filed on the young man's behalf in the court of Azua. Thanks to this judicial action and in light of the extreme arbitrariness of the decision, the person was released.[106]

---

[105] "En Elías Piña hay una historia de condenas excesivas contra haitianos," *Diario Libre*, 17 March 2003, p. 14; "Critican condenas severas de jueza contra haitianos", *Hoy*, 3 April 2003, p 9.

[106] There are many cases of individuals of Haitian origin who are not aware of the reason they are in prison. One attorney interviewed referred to the case of a Haitian who had served 12 years in prison in Monte Plata, accused of stealing a fighting cock. However, his extended prison sentence was only known among the attorneys who visited the prison

Domestic Violence

Cases that involve allegations of domestic violence also manifest a lack of judicial protection, particularly for Haitians or Dominicans of Haitian descent.[107] The authors heard of cases in which women from the *bayetanas* are not assisted by the police, who present excuses ranging from requiring the victim's presence during the aggressor's detention (naturally not reasonable) to claiming a lack of gas in police vehicles. In addition, women who "dare" to report these crimes have apparently been harassed, and they often fear the imprisonment of the aggressor, as he usually is the sole breadwinner and his absence requires that they now have to take over as provider for their families.

According to attorneys who specialize in this area, the lack of diligence with which the judicial system confronts these cases is manifested in the inadequate manner in which the police gather evidence and the fact that judges forward the matters to correctional agencies instead of processing these cases as crimes (that is, in the criminal investigation courts). The family violence that is reported ends up being classified as "simple assault" in judicial rulings, with those responsible receiving correspondingly lower sentences. The public prosecutor's office seems to pay little attention to these cases (there is no follow-up) and the victims, in the face of so many obstacles, tend to drop their complaints.

The cases described are not the only cases to have achieved public notoriety. In general, Haitians and Dominico-Haitians continue to be a marginalized group, not only in the political and economic spheres, but also in the judicial ambit. Although organizations are gradually beginning to use the judicial system as a tool to expose racial discrimination, the results are still unreliable.

Conclusions

This report illustrates how the problem of racism in the Dominican Republic is related to "the black issue," which is defined as a problem with Haitians. The Dominican government's relative passivity in confronting the problem has led to the serious social marginality of this not insignificant migratory population.

In effect, the Dominican Republic's institutional structure does not include mechanisms or bodies dedicated to dealing with the problems associated with the massive immigration of Haitians to this country, or to address the situation of

---

and accessed a case file. They were shocked that the only procedure reported was that of imprisonment. There was no record of a legal procedure or any action on the part of the prosecutor's office. A writ of *habeas corpus* was presented and the prisoner was released.

[107] According to MUDHA, 119 deaths related to domestic violence were reported in 2002; this figure had risen to 140 deaths by early December 2003 (it is said that these numbers only include deaths directly caused by physical violence and not those that occur three or four days after the attack).

Dominicans born to Haitians who have resided in the Republic for years and even decades. The situation is aggravated by the strong linkages between the political elite and nationalist groups that hold views dominated by anti-Haitian sentiment that promotes prejudice and racial stereotypes.

As we have seen, these aspects of the situation affect the justice system. With few exceptions (which have been difficult to move forward given the executive branch's lack of cooperation), the courts have heard few cases of racism and have lacked a progressive attitude and failed to protect the rights of members of the community in question when their intervention has been requested. It would therefore seem that social organizations dedicated fighting racism and xenophobia could begin to use the judicial tool as a channel for advancing their agenda of protecting the rights of members of this community.

PERU

Background Information

The treatment of Afro-descendants in Peru, though similar to that in the other countries studied herein, is aggravated by the invisibility of this group, whose marginal situation is reflected in the social, cultural and political ambits, as well as in the judicial system, as the following paragraphs will show.

As was observed in the other countries studied, national censuses in Peru since 1940 do not include racial or ethnic variables that would enable researchers to know exactly how many Afro-descendants are living in the country. This lack of knowledge not only heightens the invisibility of this ethnic minority but also constitutes the main obstacle to adopting public policies designed to combat racism and discrimination against Afro-Peruvians.

Moreover, there is little specialized information on the black movement in Peru or on the problems faced by Afro-Peruvians. The lack of official statistics and studies on poverty levels, location of settlements and migratory processes, coupled with the general situation of social exclusion, all contribute to the permanent invisibility in which this segment of the population lives, in spite of their numbers. Indeed, Afro-Peruvians represent a significant portion of the national population, numbering between 8 and 15%, or more than 2.5 million people. Yet is it only known that:

> Afro-Peruvians live in poorer and more depressed areas and do not have access to basic services such as electricity, water, and drainage. There is also a lack of adequate infrastructure and public services like health, education and security. This leads us to the conclusion that Afro-Peruvians are the objects of a sort of geo-ethnic discrimination.[108]

The Africans who arrived in Peru came through the port of Callao and were mainly slaves who were mainly used to compensate for the lack of indigenous laborers and, in the case of the *ladino blacks*, assist in the Spanish conquest of the Americas. Once established in their new country, they usually worked on sugar and cotton plantations. Their situation was not very different from that of the slaves that lived in Colombia, though some argue that Colombian slaves were even worse off because that country abolished slavery in 1854, much later than in Peru, leaving the slaves in an even more precarious situation. In fact, it is known that "the plantation owners who had slaves in that country [Colombia] sold a group of almost 200 people including men, women and children to Peruvian plantation owners."[109] The Peruvian government allowed participation in this type of transaction, and authorized the Elías family to buy black slaves.[110]

---

[108] José Carlos Luciano Huapaya, *Los Afroperuanos. Trayectoria y destino del Pueblo Negro en el Perú*, Centro de Desarrollo Étnico (CEDET), Lima, October 2002, pp. 76-77. (Translator's note: All direct quotes from this document and the rest of the documents cited in this chapter were translated from the Spanish.)

[109] *Ibid.*, p. 3.

[110] *Ibid.*

Most (92%) Africans who arrived in Peru eventually settled on the central coast (as a result of the dismantling of the sugar and cotton plantations) even though many of them were originally taken to the highlands in response to insurrections by indigenous groups. However, these Afro-Peruvians were unable to adjust to the Andean climate –which is very cold during the rainy season- and preferred to settle along the coast. Today, researchers have identified "as many as 26 communities that include an important number of Afro-Peruvians. It is also estimated that more than 55% of this population lives in Lima and the central coast."[111]

Several of those interviewed for this study suggested that the lack of cohesion observed in the black movement in Peru is due to how people of African descent were brought into the country. The author cited above, who is one of the most important (if not the most important) figures in the Afro-Peruvian community, states-:

> One of the distinctive features of the [slave] trade in Colonial Peru is that it was only directly controlled by the Spanish between 1580 and 1640. The work of providing slaves for plantations, cities, private owners, and de facto owners was therefore always carried out in an indirect manner through purchases from the Portuguese, English, French and Dutch. This led to a high degree of ethnic diversity. The heterogeneous nature of both the slave population and the native Peruvians themselves thus impeded the formation of a more or less homogenous African ethnic group that could reproduce African traditions and culture, or at least some of them, on our soil (…).[112]

This situation was accompanied by the tendency of some Afro-Peruvians, whether deliberately or unconsciously, to assimilate and adopt white or, strictly speaking, *mestizo* cultural patterns in an attempt to advance even minimally in Peru's stratified society.[113] For members of the black community the process of "whitening" represented the possibility of aspiring to a better quality of life, not only socially but also in their capacity to participate in judicial procedures, though this was generally as defendants.

The main problem for Afro-Peruvians in the justice administration system, as will be shown below, is not lack of proper attention or poor treatment of Afro-Peruvians by the State; rather, it is their almost complete lack of access to the system. As a result, while some countries create mechanisms and strategies designed to bring the demands of the African American population to the judicial sphere, Peru's black community is not yet aware or cohesive enough to be considered a true minority with goals and demands that

[111] *Ibid.*, p. 76.

[112] *Ibid.*, p. 26.

[113] As José Luciano said, "[Afro-Peruvians] directed their aggression against themselves, reinforcing the process of depersonalization and group disintegration that was initiated during the Colonial period. They opted for *mestisaje* as a way of 'whitening' and social climbing. Once transfigured and converted into 'citizens,' their existence began to be negated by society as a whole and by blacks themselves. The myth of the racial democracy was formed." (*Ibíd*, p.35)

could be presented to the State and the rest of Peruvian society.[114]

However, racism against Afro-Peruvians does exist, and may be observed on the more basic level of social relationships, where its strong presence is felt in day-to-day interactions. In all but a few of the interviews conducted, those interviewed mentioned popular refrains about blacks and their situation. Indeed, Peruvians commonly say that blacks are only good at the jobs of soccer player, driver, body guard, hotel bell boy or, in the case of "Afro-Peruvian women, objectified, limited to performing domestic chores or raising children, and frequently seen as sexual objects."[115] Examples of these stereotypes include sayings such as "*el negro sólo piensa hasta los 12*" (blacks only think until they're 12); "*si el negro no lo hace de entrada, lo hace de salida*" (if a black doesn't do it on the way in, he does it on the way out); "*blanco que corre hace deporte, negro que corre es ladrón*" (a white man who runs is an athlete, a black man who runs is a thief); "*negro vestido de traje, es extranjero* " (any black in a suit is a foreigner), and many others.

Despite the lack of indicators on the marginality and social exclusion of Afro-Peruvians, researchers have estimated that Afro-Peruvians account for 60-70% of the population in the Callao region and that that community deals with a high level of criminalization. One statistic that is most revealing of the disadvantaged position of these communities is the fact that some of the sectors known as "red zones" (Chacarita, Barrancón) did not have basic services such as electricity and sanitary services until as late as 2000-2001.

Legal Norms and Institutions

Peru is a signatory of most Inter-American agreements, and ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1971.

Peru's Constitution, like those adopted in other countries in the Americas, includes a clause on general equality. According to Article 2.2 of the Constitution, "all persons have the right to equality before the law. No one should be discriminated against for reasons of origin, race, sex, language, religion, opinion, economic condition, or for any other reason whatsoever." This right is reinforced later in the document with the right "to ethnic and cultural identity. The State recognizes and safeguards the ethnic and cultural plurality of the Nation." (Article 2.19) Both rights are guaranteed through a protective measure (*acción de amparo*) outlined in Article 200.2, which can be invoked "against the act or omission by any authority, official, or individual that infringes or threatens" those rights.

[114] The Women's Ministry reported in an open session held in 2002, that 90% of Peruvians are discriminated against for not being white, and 50% for being women (Cimarrones, "El Quinto Suyo: Afrodescendientes en el Perú, " published on a CD Rom that was provided to the authors).

[115] José Luciano, *op. cit.*, p. 77.

However, no constitutional norms similar to those that have been established for indigenous communities have been created for Afro-Peruvians (Chapter IV). The Constitution endows native peoples with legal status and identity for the autonomous administration of their land, their communal work and organization (Article 89). These norms also state that "the authorities of the *Campesina* and Native Communities, with the support of the *Rondas Campesinas*, may exercise the jurisdictional functions within their territory in accordance with common law, as long as they do not violate the fundamental rights of the person in question." (Art. 149) Not one of the Peruvian Constitution's more than 200 sections make reference to Afro-Peruvians.

At the legal level, there is no legislation that focuses exclusively on the black community, though some norms do exist to regulate aspects of life in indigenous communities (Legal Decree No. 22175/78, the Law of Native Communities and Agrarian Development of the Forest and Edge of the Forrest), outlining and describing specific benefits.[116]

There are few specific references to Afro-Peruvians in the country's legislation, though the references to children and adolescents states that "this Code should be applied to all children and adolescents living in Peru without distinction on the basis of *race* (...) or any other characteristic of the minor or his or her parents (...)" (Art. IV).[117] One piece of legislation that does include a definition of racism was labor law 26.772, passed in 1997 at the urging of the Francisco Congo Black Movement (according to one source).[118] Article 1 of this law states that "job offers and access to education should not involve requirements that constitute discrimination or the annulment or alteration of equal opportunities or treatment, personal requirements or access to technical or professional training that are not contemplated in the law that imply different treatment with no objective and reasonable justification based on *race*, color, sex, religion, opinion, nationality or social

[116] According to Jorge Ramírez, an attorney and General Director of the Black Association for the Defense and Promotion of Human Rights (*Asociación Negra de Defensa y Promoción de los Derechos Humanos*) –and currently a member of the National Commission of Andean, Amazonian and Afro-Peruvian Communities (*Comisión Nacional de los Pueblos Andinos, Amazónicos y Afroperuanos*, CONAPA)- one example of the lack of government attention to Afro-Peruvians was the State's proposal that a special chapter on discrimination against *mestizos* be incorporated during the Durban Conference held in South Africa in 2001. According to Ramírez, this demonstrates that the government wished to focus attention on racism against *mestizos* rather than discrimination affecting any other community. Roberto Pereira, Commissioner of Constitutional Affairs, noted a similar situation within an important agency that focuses on defending people's rights. Pereira stated that there is a "native communities team" (within the Human Rights Agency of the public defender's office) that is responsible for addressing the needs and complaints of members of native communities. There is no analogous agency for Afro-Peruvians, though their problems, complaints, and violations of their fundamental rights are dealt with by the same team.

[117] According to the same Code, "(...) when the cases involve children or adolescents of ethnic, native or indigenous communities, their practices and customs should be respected (...)." (Article IX)

[118] Jesús "Chucho" García, "Comunidades afroamericanas y transformaciones sociales," in Daniel Mato (comp.), *Estudios latinoamericanos sobre cultura y transformaciones sociales en tiempos de globalización*, Consejo Latinoamericano de Ciencias Sociales (CLACSO), Buenos Aires, 2001, p. 54.

origin, economic condition, political condition, social status, age, or any other condition." This law also establishes that "any firing based on discrimination on the basis of (...) *race* (...) will be annulled or invalidated."

In the case of criminal legislation, Law 27.270, passed in May 2000, introduced the crime of discrimination. Article 1 of this law refers to Article 323 of the Criminal Code, which states that "any person who discriminates against another person or group of persons on the basis of *racial, ethnic,* religious or social difference will be sentenced to thirty to sixty days community service or the limitation of free days in the amount of twenty to sixty days." The law goes on to state that "discrimination is understood as the annulment or alteration of opportunities or treatment in personal needs, the requirements to access educational centers or technical and professional training that involve differentiated treatment based on *race*, sex, religion, opinion, social origin, economic condition, civil status, age, or any other condition." (Art. 2)

Institutions created by the Peruvian government to safeguard the interests native populations and ethnic minorities include the National Commission for Andean and Amazonian Communities (*Comisión Nacional de los Pueblos Andinos y Amazónicos*, CONAPA). The name of this body is further proof of the invisibility of Afro-Peruvians: although no express mention is made of Afro-Peruvians in its name, the organization is actually responsible for creating and implementing projects and programs that benefit this group.[119]

CONAPA was created in October 2001 through Supreme Decree 111/2001 and, according to its Website, seeks to "promote and guarantee the recognition and application by Peruvian society of collective and individual rights of *native peoples;* to ensure respect for the fundamental rights of vulnerable *native peoples*, especially those in voluntary isolation and those living in extreme poverty; to strengthen the institutional structure and technical secretariat of organizations representing *native peoples*; to represent the State as an inter-sectorial entity that promotes the demands of indigenous peoples among the public sector and civil society, and promotes self-determined, sustainable development of *indigenous peoples* in the context of their own identity."[120]

Given the fact that the Commission is supposed to promote public policies benefiting not only indigenous communities but Afro-Peruvian ones as well, there is a clear need to extend the stated objectives to formally include the latter. This exclusion is also evidenced by the fact that the Commission only has 9

[119] The CONAPA Website (www.conapa.gob.pe), is a typical example. Some documents available on the site refer to the "National Commission of Andean, Amazonian and Afro-Peruvian Communities," while others exclude the term 'Afro-Peruvian.' The same occurs with the images posted on the site: it is hard to find one that includes an Afro-descendent, though there are many that feature members of indigenous Amazonian and Andean communities.

representatives of Afro-Peruvian communities.[121] Moreover, according to those interviewed for this report, including government officials and members of social organizations, the work carried out by this State agency on behalf of Afro-Peruvians (essentially awareness-raising workshops and forums to showcase CONAPA's plans) was of little help to the community.

Finally, a significant step was made in April 2003, when the Afro-Peruvian community and members of indigenous communities made a joint proposal to make express, specific reference to their rights in the Peruvian Constitution. Leaders of Afro-Peruvian organizations see this agreement on a common proposal as an encouraging sign of strategic alliance between the black movement and Andean and Amazonian organizations.[122]

[120] See www.conapa.gob.pe ("Objectives"). Italics added.

[121] The remaining 16 members are "representatives of studies of the problem" and State representatives before the Commission, which is presided over by Miguel Hilario Escobar (who assumed this role in order to replace First Lady Eliana Karp de Toledo in August of 2003).

[122] The proposal presented to Congress included the incorporation of the following article in the constitution: "[the] State recognizes the Afro-Peruvian community as having public legal status and guarantees its collective rights. The Afro-Peruvian community has its own rights, cultural tradition, and knowledge, which are sources of enrichment for the Peruvian Nation. It is the obligation of the State to provide for its autonomous development and participation in political life through its direct incorporation in the national parliament. It is the obligation of the State to fight all forms of discrimination suffered by the Afro-Peruvian community and to fully embrace the country's multiculturalism."

Racism and the Judicial System

According to interviewees that included judicial system officials, "Peruvian psychology" impedes cases of racism and discrimination from reaching the courts. A more complex explanation would be that Peruvian society's transversal lack of confidence in institutions in general is accentuated for Afro-Peruvians. As mentioned above, the invisibility of the "Afro question" in Peru plays a decisive role in the community's lack of access to justice and, in the case of those subject to the system –defendants- in the general failure to report situations of discrimination.

The Prison System

The lack of detailed statistics on Peruvian prisoners is notable. In addition to the absence of general data on racial minorities and native communities in prison, the visit of researchers to Peru revealed that there is no registry of black inmates available. As a result, the information gathered is heavily based on the experiences of individual actors working in or around the prison system, and on non-systematized information.

Even though prison legislation in Peru is more solid than in other Latin American countries, mainly as a result of the judicial reform implemented during the 1990s,[123] in practice the situation is not

[123] For example, the Criminal Execution Code (in force since 1991), Regulations on Life Sentences and the Progressiveness of the Treatment of Interns who are Difficult to Rehabilitate and Processed and/or Sentenced for Common Crimes (D.S. Nº 003-96)

significantly different from the rest of the continent. The National Coordinator of Human Rights –an umbrella group of non-governmental organizations that defend, promote, and provide education on human rights throughout the country- claims that prison overcrowding has reached a critical level in Peru. Data from the National Penitentiary Institute –to which the authors' were not granted direct access- reported a holding capacity for prison facilities of 18,000 people, and an actual occupancy of more than 27,000 (most of these in Lima) in the year 2000.[124]

The most relevant case of prison overcrowding is found in the San Pedro prison, formerly known as Lurigancho. San Pedro, which was constructed to hold just over 1,800 inmates, currently houses more than 6,700, an over-occupancy rate of 240%. The large number of black prisoners in this facility makes it particularly relevant for the issues under study.

According to Oswaldo Bilbao, Executive Director of the Center for Ethnic Development (Centro de Desarrollo Étnico, CEDET), the black population at Lurigancho (as it is still called by most) is by far the worst off among prisoners (they are located in the most abandoned part of the prison, known as "*La Pampa*"). He also states that the lack of information on the black population is aggravated by the fact that many prisoners have been held for years –some for more than 15 - without having been sentenced.

Another actor, Jorge Ramírez, General Director of the Black Association for the Defense and Promotion of Human Rights (Asociación Negra de Defensa y Promoción de los Derechos Humanos, ASONEDH), stated that Afro-Peruvians are readily convicted because of stereotypes, some of which have even been assimilated by blacks working in the system, attending the public or as guards.[125] Afro-descendents also face "a lack of legal protection" in judicial defense: when they are able to secure some type of professional defense, it is generally provided by individuals who perpetuate the racial prejudices built into a system that demonstrates no sensitivity towards the issue of race.[126]

and the Regulation on Life Sentences and the Progressiveness of Treatment for Inmates who are Processed and/or Sentenced for the Crime of Terrorism or Treason (D. S. N° 005-97) are similar. The last two Supreme Decrees were annulled by Supreme Decree Nº 003-2001, which states that it establishes "norms regarding the right to legal defense and the treatment of inmates in prison facilities," regulating interns' right to receive visits from family members and friends, to hold interviews, and to communicate privately with their attorney, as well as more time in the prison yard.

[124] Coordinadora Nacional de Derechos Humanos, *Informe Anual 2000*. See http://www.cnddhh.org.pe/anual00/cap32f.htm.

[125] Wilfredo Ardito, "Racismo en el Perú: ¿seguirá la impunidad?" in *La Insignia*, March 2002. See http://www.lainsignia.org/2002/marzo/soc_045.htm .

[126] The best example of how Afro-Peruvians' association with crime permeates all levels, even within government, is the State security service's safety ad warning children not to accept invitations from strangers. In this sequence, entitled "Know How to Protect Yourself," a child turns away from a black hand and takes a white one and confidently walks away.

The Judicial System

The stereotypes discussed in the preceding pages –that blacks are thieves, that they are lazy and only good for domestic work or physical activities, among many others - carry over into the justice administration system. Beyond the above-described situation in the prison system and the lack of statistical data, it is known that in prisons like San Pedro (Lurigancho), the Afro-Peruvian population is so numerous that, as one Judicial Academy official interviewed put it, "when a white person enters the prison, there's a problem."

As will be shown below, in spite of the numerous examples of racist acts, according to national and international standards only one case of racial discrimination has been formally filed in Peruvian courts, and this was not successful. This situation leads us to ask why requests for judicial protection against racist practices are not brought before the courts.

One explanation is offered by Wilfredo Ardito, an IDL researcher, who states that Peruvian culture is not generally litigious, and people tend not to look to the courts to resolve abuses and violations of their fundamental rights. In his opinion, this is mainly because Peruvians do not perceive the potential benefits of making such reports; the high cost of litigation (due to judicial fees that many feel are unconstitutional, as they undermine the right to effective judicial protection); and finally from a generalized lack of confidence in State institutions. These factors are accentuated for Afro-Peruvians, who generally do not have a clear understanding of the justice system, as their participation is usually limited to being defendants in common criminal cases (for robbery, drug trafficking, etc.), a situation that is related to the poverty in which they live. This reality is sadly summed up in the crude expression "*no se requiere más prueba para condenar a una persona que el que sea negra*" (the only proof you need to convict someone is that they're black).

As in other countries under study, there is no data available on the racial composition of the judicial system in Peru, including the degree of racial diversity. However, researchers for this report did obtain some data that indicated the presence of people of African descent in the judicial system is very low and is limited to less important jobs such as administrative positions and management support in tribunals, courts, and other justice administration offices, such as public prosecutor's offices, public defender's offices, and so on.[127]

[127] During the visit made in preparation of this report, the authors heard of a situation in which Superior Court judges "from a city in the highlands" openly made racist jokes about a black official who had come to work in the court. In the upper echelons of power, discrimination also exists: The authors were told by black former union leader and current member of Congress José Luis Risco that his request to take the floor was ignored during parliamentary debates in the Commission on Justice and Human Rights. The explanations given for this incident varied, some citing the congressman's incompetence and others the fact that the president

The stereotyping that causes this inequitable representation of blacks is evident. Supporting this argument, researchers from the NGO IDL noted that participants in special police training sessions had no problem recognizing their stereotyping of blacks, who for these officials are directly identified with criminality. Thus, from the very beginning of criminal prosecution by the State, racist criteria are used that will hardly diminish as the case progresses.[128]

For its part, the public defender's office assured us that Afro-Peruvians are "the client base of the criminal prosecution system;" as one spokesperson put it, the problem of race is directly related to economic issues and exclusion.

Reportedly, of a total of 500 people working in the public defense system, only 4 are black. Furthermore, none of those interviewed could attest that there were any public prosecutors of African descent. This coincided generally with the opinion of public sector representatives interviewed, who stated that "you'd have to use a magnifying glass" to find a black judge.[129]

Judicial Branch representatives interviewed corroborated this situation. Lima Supreme Court Chief Justice, Carlos Arias, did not know any judges of African descent, though he did know a Chief Justice who was "a dark *mestiza*," which situation, he assured us, reflects the racial composition of the country's law schools. Mr. Arias stated that of the 230 students who graduated in 1990, only one was of African descent. In view of this information one can deduce that judges, prosecutors and public defenders of African descent are virtually absent in the Peruvian judicial system..

Nevertheless, this absence of Afro-Peruvians in positions of authority is clearly not exclusive to the judicial structure. The marginalization in which they live excludes them from primary, secondary and higher education and cuts across every level of the public sphere. Many feel that this has created a truly vicious cycle, leaving the issue of blacks in Peru off the government's agenda and, except on rare occasions, off the public one as well. In effect, as José "Pepe" Luciano put it,

---

of the Commission simply didn't see his raised hand.

[128] As said by Wilfredo Ardito, "[i]n the area of judicial administration, magistrates, prosecutors and police officers continue to perceive individuals with Andean or black features as more likely to commit crimes. As a result, members of these groups are submitted to interrogations and racist statements. A similar attitude is shown towards victims that have these features, in that officials dismiss the victim's statements and attempt to dissuade him or her from seeking justice. Finally, members of these groups, whose social position or educational level may not be obvious, frequently suffer abuses including arbitrary detentions or beatings, as well as the violation of various rights while they are detained" (Ardito, *op. cit.*).

[129] The National Magistrate's Council (charged with appointing, confirming and removing judges and prosecutors) response to the same question (whether or not there were black officials in the judicial system) was, "Should there be?" This government agency apparently has one black staff member who delivers documents.
The General Secretary of the Magistrate's Academy Executive Council did not know of any black judges, public defenders or public prosecutors, except for "one who managed to become a civil justice of the peace."

> [a]nother alarming facet of the situation [of marginality] of Afro-Peruvians is their exclusion from public life. This exclusion is not only limited to the fact that Afro-Peruvians do not occupy important public positions, but is reflected in the government, in political parties, and in civil society's tendency to ignore their problems.[130]

As mentioned, this all results in the ongoing invisibility of Afro-Peruvians and their problems. They are condemned to be victims of what is called "underhanded racism" both by society and the State itself, which, we were told, has not been able to coherently articulate the demands of this population.[131]

Cases

As we have seen, Peru stands out for the complete absence of cases of racism and discrimination brought to the courts, though this does not imply that situations that violate the principle of racial equality under international and local norms do not occur on a daily basis. As stated by one individual interviewed, if there is any tendency in the justice system's treatment of blacks, it is definitely not to be found in judicial rulings, but rather in the way Afro-Peruvians are treated on a daily basis in the courts. (Indeed, some insist that this faithfully reflects how Afro-Peruvians are treated in the society itself).

While in Peru the authors observed that Afro-Peruvian organizations lack a judicial orientation, which makes the legal approach to addressing problems racial discrimination a less favorable strategy than other measures when it comes to positioning topics on the public agenda.[132] Certainly, up until now publicity and media impact has been the favored tool for raising public awareness to recurrent discriminatory and racist behaviors that exist in Peruvian society. A review of these types of cases will be presented at the end of this chapter.

As a result of this attitude, only one judicial case of racism against Afro-Peruvians was brought to light. In this case, a complaint was filed with the United Nations Human Rights Commission in 2003 by a black Peruvian National Police officer against the Peruvian government for denial of justice in a case of discrimination within the armed forces.[133]

In December 2001, Elías Guillermo Urriola Gonzales, a commandant in Peru's National Police Force, was notified that he had been given permission to retire, or, to put it plainly, had been discharged from the institution. According to the complaint presented to the international organization –to which the authors of this report had

130 José Luciano, *op. cit.*, p.77.

131 It is said that CONAPA's effectiveness in promoting development policies for Afro-Peruvians has been limited compared to the tasks directed towards indigenous and Amazonian communities. (As mentioned earlier, this agency has monopolized the voice of racial groups, erasing their already limited presence).

132 See the Conclusions and Recommendations section of this report.

133 It would seem that racism in the armed forces is a constant in Peru. According to Wilfredo Ardito, "it is shocking that two of the spaces in which discrimination continues to take the form of racial segregation belong to the State: the Air Force and the Navy. Both of these agencies systematically reject officer candidates with Andean and black features." (Ardito, *op. cit.*).

direct access along with other documents submitted with it - the discharge "did not meet the legal requirements (...), and violated all of his constitutional rights as recognized in the international conventions that had been ratified by the Peruvian government."[134]

The plaintiff, whose claim was supported locally and at the international level by the Black Association for the Defense and Promotion of Human Rights (Asociación Negra de Defensa y Promoción de los Derechos Humanos, ASONEDH), the discrimination against him began in the early 1990s, when he filed a complaint against a superior in response to a bad performance report. The case file indicates that, as a result of this early complaint,

> the Police Chief referred to in this case initiated a campaign of persecution and revenge through inhumane, humiliating and discriminatory treatment that forced the complainant to request a hearing (...) in order to expose the cruel treatment based on race and racial stigma that damaged the soldier's humanity. The hearing was granted, but the complaint was not addressed, and the offenses, insults, and attempts at physical aggression became more intense.[135]

As a result, Officer Urriola was subject to a variety of punishments (normally, "*de rigeur* arrest") for apparent misdeeds, often without prior notification, or on some occasions receiving preventive punishment before the deeds had been substantiated. It was also reported that some of the disciplinary measures employed are not provided for in the law; in other cases, irregular situations were produced intentionally by having gas vouchers issued to Urriola used by others. The report notes several times that the plaintiff requested meetings with his superiors, which resulted in either no action or the dismissal of his concerns. Commandant Urriola thus accumulated a series of disciplinary notations on his employment record over the course of his career that, taken together, could formally justify his forced retirement. Nevertheless, as noted by the Ombudsman's Office, despite the accumulation of (supposed) disciplinary measures applied against Urriola, "the administrative resolution by which he was discharged is not sufficiently well-founded, and would be a violation of his right to administrative due process."[136]

At first, Commandant Urriola attempted to appeal the forced retirement in different instances, but was unsuccessful at each turn. He first presented an appeal to the Ministry of the Interior that was declared inadmissible (in May 2002); following this, Urriola presented another appeal that, in spite of "multiple requests and notarized letters, the appeal presented was declared inadmissible (…) based on the resolution that declares inadmissible

[134] Personal Complaint Regarding Racial Discrimination against the Peruvian State on the part of Elías Guillermo Urriola Gonzales, pp. 7-8 (document submitted to the authors of this report).

[135] *Ibid*., pp. 18-19.

[136] Letter from Dr. Rossana Cuentas Pinto, Chief of the Human Rights and Justice Administration Area, Public Defender's Office of Lima to Elías Urriola Gonzales, sent 29 April 2003 (document submitted to the authors of this report).

any appeal that has already exhausted the administrative route, without evaluating the bases of the appeal and the supporting evidence that was filed."[137]

Once the administrative instances were exhausted, Commandant Urriola appealed to ordinary justice, presenting an action of guarantee before the 44th Civil Court of Lima. He brought suit against the Ministry of the Interior, "so that the supreme resolution (...) which allows for discharge on the basis of changes in personnel would be declared inapplicable." The ministry in question opposed the appeal, stating that the date of the emission of the resolution did not correspond to its involvement in the case. The court accepted the ministry's argument and dismissed the case. An appeal followed this judicial ruling, and was declared "inapplicable by reason of statute of limitations," which meant that Urriola could not continue with the case through ordinary justice channels.

In response to this situation, ASONEDH submitted a letter to the First Lady of the Republic and then President of CONAPA, Eliana Karp de Toledo in November 2002, asking that she intervene "so that the plaintiff may return to active service in the Institution, accompanying the request with all instruments that accredit the allegations." As the First Lady was also the director of the state agency responsible for creating policies favoring racial and ethnic groups, she agreed to facilitate the process of reaching an understanding between the parties, and forwarded the case to the public defender's office in late November 2002.

According to the facts in the case file, it was only in late May 2003 that the public defender's office sent the document mentioned above to Commandant Urriola, in which it stated that having reviewed the documentation presented, they were "unable to find any objective element that would accredit discriminatory acts against him," although it also notes that "the administrative discharge resolution was not sufficiently well-founded, and thus infringes on the plaintiff's right to administrative due process."[138] The same office later sent the victim a letter requesting that he appear in their office, "an invitation that was accepted but that did not lead to a resolution of the matter." In May 2003 the plaintiff requested that the case be reopened "based on the fact that the ruling body could not find any objective element that proves discrimination, a request that was never absolved or resolved," in spite of the plaintiff's repeated requests that the state agency decide the case. Given the lack of response from the public defender's office, Urriola filed a "protective measure established by the Law of Administrative Procedure, making use of administrative silence (...) without receiving a response and assuming that the administrative means had been exhausted."

[137] Complaint …, p. 11.

[138] *Supra* note 112.

Given the impossibility of reaching a solution at the national level, Commandant Urriola, represented by ASONEDH, appealed to the United Nations in September 2003, alleging the violation of different local and international judicial norms by the Peruvian State. He demanded his reinstatement in the police institution at a level appropriate to his seniority and, as a result, his right to advancement.[139]

This case is interesting for several reasons. First, the discriminating agent is a State agency; second, it reveals the inadequate response of the judicial branch and other bodies that are charged with protecting citizens' fundamental rights. Furthermore, as explained above, this is the first case of racism against an Afro-descendent that has been judicially processed, meaning that it could spur the presentation of other cases before the judicial branch.

Other Case Studies

The prevalence of racist comments and attitudes against blacks in Peru has already been mentioned. Treatment of Afro-Peruvians on the street and in public places is notoriously racist, and this group seems resigned to this treatment, preferring to take part in the so-called "whitening process" rather than demanding respect for their rights.

Many of those interviewed for this report cited as the selective entrance to nightclubs and discotheques a classic example of discrimination. In general, the entrance criteria defined by club owners and operators tended to exclude Afro-descendents. However, it is worth mentioning that this type of discrimination, which led to the passage of Law N º 27.049 establishing citizens' right to be free of consumption-related discrimination, did not focus on discrimination that exclusively affected blacks, but rather on actions that, strictly speaking, were directed against all non-whites.

The law itself was passed in response to media pressure criticizing the way in which nightclubs selected their clientele. Article 7-B of Legislation N° 716 added that "vendors shall not establish any type of discrimination among those that seek to purchase their products and services in places that are open to the public. Selecting clientele is prohibited, as are excluding people or instituting similar practices, unless issues related to the safety of the establishment or security of the clients or other objective and justified situations are at stake." However, excluding people who are willing to pay to get into a nightclub continues to be regular practice in Peru.[140]

[139] According to Jorge Ramírez Reyna, president of ASONEDH, as of the date this report was published the Office of the United Nations High Commission on Human Rights, before which this case was presented, had not responded.

[140] One of the most emblematic cases, and one that did reach the courts, is that of the club *The Edge*, located in Miraflores (Lima). In spite of the negative ruling in the courts, the topic of (general) discrimination was placed on the public agenda. This case was not analyzed in detail as it did not involve discrimination specifically directed towards people of African descent. For more information on this case, see Felipe González and Felipe Viveros (eds.), Defensa Jurídica de Interés Público:

Interviewees also repeatedly mentioned the case of the "Armendáriz monster," related to a series of crimes committed in the 1950s. The defendant, an Afro-Peruvian, was accused of raping and murdering 9 children. He was imprisoned in the El Frontón prison close to San Lorenzo (Callao) and promptly executed. It is said that the defendant's death was the result of the enormous social pressure to find someone responsible for the horrendous crimes, rather than from hard evidence, of which there was not enough to secure a conviction. Paraphrasing an official from the public defender's office, since "blacks are the clients of the judicial system," the most convenient response was to arrest an indigent Afro-Peruvian and make it seem like he was the killer.

Conclusions

After analyzing the general situation of Afro-descendents in Peru and the justice system's treatment of this group, including their lack of access to justice, one can identify the concerns and problems of this racial group that have not received adequate attention from the State and civil society.

Relegated to subordinate or dependant positions, Afro-Peruvians have yet to organize themselves effectively enough to forcefully communicate their collective needs to government agencies. Racism and race-based discrimination are constants in Peruvian society, which passively accepts the popular jokes and sayings that reflect pejorative attitudes towards black Peruvians.

The main problems faced by Afro-Peruvians in the judicial system are a lack of real access to justice, their stigmatization as common criminals, and limited response to their needs. These do not only involve the way in which Afro-Peruvians are treated before the courts, but also the lack of representation of this community in positions of authority within the judicial system.[141]

To reiterate a statement made repeatedly above, this situation is invisible to civil society itself, which centers its efforts on ensuring that common racism is noted by the media. The absence of specialized studies of the systematic nature of the racial discrimination suffered by Afro-Peruvians and the lack of official statistics further impede the work that could be done in benefit of this segment of the population.

The first case of racial discrimination to be presented before Peru's courts was filed as recently as 2003. After failing to obtain the expected response from the national court system, the plaintiff appealed to the universal

enseñanza, estrategias, experiencias, Cuaderno de Análisis Jurídico Serie Publicaciones Especiales Nº9, Universidad Diego Portales, Santiago, 1999, pp. 63 ff.

[141] One attorney interviewed shared an anecdote that is hardly amusing about a black colleague who was sharply ordered to the right side of the courtroom by a judge because "that's where the defendants stand."

human rights protection system. The case will serve to encourage grassroots organizations to view the judicial tool as a new strategy to be used in their struggle to increase the visibility and profile of this historically marginalized group.