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RACISM, SOCIAL PATHOLOGY AND ITS LEGAL IMPLICATIONS FROM THE CHANGES INSERTED BY LAW NO. 14,532/23

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ABSTRACT

This article seeks to address the theme of extreme legal and social relevance regarding racist practices and their reflections on Brazilian Criminal Law, addressing historical aspects on the subject, as well as certain concepts used at the vertices of certain discriminatory and prejudiced practices. In this context, an approach will be made to the constitutional treatment and the main laws that govern the matter in the national legal system, focusing on the constitutional/criminal confrontation with regard to prejudice and racial discrimination, based on the treatment given to crimes of racism and racial injury from the emergence of Law No. 14,532/23. Inconsistencies and existing gaps are pointed out, as well as suggestions for improvement, despite the recent legislative increase, formulating reflections on the problem of the (un)need for Criminal Law to focus its batteries on the protection of groups historically victimized by the incidence of prejudiced and discriminatory conducts in the light of a Democratic State of Law and the necessary dignity of the human person.

Keywords: Constitutional Law. Criminal law. Crimes of Discrimination. Racism. Imprescriptibility. Dignity of the Human Person.

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INTRODUCTION

The theme of discrimination and racial prejudice is one of the great ills of humanity, taking us back to the beginnings of human existence. In Brazil, this scenario is not different, since the aversion of certain groups towards others has always been a constant, providing a historical and still unovercome reality in which millions of people suffer or have suffered the most harmful forms of discrimination, prejudice, aversion towards others.

The understanding of this deplorable and highly pernicious phenomenon to social relations leads us to the necessary analysis of certain concepts employed, notably with regard to the expressions discrimination and prejudice, demonstrating their magnitude and differences in meanings. This approach, despite its sociological and anthropological bias, is also legal, to the point of verifying the incidence of Criminal Law to curb certain conducts, especially through the typification of racism and the crime of racial injury in the Brazilian legal system. In this context, the debate about the (in)adequacy of the treatment given to discriminatory or prejudiced racist conducts is always latent, making the debate around the interference of certain branches of law always relevant and current, especially regarding the sufficient and desired limits for the criminalization of practices of this nature, as well as the necessary conformation of the criminal process to give effectiveness to the criminal legal system from the constitutional perspective and in the light of the of a Democratic State of Law, in line with the primacy of human dignity. From this point of view, it is proposed to verify that, despite the inherent seriousness of prejudiced and discriminatory racist conducts and recent legislative changes, advances are still needed, filling gaps and, notably, to consider them heinous, since they are absent from the list of criminal offenses of this nature.

DISCRIMINATION/PREJUDICE. A REMARKABLE PANORAMA IN WORLD SOCIETY

Since the dawn of humanity, there has been the occurrence of hatred and aversion of certain human beings towards their peers, and of certain groups towards some collectivities. Thus, in antiquity, there was intolerance regarding religious or sociocultural differences. In this sense, mass murders for religious reasons are common throughout human history, since "*they are as old as religion and, as well as they are prestatal, or committed by societies with organizations completely different from modern and very different from each other*" (ZAFFARONI, 2012, p. 54).

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In addition, the development of capitalism and the conquest of territories revealed another historical mark of humanity, characterized by the phenomenon of slavery (SANTOS, 2010, p. 28). About one hundred million black Africans were enslaved and/or killed in compliance with the slave system in the Americas, resulting in the largest genocide in human history (CHIAVENATO, 1987, 44-45). In this context, it is important to remember that "countless Indians were dispossessed, expelled from their lands and killed during the colonization process of the three Americas" (SANTOS, 2010, p. 29). With the expansion of these discriminations and prejudices, a "feeling of superiority of the white in the economic center of the planet" (SANTOS, 2010, p. 29) emerges, together with distorted studies of the evolution of the human species, contrary to the principles of the Enlightenment, giving rise to Aryanism.

Responsible for formulating the doctrine of the superiority of the Aryan race, the Frenchman Arthur de Gobineau aimed to praise his hereditary lineage. To this end, he had the help of Richard Wagner to spread his theories in Germany, creating "the myth of the superiority of the Germanic people, taken to the borders of fanaticism with the rise of Nazism, which culminated in the extermination of millions of people" (SANTOS, 2010, p. 30), which occurred in World War II. The atrocities that occurred in the Second World War served as the basis for the elaboration of the 1950 and 1951 Declarations of Unesco, precisely striving to avoid the repetition of the Nazi case. At this point, Alessandro Baratta (2004, p. 133-134) drew attention to the fact that international law selectively and structurally influenced domestic Criminal Law, since selectivity occurred through powerful local groups that were able to influence legislation "*using criminal institutions as a weapon to combat and neutralize the behavior of opposing* groups". Despite all the efforts and the sad lesson of the greatest war in the history of humanity, in the United States of America, considered as one of the winners of the war, paradoxically, the problem of "racial segregation" persisted, which "continued to exist in a ferocious way, with the maintenance of the equal but separate principle, causing there to be, in a mandatory way, the segregation or prohibition of blacks" from attending schools, means of transportation (in twenty-one Confederate states), which lasted until the decision of the case *Brow vs. Education of Topeka by the* U.S. Supreme Court, in 1954 (FERREIRA, 1995, p. 158-159). Also in the African scenario, the South African apartheid regime (racial segregation) was verified until 1996, giving way only with the advent of the new Constitution that in its preamble recognized the injustices that occurred in its past, ensuring respect for human

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rights, as well as diversity and equality among all citizens. (SOUTH AFRICA, 1996). South African apartheid originated from the Congress of Berlin in 1884/1885, when the African continent was artificially divided (straight lines) to legitimize the achievements of nineteenth-century neocolonialism (ZAFFARONI, 2012, p. 10).

In colonial societies, discrimination presented itself with a clear harmful distinction that reduced the possibility, or prevented certain categories of the population, from having access to certain positions, professions or occupations of positions. In parallel, segregation, on the other hand, meant the physical separation or isolation of specific ethnic or racial groups from the bulk of the population or from essential social structures (BETHENCOURT, 2013, p. 337), as in *South African* apartheid.

The magnitude of the problem is such that even in the positivist criminological school racism was present. Raffaele Garofalo considered "culture itself" as the "superior culture", in frank ethnocentrism impregnated with racism, since he refers with contempt to the "degenerate tribes", which are the cultures that do not obey what he considers should be the moral feeling", considering them inferior beings, not Europeans, delinquents (ZAFFARONI; PIERANGELI, 2018, p. 277).

Constant conflicts between Catholics and Protestants (United Kingdom), between Jews and Muslims (Middle East), Russians and Ukrainians, etc., allow us to observe how complex and perennial the issue of prejudice and discrimination is, as well as the enormous difficulty of eradicating them or, at least, of reducing them among citizens. Nucci asserts that racism has already caused humanity, in several places, enormous harmful consequences, often driven to the extermination of thousands of human beings, under the pretext of being inferior, which is why they did not deserve to live (2020, p. 696).

In addition, we understand that daily violence between ethnic groups continues to be visible in different parts of the world, as was the case with slavery and enslavement, often based on prejudices related to ethnic ancestry, which is why we inevitably need to "go a long way to fulfill the dream of human dignity and the real implementation of human rights" (BETHENCOURT, 2013, p. 582).

In this way, in the words of Sarlet (2002, p. 620), the dignity of the human person is "the intrinsic and distinctive quality of each human being that makes him or her deserving of the same respect and consideration by the State and the community", provoking a wide range of "fundamental rights and duties that ensure the person against any and all acts of a degrading and inhuman nature, as they will guarantee him the minimum existential

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conditions for a healthy life", providing and promoting "his active and co-responsible participation in the destinies of his own existence", as well as of life in society with other human beings. Therefore, the practice of prejudiced or discriminatory conduct undermines these values, and deserves absolute legal protection.

DISCRIMINATION/PREJUDICE IN BRAZIL. CONSTITUTIONAL/LEGAL CONFORMATION

The Brazilian case is quite representative in the global scenario, since Brazil was the last country in Latin America to officially abolish slavery, a fact that only occurred on May 13, 1888, through the Golden Law - No. 3,353 of 1888 (BRASIL, 1888). However, even after the abolition of slavery, the reception of blacks (and why not say Indians and mestizos) in contemporary society and in the labor market is still quite incipient, since affirmative and legislative actions to circumvent the scenario are recent, with no lack of examples of prejudiced behavior in social environments, despite the fact that the constitutional text is clear, already in its preamble, stating that Brazilian society must be egalitarian and without prejudice. As if that were not enough, among the fundamental objectives of the Federative Republic of Brazil, item IV of article 3 of the Constitution, there is the objective of *promoting the good of all, without prejudice of origin, race, sex, age and any other forms of discrimination* (BRASIL, 1988). In addition, item VIII of article 4 establishes that it is a principle of the Federative Republic of Brazil *to repudiate terrorism and racism* (BRASIL, 1988). To conclude, item XLII of article 5 also provides that the fundamental right and guarantee of Brazilian citizens is the non-bailability and imprescriptibility of the practice of racism, which must be punished with imprisonment by means of a complementary law. There is, therefore, an imposing and clear constitutional command aimed at combating and preventing all forms of prejudice and discrimination. In the legislative spectrum and in line with the Constitution, it is worth highlighting the recent Statute of Racial Equality, Law No. 12,288 of 2010 (BRAZIL), the Law of Crimes of Racism, Law No. 7,716 of 1989 (BRAZIL), the Law of Racial Quotas at the federal level, Law No. 12,990 of 2014 (BRAZIL), among others. Recently, there was an increase in Law No. 14,532, of January 11, 2023, partially amending Law No. 7,716/89 and the Penal Code.

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ESSENTIAL APPROXIMATE CONCEPTS

The expression "prejudice", according to the definition given by the Aurélio Dictionary (FERREIRA, 2010), derives from the Latin term *preconceptu*, meaning: concept or opinion formed in advance, without consideration or knowledge of the facts (a preconceived idea); judgment or opinion formed without taking into account the fact that contests them (a prejudice); by extension: suspicion, intolerance, racial hatred or aversion to other races, Creeds, religions, etc.: Racial prejudice is unworthy of human beings, constituting a subjective perception that does not need to be externalized.

The expression "discrimination", unlike prejudice and racism, according to the Aurélio Dictionary (FERREIRA, 2010, p. 724), emanates from the Latin *discriminatione*, consisting of the act or effect of discriminating concretely, externalizing acts with the content of differentiating, differentiating, discerning. The content of discrimination does not even need to be something with a pejorative connotation, and can constitute affirmative, positive predicates.

However, as for the expression "racism", for the Aurélio Dictionary (FERREIRA, 2010, p. 1.769), it has the meaning of being a tendency of thought, or way of thinking in which great importance is given to the notion of the existence of distinct, superior and inferior human races. In UNESCO's view, racism is the expression of the fundamentally anti-rational system of thought. It constitutes a challenge to the tradition of humanism that our civilization claims for itself (UNESCO *apud* SANTOS, 2010, p. 47). On racism, on May 10, 1994, in his speech as the first black President elected in South Africa, Nelson Mandela took his oath stating "that for so long it had been the place of white power and control", and that "he believed that from the calamity of the past, a new society would be born, worthy of world pride. I spoke about how our victory belonged to everyone, because it was a victory in favor of justice, peace and human dignity" (2006, p. 161-162).

Regarding the breadth of the expression racism, in a historic and precursor judgment, the Full Court of the Federal Supreme Court, in the judgment of *Habeas Corpus* No. 82.242-2/RS (Siegfried Ellwanger Case), on 09/17/2003, understood that it would also reach prejudice and discrimination based on religion.

From the approximate concepts referenced, without intending to exhaust them, it is relevant to observe the inflections of Criminal Law with regard to prejudice and discrimination related to them from the constitutional north.

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FROM CONSTITUTIONAL TO CRIMINAL TREATMENT. IDIOSYNCRASIES AND LACK OF MEANINGS

Essentially, regarding the treatment given in the Brazilian Constitution of 1988, the *caput* of article 5 of the Constitution ensures that "everyone is equal before the law, without distinction of any kind". In consonance, item XLII of the article establishes a command to criminalize conducts that are offensive to equality, since "the practice of racism constitutes a non-bailable and imprescriptible crime, subject to the penalty of imprisonment, under the terms of the law" (BRASIL, 1988). At the same time, also in article 5, under the label of Fundamental Rights and Guarantees, there is a provision in item XLIII to the effect that

> the law shall consider the practice of torture, the illicit trafficking of narcotics and related drugs, terrorism and those defined as heinous crimes to be non-bailable and not susceptible to pardon or amnesty, for which the principals, the executors and those who, being able to avoid them, omit to do so;

It so happens that the constitutional diploma needs interpretation, in order to avoid reductionist prospection on the subject, insofar as, despite the clarity about the necessary equality among citizens and the prohibition of any distinction, it established a command for the criminalization of the practice only by using the expression *racism*, raising it to the purview of non-bailability and imprescriptibility.

Symptomatic of this constitutional fragility is the wording given to Law No. 7,716/89 (BRAZIL), when it states in its preamble that it is intended to define *crimes resulting from prejudice of* ***race or color***. In its article 1, it provides that *crimes resulting from discrimination or prejudice of race, color, ethnicity, religion or national origin* ***will be punished, under the terms of this Law***. (emphasis added)

In this normative conjuncture, there is a constitutional command for the criminalization of **racism** in *an imprescriptible and non-bailable character*. The preamble of Law No. 7,716/89, which aims to implement the constitutional precept, refers to the criminalization of prejudice based on **race and color**. When observing the wording of the criminal types of the same law, there is an express provision in the sense that the crimes listed in its preamble may result from **discrimination or prejudice of race, color, ethnicity, religion or national origin**.

From these findings, the dilemma regarding the limits of the constitutional imperative that considers *racism* imprescriptible and non-bailable soon arises, when Law No.

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7,716/89, which aims to implement the Constitution on this subject, apparently effected a true terminological split or extension by enunciating the criminalization of prejudice or discrimination on the basis of **race**, separating this vernacular from the expressions **color, ethnicity, religion and national origin**. It is also important to note that Law No. 7,716/89 did not provide for the imprescriptibility and non-bailability. Therefore, at least from a formal point of view, it is necessary to ask whether the imprescriptibility and non-bailability affect only discrimination and prejudice related to **race**, or also discrimination and prejudice based on **color, ethnicity, religion and national origin**?

This is not a dilemma of little relevance, insofar as the statute of limitations, as an extinguishing cause of punishability, represents one of the greatest limits to the *State's jus puniendi* . When it is incidence, it is a typical, anti-legal and culpable fact. However, due to the deference of the State itself, there is the recognition that the exercise of punitive power must be limited to a certain time, as a guarantee of citizens against state absolutism. It should be noted that the possibility of punishment of the fact is extinguished by an objective cause admitted by the State, that is, the expiration of the period established by itself for the exercise of its power. In this case, it is a question of the supremacy of the right of citizens to be forgotten by the State over certain criminal conducts to the detriment of the *jus puniendi* exercised over identical conducts not reached by the passage of time. In fact, in Brazil **only two types of criminal offense are not subject to statute of limitations,** as provided for in the Federal Constitution. Racism (art. 5, item XLII) and the action of armed groups, civilian or military, against the constitutional order and the Democratic State (art. 5, item XLIV).

Likewise, no less relevant is the non-bailability, insofar as the institution of bail translates into an alternative, more tenuous form of the exercise of the state's punitive power. It is offered as a less drastic solution to the detriment of precautionary segregation, becoming widely used today after the reform undertaken in the Code of Criminal Procedure through Law No. 12,403/2011 and Law No. 13,964/2019.

In this configuration, it seems to us that the answer to the question about the limits of the imprescriptibility and non-bailability of racism, based on the scope of this expression, must be extracted from the constitutional text itself. To the extent that item XLII of article 5 of the Constitutional Charter establishes that the practice of racism will have these consequences, *under the terms of the law*, the intention of the constituent legislator is

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explicit in relegating to the ordinary legislator the commitment to the limits of this criminalization and of the concept itself.

Following the guidelines established by the UN Universal Declaration, which in its article 1 already establishes equality, freedom and dignity among all citizens (UN, 1948), the extension of the concept of racism was defined in the UN's 1968 International Convention on the Elimination of All Forms of Racial Discrimination, through Resolution 2.106-A of its General Assembly, ratified by Brazil on March 27, 1968, covering all forms of distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin that aims at the annulment or restriction of the recognition, enjoyment or exercise on the same level of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (UN, 1968). Article 4 of the Convention establishes the necessary criminalization of these conducts by emphasizing that its member states must punish, in accordance with the law, the dissemination of ideas, discrimination, or any acts capable of generating violence or provocation reflected in racial superiority or hatred directed at any race or group of people of another color or ethnic origin.

As Sarlet (2013, p. 13-44) asserts, the dignity of the human person has been *elevated to the condition of a structuring constitutional principle and foundation of the Democratic Rule of Law*. Therefore, it is up to the State to assume the role of *an instrument for the guarantee and promotion of the dignity of people individually and collectively considered*. And, for this, it is necessary to consider the dual function of the principle of the dignity of the human person, acting both as a limiter of the intervention of the State and third parties, and in the task of generating a legal duty to protect and promote human dignity against the State and third parties. It is in the second function that the constitutionality of state intervention is justified, through the imprescriptibility and non-bailability of all forms of prejudice and discrimination, considering the expression racism in a comprehensive way, including the set of human attributes conformed by race, color, ethnicity, religion and national origin or origin. It should be noted that the State's interventionist wording, via the Constitution, when dealing with the necessary criminalization of prejudice and discrimination, refers to racism, a generic and expansive term, which must be combined with the necessary, unrestricted and broad protection of the dignity of the human person, radiating over all fundamental rights. In this sense, the materialization of the expansive understanding adopted by the STF was emblematic when

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judging the "Siegfried Ellwanger" case, with the expansion of the scope and scope of the expression racism to reach prejudice and religious discrimination, by focusing on the typicity of the crime of article 20 of Law 7,716 of 1989.

Recently, in 2019, through a joint judgment of the Direct Action of Unconstitutionality by Omission No. 26 and the Writ of Injunction No. 4733, the Plenary of the STF, by majority, extended the application of Law No. 7,716 of 1989 to homophobic and transphobic conducts, real or alleged, while the National Congress does not enact a specific Law, punishing such conducts, since the criminal repression of the practice of homophobia and transphobia does not reach, much less restrict the exercise of religious freedom, as long as such manifestations do not constitute hate speech. In summary, the thesis expands the concept of racism, going beyond biological or phenotypic aspects, reaching the denial of the dignity and humanity of vulnerable groups, such as the LGBT population (BRASIL, 2019).

Therefore, Heringer Júnior (2012, p. 91) is right when he advocates that Criminal Law can turn its batteries to the effectiveness of constitutional principles, highlighting the reinforcement by the effectiveness of equality among citizens, to the extent that the criminal sphere affects society in a transversal way, causing weaknesses and unevenness in the incidence of the criminal legal system.

In this way, the practice of conducts that result from discrimination or prejudice of race, color, ethnicity, religion or national origin, or even that deal with transphobia or homophobia, represent imprescriptible, non-bailable crimes, subject to the penalties of imprisonment set forth in Law No. 7,716/89.

However, despite the clarity of the constitutional text regarding the need for unrestricted criminal treatment against prejudice and discrimination due to racism, such conducts have not yet been considered heinous by the legislator, according to what is taught by Law No. 8,072 of 1990 (BRAZIL). In it, a huge range of criminal types is labeled as heinous, not including racism. This vicissitude portrays an undeniable legislative omission when a hermeneutic construction is carried out based on the constitutional label given to the subject. In fact, the contradiction is evident, insofar as racism is imprescriptible and non-bailable, but it is not heinous. It is reiterated that racism (art. 5, item XLII) and the action of armed groups, civilian or military, against the constitutional order and the Democratic State (art. 5, item XLIV). It should be noted that the gap existing here denotes a lack of attention by the ordinary legislator to a topic of such relevance. Such omission

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may result from lack of attention, carelessness and indifference of the ordinary legislator, or it translates preordained political will not to elevate racist behaviors to the category of heinousness. In other words, a deliberate conception of the legislator in the sense of conferring common treatment to conducts of such legal and social repugnance. Now, if the constitutional text establishes the non-bailability and imprescriptibility of racism, as well as determines the existence of its criminalization with the penalty of imprisonment, it also raises a certain layer of criminal conduct to the level of heinousness, the highest level of legal and social repugnance (BRASIL, 1988). However, to this day, Law No. 8,072/90 is lacking in this regard. And, it should be noted, both the necessary criminalization of racism in an imprescriptible and non-bailable character, as well as the need for legislation establishing the heinousness of certain criminal conducts are found in the Title of Fundamental Rights and Guarantees of the Constitution, forming a cohesive and harmonious, inclusive and systemic normative spectrum, leading the interpreter to the necessary integrated observation. In this regard, it is urgent for the ordinary legislator to include in the list of heinous crimes all crimes of racism, contained in Law No. 7,716/89 or not, based on an interpretation in accordance with the Constitution.

RACISM AND RACIAL INJURY

Despite the existence of Law No. 7,716/89 (BRASIL, 1989), which establishes the typification of racism in its various forms and conducts, the typical figure of qualified injury, provided for in paragraph 3 of article 140 of the Penal Code, introduced by Law No. 9,459/97 (BRASIL, 1997), also coexists in the Brazilian criminal legal system. And, more recently, Law No. 14,532, of January 11, 2023 (BRASIL, 2023), came into force, which introduced significant changes in the panorama in force until then, notably with regard to the figure of the crime of injury. This spectrum makes up a comprehensive set of criminal types that have as their legal object the protection of human dignity in its fullness, curbing prejudice and discrimination in all its forms and manifestations.

In this panorama, it is necessary to analyze the distinction and approximation of the criminal types inserted in these environments, with a view to verifying (in)congruities and consectarians.

For Rogério Greco, "unlike slander and defamation, with the typification of the crime of slander it seeks to protect the so-called subjective honor, that is, the concept, in a broad sense, that the agent has of himself" (GRECO, 2017, p. 639). For Aníbal Bruno, "injury is

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the outrageous word or gesture with which the agent offends the victim's feeling of dignity [...]" (BRUNO, 1976, p. 300).

The legal good protected, therefore, in the crime of insult, will always be the subjective honor of the victim, consisting "in the conscience and feeling that the person has of his own value and prestige, that is, self-esteem" (CONDE, 2002, p. 274). Therefore, in the case of injury, the taxpayer is a specific person offended in his subjective honor, that is, affected in his predicates individually.

As already mentioned elsewhere, Law No. 7,716/89, from its article 2-A to article 20, provides for the various criminal types alluding to what it proposes in its article 1, that is, to punish "crimes resulting from discrimination or prejudice of race, color, ethnicity, religion or national origin."

It so happens that, as of the entry into force of Law No. 14,532, of January 11, 2023, there was the introduction of the new figure engraved in article 2-A, with the following wording:

> Article 2-A Insulting someone, offending their dignity or decorum, on account of race, color, ethnicity or national origin.
> Penalty: imprisonment, from 2 (two) to 5 (five) years, and fine.
> Sole Paragraph. The penalty is increased by half if the crime is committed through the concurrence of 2 (two) or more people.

In short, the figure of racial injury was created, contemplating prejudice and discrimination for reasons of race, color, ethnicity or national origin.

It happens, however, that the figure of qualified injury provided for in paragraph 3 of article 140 of the Penal Code persisted, with the new wording that Law No. 14,532/23 also gave it, described as follows: "If the injury consists of the use of elements referring to religion or the condition of an elderly or disabled person. Penalty - imprisonment, from 1 (one) to 3 (three) years, and a fine."

In this configuration, it is clear that prejudice arising from religion or the condition of an elderly or disabled person was not included in the list of the crime of racial injury in Law No. 7,716/89, remaining only as a typical figure of qualified injury.

It so happens that the Law of Crimes of Racism itself, No. 7,716/89, in its wording contained in article 1, provides for prejudice and discrimination on the basis of religion as a crime of racism. However, the figure of racial injury, now contained in its new article 2-A, excluded racism arising from religion. Thus, there is a total incongruity, insofar as the

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command of article 1 is clear in determining the punishment of prejudice on the grounds of religion, and the legislator, in intending to improve Law No. 7,716/89, excluded it from the typicity of racial injury. The same situation is observed regarding the reason for prejudice and discrimination resulting from the condition of being elderly or disabled. However, this omission is not incongruous, insofar as there is no provision in Law No. 7,716/89 to consider prejudice due to the condition of elderly or disabled as racism, as well as there is no provision in the Federal Constitution in this regard.

It is not just a matter of legislative omission. There are extremely relevant consequences. It should be noted that, when prejudice on the grounds of religion remains as a criminal type of qualified injury, of article 140, paragraph 3, of the Penal Code, its penalty is only 1 to 3 years of imprisonment and a fine. On the other hand, the new figure of article 2-A of Law No. 7,716/89 establishes a penalty of 2 to 5 years of imprisonment, and a fine, increased by half if the crime is committed through the concurrence of 2 or more people.

In addition, the aggravated injury established in article 140, paragraph 3, of the Penal Code, on grounds of religion, is not a non-bailable and imprescriptible crime, while all the crimes provided for in Law No. 7,716/89, which now includes racial injury (except for reasons of religion), have this nature.

Finally, as to the nature of the criminal action, until the enactment of Law No. 12,033/2009, the crime of qualified injury enshrined in the third paragraph of article 140 of the Penal Code was a private criminal action, in absolute nonsense, since the victim, often without any condition to constitute a prosecutor, or even to be attended by the Public Defender's Office, needed to file a criminal complaint. In view of the legal objectivity protected by the criminal type and the Brazilian social reality, there was a legislative change to consider such injury a crime of public criminal action conditioned to representation. On the contrary, the racial slur of article 2-A of Law No. 7,716/89 and the other types of this law are of unconditional public criminal action. In this context, there is more benevolent treatment to the perpetrators of the remaining injury of the Penal Code, since the criminal action can only be promoted by the Public Prosecutor's Office if there is representation of the offended party, while in the injury now provided for in Law No. 7,716/89, the criminal action may be promoted by the Public Prosecutor's Office regardless of the victim's will.

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Therefore, there is a flagrant incongruity provided by the legislator, when producing Law No. 14,532, of January 11, 2023, creating the typical figure of racial injury for prejudiced or discriminatory conduct on the basis of race, color, ethnicity, or national origin and excluding the concept of religion, insofar as Law No. 7,716/89 itself is clear in listing in its article 1 its content aimed at punishing prejudice and discrimination by reason of of race, color, religion, ethnicity and national origin.

As if that were not enough, the increase in Law No. 14,532/23 represents the loss of the opportunity to establish the heinousness of the crime of racial injury, which was created by it. In short, and as already reaffirmed, the legal repugnance is such around crimes of racism that the Magna Carta considered them imprescriptible and non-bailable. However, the ordinary legislator, since the emergence of Law No. 7,716/89, through several legal diplomas that amended it, and now the recent Law No. 14,532/23, none of them has recognized the heinous nature of prejudice and racial discrimination. In this sense, it is essential to emphasize that the imprescriptibility is an institute whose consequences are extremely more serious when considering the current effects of heinousness. Being imprescriptible represents the possibility of punishment as long as the perpetrator of such crimes is alive. The heinousness is reflected only in some institutes of penal execution, in addition to the impossibility of bail, basically.

And, even more, Law No. 14,532/23 did not bring the corrective pointed out by the Federal Supreme Court when the Direct Action of Unconstitutionality by Omission No. 26 and the Writ of Injunction No. 4733 were jointly judged, the Plenary of the STF, by majority, an opportunity in which it extended the application of Law No. 7,716 of 1989 to homophobic and transphobic conduct, real or supposed, as long as the National Congress does not enact a specific Law, punishing such conducts, since the criminal repression of the practice of homophobia and transphobia does not reach, much less restrict the exercise of religious freedom, as long as such manifestations do not constitute hate speech. In summary, the thesis expanded the concept of racism, going beyond biological or phenotypic aspects, reaching the denial of the dignity and humanity of vulnerable groups, such as the LGBT population (BRASIL, 2019). It should be noted that, through Law No. 14,532/23, there was the creation of the typical figure of racial injury, in addition to other developments, without, however, the typical insertion of prejudice and racial discrimination by homophobic and transphobic practices. Once again, two possibilities are envisioned. On the one hand, to consider omission due to negligence, lack of attention from the ordinary

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legislator. Two, deliberate, conscious behavior, configuring again a legislative political option. In our opinion, in any case, regrettable legislative omission, in the face of the contemporary scenario.

Despite the controversy, it seems to us that the insult with a racist connotation is conglomerated in the constitutional spectrum of the necessary legislative proactivity aimed at curbing any form of prejudice and discrimination, also conforming to the principle of the dignity of the human person that radiates over all other normative precepts. The Brazilian legislator, despite providing relative advances in terms of combating and attempting to eradicate racism and prejudice, still falls short of the necessary material implementation of constitutional commitments, in addition to providing legislative vicissitudes susceptible to critical notes.

FINAL CONSIDERATIONS

Fundamentally, the issue of combating prejudice and racial discrimination is burning in the twenty-first century. Due to the fact that it was a colony of Portugal, Brazil was the target of intense discriminatory and prejudiced practices, notably due to the slave culture that victimized indigenous people and Africans who served as labor for European economic exploitation in the national territory. This fact formally ceased only with the Golden Law of 1888, responsible for abolishing slavery in Brazil. However, despite the long journey of humanity, which has reached high levels of industrial, technological, scientific and even economic development, regrettable facts persist that have been constantly verified in the sense of highly repugnant behaviors that reveal themselves to belittle human beings because of their race, color, religion, ethnicity and national origin.

However, the rescue of the human dignity of historically segregated groups in society is not an easy task, since stigmatization and social inequality refer to the recent past of racial segregation, requiring not only laws, but, above all, affirmative and expansive actions so that fundamental rights and guarantees contained in the 1988 Constitution are materialized. thus reducing the existing social difference.

In the constitutional spectrum, the command is absolute and clear in the sense of curbing all prejudiced and discriminatory forms of racial connotation, which is verified in item IV of article 3, item VIII of article 4 and item XLII of article 5, a perspective that constitutes an objective of the Republic, whose repudiation is such that prejudice and

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discrimination should be criminalized in a non-bailable and imprescriptible character, in addition to his punishment with imprisonment in accordance with the law.

For this reason, Law No. 7,716/89 stands out, with several criminal types inserted therein, which now provides for the crime of racial injury in its article 2-A, instituted by Law No. 14,532 of January 11, 2023, with a greater sanction when compared to the already existing qualified injury provided for in paragraph 3 of article 140 of the Penal Code. Despite the peculiarities of each typical provision pointed out, all of them make up the Brazilian system for combating prejudice and discrimination on the basis of race, color, religion, ethnicity or even origin, and must be observed in their systemic-constitutional form and linked to the protection of the dignity of the human person in a full and unrestricted way. In this context, the communication of the constitutional command that labels all practices of racism as imprescriptible and non-bailable seems to us inevitable and necessary, under penalty of incurring in nonsense. At the same time and in an identical way, the characterization of heinousness for certain crimes whose selectivity is the responsibility of the legislator is a fundamental constitutional guarantee, which requires systemic and conjunctural analysis, including in this category the crime of racism and the practice of prejudice in any of its forms.

For this conclusion, in addition to the systemic aspect that involves all the typicity inherent to the fight against racism, it is worth highlighting the importance of the judgment of the "Siegfried Ellwanger" case, in which the Federal Supreme Court applied Law 7.716/89 (law of crimes of racism) to a case in which there was religious discrimination against Jews, with all the encumbrances that the crime of racism has according to the Federal Constitution: imprescriptibility, non-bailability, penalty of imprisonment. Furthermore, the same Supreme Court recently extended the incidence of this law to crimes of transphobia or homophobia, in order to provide criminal protection to the LGBT population, until there is a specific law protecting it.

However, it is noteworthy that no typical figure who criminalizes racist conduct is taxed as a heinous crime by ordinary legislation. This perspective reveals that there is still a long way to go, not only in terms of social behaviors that still frequently reveal prejudice and discrimination arising from race, color, ethnicity, religion and national origin, but also in the spirit of the legislator, who was not inspired by the Federal Constitution and is insensitive and refractory to its commands in the sense of total intolerance with such practices. Now, if the original constituent itself attributed the imprescriptibility and non-

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bailability to racism, why did the ordinary legislator not list it in the list of heinous crimes? Also, why does an imprescriptible and non-bailable crime have such a lenient penalty?

In addition, the reform introduced by Law No. 14,532, of January 11, 2023, creating the typical figure of racial injury in article 2-A of Law No. 7,716/89 provided an omission regarding the prejudice and discrimination inherent to religion, since this predicate did not have its typicity contemplated as a crime of racism, remaining in the condition of qualified injury, with substantially lower sanctions, different nature of the criminal action and without the character of imprescriptibility and non-bailability.

Furthermore, the legislator, by producing Law No. 14,532/23, lost the opportunity to include prejudice and discrimination on the grounds of transphobia or homophobia in the list of crimes of racism in Law No. 7,716/89, in order to provide effective criminal protection to the LGBT population, under the terms of the decision of the Federal Supreme Court.

Inevitably, we still have a long way to go, as advocated by Nelson Mandela (2006). However, we cannot accept that our fellow human beings are treated as inferior human beings, solely for reasons related to race, color, religion, ethnicity and national origin. It is our duty, as legal operators, to fight for necessary and punctual changes to be implemented, maintaining permanent vigilance and combat over this social evil.

Having made these considerations, within the narrow limits of this work, it seems evident to us that the theme of the necessary unrestricted fight against prejudice and racial discrimination, in addition to procedures that rescue social awareness for respect and equality among all human beings, lacks permanent vigilance, awareness and constant academic reflections, in the hope of being able to build a more harmonious society, respectful and egalitarian.

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