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## Unmasking the Racial Projects of the Colombian Multicultural Racial State

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**UNMASKING THE RACIAL PROJECTS OF THE COLOMBIAN  
MULTICULTURAL RACIAL STATE**

A Dissertation Presented

by

DARIO HERNÁN VÁSQUEZ PADILLA

Submitted to the Graduate School of the  
University of Massachusetts Amherst in partial fulfillment  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

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Sociology

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Unmasking the Racial Projects of the Colombian Multicultural Racial State

A Dissertation

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## **DEDICATION**

To our martyrs and our dreams.

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**ABSTRACT**

**UNMASKING THE RACIAL PROJECTS OF THE COLOMBIAN  
MULTICULTURAL RACIAL STATE**

MAY 2022

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Drawing on official reports, legislative procedures, court documents, and interviews with black leaders and scholars, this dissertation focuses on the racial discourses and institutional practices of the Colombian multicultural racial state. In a series of three papers, I empirically examine how the executive, legislative, and judicial bodies of public power interpret and regulate race, ethnicity, and racism in the country. In Chapter 2, I scrutinize the logic, discourses, practices, and silences of the Colombian state by analyzing the official reports submitted by the government to the Committee on the Elimination of Racial Discrimination (CERD). I forward the notion of the *racial grammar of white liberalism* to account for the liberal logic utilized by states to camouflage structural racism and facilitate racial domination even in multicultural societies. Chapter 3 examines the racial discourses that emerged while enacting Act 1482 of 2011 (Anti-discrimination Law) and its rationale. In this chapter, I argue that given an understanding of racial discrimination as an individual-based issue, the anti-discrimination law aims to chase racists without contesting the institutional and structural

dimensions of racism, producing what I call the *racist without racism* model. In Chapter 4, I study Ruling T-691 of 2012 of Colombia's Constitutional Court to examine the legal discourses on race utilized by this corporation when addressing cases of racial discrimination under the multicultural paradigm. I argue that the Constitutional Court is the first guardian of the multicultural regime through what I call the *legal fetishism of ethnicity* as an interpretative and discursive framework that protects cultural differences while reducing the significance of race. By unmasking the current Colombian state's racial project, this dissertation shows how the state systematically ignores a more complex, structural, and historical understanding of racism and its implication for the institutional strategies to confront racial discrimination. This research contributes to the current literature on racial states and racism in Latin America by scrutinizing the state's grammar, discourses, and political praxis to legitimate a politics of color-blind recognition, de-racialize citizenship, and reinforce an uncritical conception of multiculturalism.

## TABLE OF CONTENTS

	Page
ACKNOWLEDGMENTS .....	v
ABSTRACT .....	vii
CHAPTER	
1. INTRODUCTION .....	1
A Brief Context: Race, Ethnicity, and Racism in Colombia.....	5
Data and Methods.....	9
Dissertation Overview.....	12
2. THE RACIAL GRAMMAR OF WHITE LIBERALISM IN THE COLOMBIAN STATE .....	16
Introduction .....	16
The Racial Grammar Approach .....	19
The Racial Liberalism Approach .....	20
The Racial Grammar of White Liberalism.....	22
On the CERD and State Parties' Reports.....	25
Approaching the Racial Grammar of White Liberalism in the Reports Submitted to the CERD .....	27
Dehistoricizing Racial Oppression .....	27
Racism and Violence: Deracializing the Armed Conflict.....	30
Defining Racism and the Legal Strategies to Confront Racial Discrimination .....	34
Implications of the Racial Grammar of White Liberalism.....	38
Conclusions .....	43
References .....	45
3. CHASING RACISTS, PROTECTING RACISM: REVISITING the ANTI-DISCRIMINATION LAW IN COLOMBIA .....	49
Introduction .....	49
Race and Law as Co-constructed Categories.....	53
Multicultural Politics in Colombia .....	54
The Colombian Context: Failed Legislative Attempts to Penalize Racial Discrimination .....	58
Law 1482 of 2011: From Racial Discrimination to All Forms of Discrimination.....	63
First and Second Debate in the Senate.....	63
First and Second Debate in the House of Representatives .....	66
Reconciliation Reports and Presidential Objections to the Bill.....	69
Implementation, Implications, and Challenges of Act 1482 of 2011.....	72
Implementing the Anti-discrimination Law.....	73
Implications of the Anti-discrimination Law.....	76
Challenges of the Anti-discrimination Law.....	79

Conclusion.....	80
References .....	82
4. “THE CONSTITUTION IS NOT ‘MULTIRRACIAL’ OR ‘PLURIRRACIAL’”: THE LEGAL FETICHISM OF ETHNICITY AND THE AMBIGUITY OF SKIN COLOR IN THE COLOMBIAN CONSTITUTIONAL COURT .....	89
Introduction .....	89
Critical Race Theory Perspective for the Analysis of Constitutional Court Rulings .....	94
The Constitutional Court’s Jurisprudence on Racial Discrimination: An Overview .....	97
Ruling T-691 of 2012: Rulings as Scenarios of Racial Contestation.....	107
Minimizing/Denying racism and racial discrimination .....	108
Towards a Critical Analysis of Racism: Black Organizations and Think Tanks .....	110
Racial Discourses of Colombia’s Constitutional Court .....	114
Suspect Categories and the “Racial Factor” .....	115
The Ambiguity of Skin-Color for the Constitutional Court.....	120
Overcoming Epistemic Racism? Afromodernities and Black People’s Agency .....	122
Seeing Like a Court: The Legal Fetichism of Ethnicity, Interest Convergence and Nonstructural Racism.....	125
Conclusion.....	130
References .....	132
5. CONCLUSION .....	137
APPENDICES	
A. SEMI-STRUCTURED INTERVIEWS DATA.....	141
B. INTERVIEW SCRIPT .....	142
C. ANTIDISCRIMINATION LAWS IN LATIN AMERICA.....	144
D. SELECTED JURISPRUDENCE OF THE CONSTITUTIONAL COURT .....	145
BIBLIOGRAPHY .....	147

# CHAPTER 1

## INTRODUCTION

The interest in studying the racial projects of Latin American states and their institutional strategies to combat racism and racial discrimination inspired this dissertation. In the mid-1980s, after several decades of discourses around scientific racism, eugenics, and mestizaje, multiculturalism emerged in Latin America as the new paradigm to conceptualize human differences. Most countries in the region adopted new constitutions or made substantial constitutional reforms to officially recognize their cultural and ethnic diversity (Paschel 2013; Ng'weno 2007; Van Cott 2000; Rodríguez Garavito, Alfonso y Cavellier 2009; Uprimny 2014; Rodríguez and Baquero 2015; Hernández 2019). Through these new “multicultural citizenship regimes” (Hooker 2008), there is a move from legal color-blindness to ethnic-racial legislations (Pachel 2010; Rahier 2019), where multicultural discourses displaced (at least partially) the monocultural racial ideology of mestizaje (Rahier 2012). Except for Brazil, the multicultural turn neglected discussions on racial inequalities and racism in Latin America (Viveros 2020).

The black anthropologist Mara Viveros (2020) suggests that in the last ten years, Latin America has experienced what she defines as an “anti-racist turn” to label the attention that racism has received in the public arena. This turn is the direct consequence of the political deficiencies of multiculturalism, the regressive policies of recent years, and the deepening of social and racial inequalities resulting from the political and economic neoliberal model (Viveros 2020). As an investigator of LAPORA (Latin

American Anti-racism in a ‘Post-Racial’ Age)<sup>1</sup>, Viveros argues that members of the research team introduced the concept of “alternative grammars of anti-racism” to designate the “actions and discourses in which racial inequality and racism are not explicit or central, but neither are they absent and whose effects are anti-racist because they challenge the racialized distribution of power” (Viveros 2020: 26). This definition fundamentally refers to the fight for territorial rights, access to justice, and defense of the right to life and autonomy, promoted by indigenous or black organizations or by individuals who are not part of any association. It embraces what I call *anti-racist practices from below*. Viveros (2020) also highlights how some governments have included in their policies and public discourses specific references to racism, have supported campaigns against racism or passed laws that penalize racism and promote affirmative action. I refer to these institutional activities as *anti-racist practices from above*. This dissertation emphasizes and complicates the possible manifestations of this set of institutional practices by taking the Colombian racial state as a case study: How can we name the actions of the state that combat or refer to racism and racial discrimination? Are all these actions, *per se*, anti-racists? What is the common core that defines a state initiative, a public policy, or a law as anti-racist?

This dissertation recognizes that the state is not monolithic, and it comprises multiple institutions and a diverse group of officials that differentially interpret and enforce its policies. I examine different states’ racial projects by studying how the executive, legislative, and judicial branches of public power interpret and regulate race, ethnicity, and racism. It implies a question about the *alternative grammar of racism* (not

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<sup>1</sup> A project that examines anti-racist practices and ideologies in Ecuador, Brazil, Colombia and Mexico through case studies (<https://www.lapora.sociology.cam.ac.uk>)

of anti-racism) utilized by the state to create the illusion of significant progress towards racial and social equality while reproducing the current racial order. Despite the existence of different state actions addressing racial discrimination, the constitutional recognition of the multicultural character of Latin American nations, and the apparent *anti-racist turn*, we are far from having ruptured the historical structures of racialization that create and maintain different regimes of oppression that substantially affect Afro-descendants<sup>2</sup>. The government, the Congress, and the Constitutional Court are three constitutive institutions of the racial state that show how it interprets racial dynamics at a particular moment in time. They define the nature and scope of the institutional protection of racialized communities, illustrate how the state represents and administers categories of difference and power, and define themselves as objective, plural, and democratic institutions inscribed into the constitutional principles. In sum, they contribute to the materialization of the Colombian state's racial projects<sup>3</sup>.

Except for Pachel (2016) and Laó-Montes (2020), scholarly studies have not examined and conceptualized racial states in Latin America. In a comparative analysis of Colombia and Brazil, Paschel (2016: 154) defines the “ethno-racial-state apparatus” as a

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<sup>2</sup> The Millennium Development Goals for Black people in Colombia show that nearly 60 percent of them live in poverty conditions, at six points above the national average. Malnutrition doubles the national average in Chocó, a geographical zone in which more than 80 percent of the population are black. Problems of famine are also higher for Afro-Colombians in Bogotá D.C. Regions with the larger percentage of black people (Caribbean and Pacific regions) tend to have the higher infant mortality rates, lack of access to safe water and sanitation, and higher rates of forced displacement as a result of the armed conflict (PNUD 2011). Similarly, the Inter-American Commission on Human Rights (IACHR) notes that structural discrimination has generated profound inequalities between the socioeconomic conditions of Afro-Colombians and the rest of the national population in a context of certain social tolerance to racist practices (IACHR 2009).

<sup>3</sup> Omi and Winant (2015: 125) define racial projects as “simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines. Racial projects connect what race *means* in a particular discursive practice and the ways in which both social structures and everyday experiences are racially *organized* based upon that meaning.”

“plethora of institutions designated to ensure that the state could move beyond symbolic recognition and toward the design, coordination, and implementation of these policies.” The author considers ethno-racial-state apparatuses that emerged from ethno-racial reforms that recognized black and indigenous rights in Colombia and Brazil. In the first case, there is a “multicultural state apparatus” created by the legislation to guarantee the participation of black communities “in the decision that affect them as well as all national decisions” (Law 70 of 1993, paragraph 3, Art. 3). In the latter, there is a “racial equality apparatus” that resulted from the demand of Brazilian black activists to “create a structure to ensure the implementation of policies related to the promotion of racial equality” (Paschel 2016: 171). In both countries, racial states entail a dialogue between the diversity of institutional actors and black and indigenous leaders. The law regulates this dialogue by explicitly establishing the mechanisms, structures, and forms of participation.

Laó-Montes (2020) goes beyond the idea of the racial states as apparatuses. He defines it as a “regulating and articulating element of the racial order as a whole while serving as a key reference in anti-racist struggles, collective actions, and policies” (Laó-Montes 2020: 70). By articulating racial states to structural violence in Latin America, Laó-Montes argues that in its most despotic dimension, the racial state constitutes “a machine of imprisonment, exploitation, coercion, devaluation, and murder of blackened and denigrated bodies and territories, which are usually subordinated to the margins of the nation” (Laó-Montes 2020: 204). He introduces the notion of a “schizoid racial state” to describe the contradictory character of racial states as a protector of the rights of black people and as an agent or facilitator of different forms of necropolitics. It is an

institutional assemblage that “articulates, coordinates, plans, and regulates” racial dominance while generating policies and norms to combat racial oppression (Laó-Montes 2020: 319).

We have to date an essential body of knowledge on race, racism, black activism, and multicultural constitutionalism in Latin America that involves different analyses of the state. Yet, studies about multicultural states as racial states is an area of inquiry that is comparatively less developed in the region. This research draws on a rich body of work on critical race theory and critical legal studies, which provide the background and theoretical frame for examining official and legal discourses as an analytical entry point to survey the racial state. Centering on the racial projects of the Colombian multicultural state, this dissertation asks: How do the government, the Congress, and the Constitutional Court represent, interpret, and regulate race, ethnicity, and racism after the Political Constitution of 1991? What do they tell us about the Colombian racial state? I analyze government documents, legislative procedures, court rulings, and interviews with black leaders and scholars to address these questions in three empirical chapters. This dissertation scrutinizes how different state institutions have utilized and legitimized different categories of power through official discourses that erase the history of racial oppression, camouflage structural racism, and de-racialize citizenship. In the following section, I provide the background on race, ethnicity, and racism, which offer the context of my site of research.

### **A Brief Context: Race, Ethnicity, and Racism in Colombia**

Periods of constitutional changes have implied a variation of Colombia’s public and institutional discourses on race and ethnicity. I refer particularly to the Political

Constitutions of 1886 and 1991. In both cases, these legal texts depict a “picture” of race relations in a national context and enable the identification of the contingency, malleability, and ambiguity of the Colombian state’s racial projects. Throughout the 19th century, Colombia had six Constitutions (1821, 1830, 1843, 1853, 1858, and 1886) in a context of institutional instability, partisan contradictions, political tensions, and civil wars.<sup>4</sup> The Constitution of 1886, the last charter enacted during this period, declared God as the source of all authority, promoted a homogenizing discourse in establishing the national identity, and limited citizenship status to men of specific social class. This centralist and homogenizing constitution did not refer to the notion of equality, restricted freedom of religion and association, and did not mention Indigenous or Black communities (Helg 2004). As Arocha (1992: 29) explains: “The essence of the 1886 charter boiled down to an either/or proposition in which “people” equaled mestizos, and “not people” equaled Indians. The constitution even glorified as the ideal goal of progress the conversion of Colombians into a single “race” that speaks a single tongue and believes in a single God.” Cultural homogenization and the erasure of ethnic-racial differences were part of the racial project of this oligarchic state, and the constitution was a constitutive element of the existing racialized social structure.

Over a hundred years later, following the regional trend where many Latin American states officially recognized cultural differences and ethnic diversity, Colombia’s 1991 Political Constitution brought about the modernization of the state

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<sup>4</sup> Before the 1886 Constitution, in the law of October 11, 1821, the state legislated on the indigenous population. They were defined as second-class citizens who were denied the vote because of their economic condition. Similarly, the law of July 21, 1821, declared the freedom of the children of enslaved black women, but they had to work until they were 18 years old. Although it prohibited the importation of enslaved people, it facilitated the slave economy in the country (Helg 2004).

(Paschel 2013; Ng'weno 2007; Wade 2011; Mosquera and León 2015). Colombia is one of the Latin American countries with the most comprehensive legislative measures in favor of the Afro-descendant population. In the international sphere, the country has signed the International Convention on the Elimination of All Forms of Racial Discrimination; the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance; and the Indigenous and Tribal Peoples Convention. In the national context, Colombia's 1991 Political Constitution provided the legal framework for recognizing and protecting the cultural and ethnic diversity of the nation. It represented a partial move from previous discourses on cultural homogenization and narratives about the ideology of mestizaje toward a multicultural and pluriethnic state (Paschel 2010). The constitution defines the country as a social state under the rule of law, recognizes the ethnic and cultural diversity of the nation, protects the right to equality before the law, and prohibits any discrimination on the grounds of sex, race, national or family origin, language, religion, and political or philosophical opinion (Col. Pol. Const. art. 1, 7, 13). The constitution also provides three mechanisms for adequately protecting citizens' fundamental rights: The Constitutional Court, the *tutela* action, and the public action of unconstitutionality (Morgan 1999).

Scholars have found that the institutionalization of the ethnic discourse in the National Constituent Assembly (NCA)<sup>5</sup> was not deliberately imposed by the state but strategically promoted by specific black organizations to shape their demands from the perspective of culture, identity, and the right to difference. The conceptual approach of a group of anthropologists aligned to the ethnicity paradigm was also part of this process

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<sup>5</sup> It was the representative body elected to modify the 1886 constitution of the country.

(Paschel 2010; Agudelo 2004). Thus, the literature shows that the so-called *ethnicization of blackness* (Restrepo 2004; Paschel 2010) resulted from a contested scenario among institutional actors, black organizations, and experts. Unlike Van Cott (2000), who argues that Afro-Colombians were more concerned about promoting equality and environmental protection during the NCA, Paschel (2016) contends that Afro-Colombians had a plan that encouraged the right to difference and not the right to equality as it occurs in Brazil.<sup>6</sup> Particularly, Paschel (2010: 758) argues that: “the ‘de-racialization’ of Afro-Colombians may have been a necessary step in guaranteeing that they would indeed benefit from multicultural policies” as a political strategy to gain territorial and ethnic rights.

During the NCA, there were different institutional perceptions about who was or was not deserving of collective rights as ethnic groups. In 1995, the ambassador of Colombia in Switzerland explained that black communities did not represent a historical connection with an unjust colonial past for the Colombian society. The state assumed that the black population was more assimilated than indigenous communities in a permanent denial of anti-black racism (Cepeda 1995). Similarly, Hooker (2005: 298) contends that:

it is easier for indians to win collective rights than blacks under Latin America’s new multicultural citizenship regimes because such rights are awarded based on the perceived possession of a distinct cultural group identity, not a history of political exclusion or racial discrimination.

There are, consequently, different forms of incorporating or rejecting colonial history and its associated processes of exclusion and marginalization of historically subalternized groups. I hope that this research on the institutional production, interpretation, and appropriation of race and ethnicity will contribute to our

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<sup>6</sup> This approach works for one sector of the Afro-Colombian Movement represented primarily by Proceso de Comunidades Negras. However, other domestic organizations like Movimiento Nacional Cimarrón are better represented by Paschel’s analysis of Brazil.

understanding of how the racial state operates in the country. One cannot speak directly of an idea of “racial progress” through the 1991 Constitution but of a form of state modernization that reshapes new racial discourses and new racial projects of the Colombian state.

### **Data and Methods**

I examine the production, interpretation, and appropriation of race, ethnicity, and racism through different institutional artifacts produced by the Colombian government, Congress, and the Constitutional Court. The data for this research is primarily drawn from archival analysis and interviews with some leaders and experts. Concerning the first method, this dissertation develops an ‘ethnography of law’<sup>7</sup> (Starr and Goodale 2002) to capture how different actors shape the institutional meanings assigned to different categories of oppression. This archival analysis examines three different types of official documents: 1) reports submitted to the CERD, 2) the legislative process for the approval of the anti-discrimination law, and 3) Constitutional Court rulings related to cases of racial discrimination. The government is the central institutional actor for the first type of document. In Chapter 1, I analyze the reports submitted by the Colombian government to the CERD from 1984 to 2018 and the concluding observations of the Committee. In the concluding observations, the Committee summarizes the presentations of the state delegate, raising a series of questions and recommendations that the states parties should address in the following reports. On the other hand, reports submitted by governments provide general information on the institutional framework for the protection and promotion of human rights and on the state actions to ensure the follow-up to the

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<sup>7</sup> Starr and Goodale (2002: 2) argue that “ethnographic methods are useful tools for accessing the complex ways in which law, decision-making, and legal regulations are embedded in wider social processes.”

recommendations given by the Committee, including the implementation of articles 1 to 7 of the Convention.

For the second type of document, Congress is the leading institutional actor. Congress comprises the Senate (102 members) and the House of Representatives (166 members). It is the highest representative body of the legislative power in the country. It has the statutory responsibility to reform the constitution, make laws, and exercise political control over government and administration (Col. Pol. Const. art. Art. 114). The legislative procedure to pass a law consists of four debates: the first two debates in the chamber of origin (Senate or the House of Representatives) and the last two deliberations in the remaining house. Each bill is assigned one or more speakers to issue a concept (conference report) about the project discussed and recommend its approval, modification, or rejection. The Congress Archives and the General Archive of Colombia house all the documents related to legislative procedures, and both are located in the city of Bogotá D.C. In Chapter 2, I focus on the legislative process for the approval of Act 1482 of 2011, known as the Anti-discrimination Law.

I focus on the Constitutional Court for the third type of legal text. The Constitutional Court is the judicial entity responsible for ensuring Colombia's 1991 Political Constitution (Col. Pol. Const. art. 241). The Constitutional Court is one of the more progressive corporations in Latin America, having, for some scholars, an emancipatory potential (Uprimny and Garcia-Villegas 2004). The Senate selects the members of the Court (9 in total) from lists of three candidates submitted by the President, the Supreme Court, and the Council of State (Col. Pol. Const. art. 239). Most of them have been historically white men. One of the functions of the Court is the

revision of laws and constitutional reform acts and to evaluate judicial decisions related to the tutelage of constitutional rights. In Colombia, citizens have the right to claim before the judges to protect their fundamental constitutional rights when they are violated or threatened by the action or omission of any public authority, organization, or institution. In the hypothetical case the judge decides that there is no violation of any fundamental right, citizens may appeal such a decision and require the Constitutional Court to evaluate the judge's decision as the superior judicial entity within the Colombian state. The Court independently and autonomously decides which cases will be examined (discretionary review). In Chapter 3, I study Ruling T-691 of 2012 and other rulings of the Colombian Constitutional Court to discuss the racial and ethnic discourses adopted by this corporation and other actors that the Court summons to participate with a concept around the case under study.

Concerning my second method, I interviewed a group of key actors, especially black leaders, who helped me have a broader context of the approval of the anti-discrimination law. I also interviewed a black woman activist and member of the Racial Discrimination Observatory<sup>8</sup>, a direct victim of racial discrimination whose case reached a deciding sentence by the Constitutional Court, and an expert cited by the Court in the ruling analyzed in Chapter 4 (See Appendix A and B). Throughout my research process, I coded and analyzed official reports, a legislative procedure, and Constitutional Court's rulings using NVIVO. I also used analytical memos as part of the data analysis process. Using memos facilitates the researcher to compare, problematize, and analyze emerging variables toward elaborating a comprehensive and critical story. I mainly focused on the

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<sup>8</sup> An organization that advised some victims whose cases came at the behest of the Constitutional Court.

meanings assigned to blackness, slavery, race, skin color, racism, ethnic group, cultural identity, citizenship, and multiculturalism. I was also interested in the legal, historical, and analytical frameworks that situate black communities' rights in the country. Further, especially for Chapter IV, I classified discourses from the type of actor (institutional actor, black leader, international organization, or expert) to find resemblances, contradictions, and conflicts in the way they refer to some of these analytical categories.

### **Dissertation Overview**

In three interconnected papers, this dissertation mainly focused on the Colombian multicultural state's racial discourses and its institutional strategies to combat racial discrimination practices. Official reports submitted to the Committee on the Elimination of Racial Discrimination-CERD<sup>9</sup>, the Anti-discrimination Law, and high-level court decisions on racial discrimination reflect and structure the official but contested meaning assigned to race, ethnicity, and racism. They create social legitimacy concerning the state's hegemonic interpretation, administration, and representation of race and race relations.

In Chapter 2, I forward the notion of the *racial grammar of white liberalism* to account for the liberal logic that national governments utilize to camouflage structural racism and facilitate racial domination even in multicultural societies. I analyze the reports submitted by the Colombian government to the CERD from 1984 to 2018 and the concluding observations of the Committee. This chapter has three significant findings: First, there is a systematic erasure of the history of slavery and its implications in today's

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<sup>9</sup> This is "the body of independent experts that monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties"  
<http://www2.ohchr.org/english/bodies/cerd/>.

living conditions of black people in the reports. Second, the Colombian state cannot see the historical correlation between racism and the armed conflict. Third, although the state progressively recognized racism and racial discrimination, it obscures structural racism by creating the illusion of racial justice, showing that it has done everything necessary to confront racial discrimination.

In Chapter 3, I examine the racial discourses that emerged during the enactment process of Act 1482 of 2011, also known as the Anti-discrimination Law, to discuss to what extent laws that prohibit racial discrimination are the most appropriate anti-racist strategies in multicultural societies. By considering the interplay between race and law as co-constructed categories (Gomez 2010), I argue that legal discourses on racism and racial discrimination institutionalize an individualist perspective that masks the systemic and structural character of racism by depriving it of its historical connection to slavery. This chapter identifies two implications of the law that demonstrate that Colombia lacks an adequate legal framework to address racism and racial discrimination. First, in the debates for the law's approval, there is a substantial lack of the history of slavery and colonialism to comprehend the logic of racism in the country. Second, while Bonilla Silva (2006) contends that color-blind racism is racism without racists, Colombian anti-discrimination law shows a complementary logic where *racists exist without racism*. The law illustrates a scenario where the states persecute perpetrators but not the structure that facilitates the reproduction of racial hierarchies. Thus, given an understanding of racism as an individual-based issue, the anti-discrimination law aims to chase racists while maintaining the institutional and structural dimensions of racism.

In Chapter 4, I study Ruling T-691 of 2012 of Colombia's Constitutional Court and other rulings on racial discrimination to show the legal discourses on race utilized by this corporation when addressing cases of racial discrimination under the multicultural paradigm. This chapter offers a deep insight into how the Constitutional Court produces, interprets, and appropriates different discourses on race, ethnicity, and racism. I identify three general tendencies in the racial discourses of the Constitutional Court: First, following the experience of the United States, the Court defines race as a 'suspect category' to show that it is not a legitimate distinction to redistribute services or rights. According to the Court, it is possible to use the "racial factor" only for compensatory reasons in situations of positive discrimination and affirmative actions. Second, the Court argues that skin color is an inconclusive category to provide differentiated rights and define who belongs to the Black communities. Finally, the Court recognizes the significance of the Haitian Revolution as a historical event usually ignored in Latin American and Caribbean historiography on nation-states' building process. I argue that the Constitutional Court is the first guardian of the multicultural regime through a color-blind politics of recognition and what I call the *legal fetishism of ethnicity* as an interpretative and discursive framework to protect cultural differences and secure the model of differentiated citizenship.

I conclude by explaining how the *racial grammar of white liberalism*, the idea of *racists without racism*, and the *legal fetishism of ethnicity* may contribute to our understanding of racial states in Latin America. These categories comprise some of the racial logics of the Colombian state when interpreting race and ethnicity or addressing racial issues. Although they emerge from the analysis of different state institutions, they

share three common patterns: the denial, minimization, or de-historization of structural racism, the individualization of racial phenomena, and the priority of ethnicity over race and skin color to guarantee the protection of racialized communities. As a whole, this dissertation challenges and complicates the Colombian state's alleged anti-racist practices and discourses.

## CHAPTER 2

### THE RACIAL GRAMMAR OF WHITE LIBERALISM IN THE COLOMBIAN STATE

This paper reveals how racial states deploy discursive strategies and institutional practices to address racial discrimination under formal equality discourses that obscure racial justice and trivialize the history of social oppression. I forward the notion of the *racial grammar of white liberalism* to account for the liberal logic that national governments utilize to camouflage structural racism and facilitate racial domination in multicultural societies. In particular, this paper seeks to answer the following questions:

1. How are slavery, armed conflict, and racism represented in the report submitted by the Colombian state to the Committee on the Elimination of Racial Discrimination (CERD)?
2. What are some of the implications of the *racial grammar of white liberalism* for accomplishing racial justice in the country? I analyze the reports submitted by the Colombian government to the CERD from 1984 to 2018 and the concluding observations of the Committee. This paper has three significant findings: First, there is a systematic erasure of the history of slavery and its implications in today's living conditions of black people in the reports. Second, the Colombian state cannot see the historical correlation between racism and armed conflict. Third, although the state progressively recognized racism and racial discrimination, it conceals structural racism by creating the illusion of racial justice and representing itself as a neutral actor in regulating racial issues. This paper contributes to the racial state literature in Latin America by focusing on the *racial grammar of white liberalism* and how it shapes a hegemonic interpretation of racial domination and racial hierarchies.

#### Introduction

In the mid-sixties, the United Nations General Assembly unanimously adopted the International Convention on the Elimination of all Forms of Racial Discrimination as the first international human rights treaty (Keane and Waughray 2017). In 1967 the Colombian state signed the Convention embracing a global trend where governments considered that racial discrimination affected other countries and not their nations (Banton 1996). Since 1984, the Colombian government began a dialogue with the Committee on the Elimination of Racial Discrimination (CERD) by presenting its periodic reports following the provisions of the Convention. These reports provide valuable information on the legislative, judicial, and administrative measures state parties

have adopted to enforce the Convention (CERD/C/2007/1 2008). However, they have been largely ignored to examine how liberalism has contributed to representing and signifying many of the racial logics that prevail in Latin-American multicultural racial states.

In this paper, I borrow Bonilla-Silva's concept of *racial grammar* (2012) and Mills' notion of *racial liberalism* (Mills 2008) as two critical approaches to analyze what the Colombian racial order takes for granted, ignores, highlights, obfuscates, recalls, and chooses to forget (Mills 2011). On the one hand, the notion of *racial grammar* refers to how racial domination becomes so hegemonic that it embraces the standards of white supremacy as the criteria by which all experiences should be compared and evaluated. It contributes to the organization of a "racialized field of interpretation and vision" (Bonilla-Silva 2012: 3) that facilitates and naturalizes racial domination. On the other hand, Mills argues that liberalism has been predominantly a *racial liberalism*, or better said, a *white liberalism* where full personhood is restricted to white men and non-whites are not considered full persons. *Racial liberalism* assumes racial disparities as a deviation from the liberal egalitarian state, exclusions are considered exceptions, and racism is reduced to individual prejudice. From these two concepts, I forward the notion of the *racial grammar of white liberalism* to account for the liberal logic that states utilize to camouflage structural racism and ignore the systematic role that racism has played in the history of modernity. It also contributes to the analysis of racial dominance even in multicultural societies where states regularly condemn it, and there is no public legitimization of white-mestizo domination.

This paper reveals how the state deploys discursive strategies and institutional practices to address racial discrimination under formal equality discourses that obscure racial justice and trivialize the history of social oppression. I apply the notion of the *racial grammar of white liberalism* to three different aspects of the Colombian multicultural racial state that can be traced through the official reports submitted to the CERD: a) institutional discourses/silences on slavery as a historical system of racial oppression; b) ways of explaining and representing the effects of the armed conflict on black people and territories, and c) official understanding of racism. In particular, this paper seeks to answer the following questions: 1. How are slavery, armed conflict, and racism represented in the report submitted by the state to the CERD? 2. What are some of the implications of the *racial grammar of white liberalism* for accomplishing racial justice in the country? To address these questions, I analyze the reports submitted by the Colombian government to the CERD from 1984 to 2018 and the concluding observations of the Committee. Reports submitted by governments provide general information on the institutional framework for protecting and promoting human rights. They also show the state's actions to ensure the follow-up to the recommendations given by the Committee, including the implementation of articles 1 to 7 of the Convention. On the other hand, in the concluding observations, the Committee summarizes the presentations of the state members' representatives and raises a series of questions and recommendations that states parties should address.

With very few exceptions, research on racial liberalism in Latin American states is scant.<sup>10</sup> The most recent Afro-diasporic studies publications focusing on Latin

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<sup>10</sup> See Hooker (2009) and Wade (2015).

American countries or the so-called field of Afro-Colombian studies do not address questions on liberalism consistently. This research contributes to the racial state literature in Latin America by focusing on the *racial grammar of white liberalism* and how it shapes the normalization of a hegemonic interpretation of racial domination and racial hierarchies. This paper has three significant findings: First, in the reports, there is a systematic erasure of slavery history and its implications for the living conditions of black people in the country. Second, the Colombian state cannot see the historical correlation between racism and armed conflict. Third, the state progressively recognized racism and racial discrimination. However, it camouflages structural racism by creating the illusion of racial justice through the legal system, showing that it has done everything necessary to confront racial discrimination.

The paper is organized as follows. First, I develop a theoretical framework to introduce the notion of the *racial grammar of white liberalism*. Second, I describe the characteristics and nature of the reports submitted by states parties to the CERD. Third, I examine how the *racial grammar of white liberalism* operates in the Colombian state. Finally, I discuss some of the implications of the *racial grammar of white liberalism* for accomplishing racial justice and anti-racism.

### **The Racial Grammar Approach**

In *The Invisible Weight of Whiteness: The Racial Grammar of Everyday Life in America*, Bonilla-Silva (2012) introduces the notion of *racial grammar* to show that racial domination not only depends on coercion and violence but also on a sort of grammar that normalizes white supremacy and contributes to the reproduction of the existing racial order. Bonilla-Silva explains this notion by focusing mainly on the

underrepresentation of black or Latino women victims of violence on TV shows, the stereotypical roles given to black people in movies, and the reduced media attention conferred to minority children abduction in comparison to white children. He also refers to the greater coverage and empathic tone with which the media approach school-shooting events when they take place in white schools.

Bonilla-Silva (2012) argues that the *racial grammar* has three essential components: it provides the “deep structures,” the “logic,” and “rules” about what can be understood or interpreted on racial matters; it is the result of social interaction, and there is always a counter-narrative that challenges the ruling *racial grammar*. In Bonilla-Silva’s view, this notion embraces the cognitive dimension of our individual choices regarding how we see and modify our bodies and the social imaginaries that shape the way we see and codify the world. In the article, however, the author does not address the long-term processes that give rise to the *racial grammar* and the state’s role in the social appropriation and reproduction of a grammar that maintains the existing racial order.

### **The Racial Liberalism Approach**

The Jamaican philosopher Charles Mills (2017) defines liberalism as the “anti-feudal egalitarian ideology of individual rights and freedoms that emerged in the seventeenth and eighteenth centuries to oppose absolutism and ascriptive hierarchy.” (Mills 2017: 28). This ideology is considered the hegemonic political landscape of the modern world and the most significant landmark for both the left- and right-wing political thoughts. For Mills, in *racial liberalism*, “conceptions of personhood and resulting schedules of rights, duties, and government responsibilities have all been racialized. And the contract, correspondingly, has been a racial one, an agreement among white

contractors to subordinate and exploit non-white noncontractors for white benefit” (Mills 2008: 1381). As a domination contract, the idea of the *racial contract* embodies the formation and persistence of racial orders. It considers the history of racial exploitation by recognizing that all persons are not treated as equal citizens (Mills 2017). Mills introduced a new debate for political philosophers and political theorists working on race by suggesting that *structural white domination (white supremacy)* instead of *white racism* should be their center of attention. The *racial contract* abandons the artificial appearance of a supposed consensus and recognizes the role violence has played throughout history.

While some scholars have questioned the relationship between liberalism and racism, Mills argues that racism is not an anomaly or a deviation of liberalism but one of its symbiotic manifestations. He demonstrates how the work of philosophers such as Locke and Kant, ascribed to the liberal tradition, confirms the interdependence of both phenomena<sup>11</sup>. Although racial liberalism is hierarchically structured by establishing different rules for whites and black/indigenous peoples (Mills 2008), racial discourses under this paradigm refute the existence of relations of domination that structurally and systematically affect black people. This liberalism is silent in the face of systematic and structural racial oppression. It does not recognize as unfair the unequal treatment given to those who were defined as sub-persons and embraces a more nominal than substantive equality that denies material protection and justice while proclaiming them as existent (Mills 2008). This approach mainly focuses on the structural dimension of racial oppression and not on how it is reproduced in daily social interactions.

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<sup>11</sup> While Locke justified the expropriation of native Americans and African slavery, Kant is considered to be one of the architects of modern scientific racism (Mills 2017, 31).

## The Racial Grammar of White Liberalism

Although Bonilla-Silva places emphasis on the individual and social dimension of the *racial grammar* as it shapes our perceptions of the world and the everyday practices of ordinary citizens who have naturalized the white experience as the universal standard, I argue that this notion may be extended to a more structural level, following Mills (2008), to incorporate the racial logics that guide the institutional dynamics of multicultural regimes. I advance the notion of the *racial grammar of white liberalism* not to describe the intersection between structure and agency in the study of racial liberalism but to designate the state's institutional logic, discourses, practices, and silences that contribute to the naturalization and reproduction of racial hierarchies.

The *racial grammar of white liberalism* has three fundamental premises: the dehistoricization of racial oppression, the deracialization of the armed conflict, and notions of racism that shape the legal strategies to confront racial discrimination in the country. First, the *racial grammar of white liberalism* recognizes the power relations that emerge in the racial orders of multicultural societies and identifies how states obliterate the history of racial oppression and systematically ignores a more complex and structural understanding of racism. A body of literature discusses how people frame the analysis of slavery as a historical system of domination by examining its legacies in contemporary life, particularly raising the debate on reparations in favor of Afro-descendant populations. These scholarly perspectives focus on the emergence of the reparation movement in the world (Biondi 2003; Michelson 2002; Lyon 2002) and the memories of slavery and afro reparations in Latin America (Mosquera 2007; Lao-Montes 2007; Antón 2007; Almarío 2007). Other studies focus on the representations of slavery in the

educational system. Research shows that the images utilized in school texts about slavery and black people obliterate the participation of Afro-descendants in the construction of the nation, arguing that for teaching slavery it is vital to develop and implement an anti-racist curriculum (Mena 2009). Similarly, Godreau et al. (2008) argue that analyzing the history of slavery represented within school systems is central to understanding how different discursive maneuvers of silencing, trivializing and simplifying the historical effect of slavery contribute to the reproduction of the ideology of *blanqueamiento* and the public denial of racism (Godreau et al. 2008). However, what is less discussed in the literature is how current states frame discourses on slavery in official documents that result from international state agreements.

Second, through the *racial grammar of white liberalism*, we must recognize that in the same way racism is inherent to liberalism, so is violence. While scholars regularly ignore the racial dimension of war and the racial ideologies of the armed actors, structural and historical violence continue to be a fundamental component of Latin American states that have affected black people's bodies and ancestral connection to their territories. It constitutes one of the most radical expressions of anti-black racism in the region. While violence is embedded in Latin America's state formation and mediates many of the rationales of the relationship between states and communities, hegemonic discourses have denied not only the existence of racial violence but, in the particular case of Colombia, have rejected the systematic connection between structural racism and the armed conflict that has taken place in the country for more than five decades. Indeed, commentators have noted that Latin American judicial systems assume that violence is unrelated to racial discrimination (Hernández 2019).

On the contrary, I argue that many of the manifestations of violence in the region are related to the notion of necropolitics proposed by Mbembe and Meintjes (2003) as an essential feature of modernity where racial violence has taken the form of a politics of death from the transatlantic slave trade to “neoliberal necropolitics” (Laó-Montes 2020). Necropolitics implies that black people's lives are not socially valued as a remnant of the dehumanization that characterized the institution of slavery (Laó-Montes 2020). Some scholars have noted that in Colombia, in cities inhabited mainly by black people who have historically experienced the terror imposed by different armed groups, black girls, for example, have been exposed to “racialized punishments and sexualized disciplines” (Abello 2020). The idea of *liberal necropolitics* (Ranganathan 2019: 494) clearly shows how liberalism is not a “biopolitical project for all” but “a project of sustaining life for some and a ‘necropolitical’ political project for others.” During wartime, there is a “subjugation of life to the power of death” (Mbembe and Meintjes 2003) and a permanent militarization of social life as a “process through which the state uses violence to control territory, bodies, and everyday lives to guarantee foreign investment and private capital” (Hernández-Reyes 2019: 225).

Third, the *racial grammar of white liberalism* illustrates how multicultural states combine both a politics of care and a politics of vulnerability. It is central to understand the different institutional discourses around race and racism and how the state implements different legal and political strategies to confront racial discrimination and maintain the existing racial order. While the law is a fundamental instrument for protecting the interests of the white-mestizo elites, it also helps us understand the liberal logic of multicultural states quite well. I argue that in Colombia, multiculturalism is not

about the participation of black and indigenous people as new honorary members of a racial contract to protect their fundamental rights or that they gain direct political or economic advantages from the contract, but rather to create the illusion of inclusion in a society that is systematically structured to exclude them. As Mills (2017) puts it: “far from being neutral, the law and the state were part of the racial polity’s apparatus of subordination, codifying whiteness and enforcing racial privilege” (41).

It is not the purpose of this paper to demonstrate the historical connection between liberalism and racism through the reports submitted to the CERD or to take stock of the public policy of the Colombian state related to ethno-racial groups. The primary purpose is to show how multicultural states, as racial states, utilize liberal discourses that facilitate or at least do not question racial domination. In a strict sense, I am not focusing on the racist speeches of the state but rather on how *racial liberalism* rationalized racial superiority in public documents that directly address racial inequalities and racial discrimination. In the next section, I detail the nature of the CERD and the characteristics of the reports submitted by state parties.

### **On the CERD and State Parties’ Reports**

The International Convention on the Elimination of all Forms of Racial Discrimination is considered one of the oldest and most important human rights treaties of the United Nations (Thornberry 2005)<sup>12</sup>. The Convention was adopted in 1965 by the General Assembly and established the Committee on the Elimination of Racial

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<sup>12</sup> There is a set of international treaties against racism and racial discrimination that enables the articulation of the work carried out by the members of the Committee with other components of the United Nations: the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the Working Group on the Effective Implementation of the Durban Declaration and Programme of Action; and the Working Group of Experts on Persons of African Descent (Thornberry 2005).

Discrimination as one of the mechanisms in charge of securing the implementation of the Convention. The board is composed of 18 independent experts, and every two years, nine members are elected to guarantee the balance between continuity and change in the composition of the Committee (ICERD, Article 8).

Under article 9, paragraph 1, of the Convention, states parties must periodically submit reports to the Committee that address how each country implements the Convention. Governments must submit the first report within one year after the entry into force of the Convention in the respective country, and the following statements are delivered every two years and whenever the Committee requests it (ICERD, Article 9). Although the guidelines for the submission of periodic reports have been changing to request more precise information from states parties, for the most part, statements must describe the ethnic characteristics of the population, the gender-related dimensions of racial discrimination, and the political and legal structure for the protection of human rights, non-discrimination, and equality. Mainly, reports must provide detailed information on the application of Articles 2-7 of the Convention (CERD/C/70/Rev.5 2000; CERD/C/2007/1 2008). These documents are a compendium of laws, public policy measures, programs, and plans developed by states at the national or local level to protect negatively racialized people from racism and racial discrimination. Through them, we can track the evolution of government programs, changes in the institutions in charge of implementing them, and the transformation of the legislation.

The Committee analyzes and comments on the reports submitted, establishing a dialogue with each of the state's parties and designating a rapporteur for each country. After each dialog, in the concluding observations, the Committee provides a summary of

the presentations made by the representatives of the government, occasionally shows its disagreement and concerns with some statements, asks particular questions regarding the application of some of the articles of the Convention, and makes specific requests for information concerning actions developed by some state institutions. Then, the Committee summarizes the responses to the questions given by state representatives during sessions.

### **Approaching the Racial Grammar of White Liberalism in the Reports Submitted to the CERD**

This paper focuses mainly on the nineteen reports submitted by the Colombian state to the CERD.<sup>13</sup> It also includes some specific references to the concluding observations. I specifically examine how the *racial grammar of white liberalism* has operated over black people in the last thirty-seven years in Colombia by analyzing the three premises that I previously proposed to understand multicultural racial states: the dehistoricization of racial oppression, the deracialization of the armed conflict, and notions of racism that mediates the legal strategies to confront racial discrimination.

#### **Dehistoricizing Racial Oppression**

Multilateral treaties and international law have established state responsibilities regarding the prohibition of slavery, servitude, and forced labor.<sup>14</sup> More recently, the World Conference against Racism, Racial Discrimination, Xenophobia, and Related

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<sup>13</sup> The nineteen periodic reports were submitted in nine documents. The examination of the five initial reports (from 1984 to 1993) is based on the concluding observations made by the Committee on the periodic reports that were examined during the early sessions held in 1984, 1985, 1989 and 1992.

<sup>14</sup> Slavery Convention (1926), the Protocol Amending the Slavery Convention (1953), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the International Covenant on Civil and Political Rights (1966), among others linked to slavery-related practices. Some of them are considered to be part of the backgrounds of international human rights law (Stoyanova 2017).

Intolerance, recognized that slavery and the transatlantic slave trade are a crime against humanity (OHCHR 2002). The Convention, however, makes no direct reference to the history of slavery and only mentions colonialism in one of its recitals<sup>15</sup>. With very few exceptions, the Committee itself has not used the concluding observations to invite states parties in Latin America to acknowledge the historical legacy of slavery and its implications on the living conditions of African descendants in Latin America and the Caribbean.<sup>16</sup> Forty-six years after the adoption of the Convention, in the General Recommendation No. 34, adopted in 2011, the Committee addresses particularly racial discrimination against people of African descent, establishing the connection between slavery and the multiple contemporary manifestations of anti-black racism:

Racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery, are evident in the situations of inequality affecting them and reflected, inter alia, in the following domains: their grouping, together with indigenous peoples, among the poorest of the poor; their low rate of participation and representation in political and institutional decision-making processes; additional difficulties they face in access to and completion and quality of education, which results in the transmission of poverty from generation to generation; inequality in access to the labor market; limited social recognition and valuation of their ethnic and cultural diversity; and a disproportionate presence in prison populations. (CERD/C/GC/34 2011)

With this in mind, it is worth asking about how the reports submitted by the Colombian state to the CERD refer to slavery to address one of the dimensions of the *racial grammar of white liberalism*. Given the nature and scope of the reports, in a strict sense, it is not a question about the memories of slavery from the perspective of the

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<sup>15</sup> “Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end” (See <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>).

<sup>16</sup> In the concluding observation of 2018, for example, the Committee argued that the inequality gap between Afro-Cubans and the rest of the population is the result of the historical legacy of slavery (CERD/C/CUB/CO/19-21 2018)

Colombian state but about how the state decides to activate or not the history of slavery to explain anti-black racism and racial inequalities.

In the initial reports previous to the 1991 Political Constitution, the Colombian state showed that in the country there were no laws that would contradict the provisions of the Convention or laws that explicitly promoted slavery, racial discrimination, or the idea of racial superiority.<sup>17</sup> Consistent with this view, after enacting the 1991 Political Constitution, some reports cite article 17 of this new charter establishing that “Slavery, servitude, and human trafficking in all their forms are prohibited.” (Col. Pol. Const. art. 17).

In the ninth periodic report submitted in 1998, the Colombian state goes beyond the legal state’s responsibility of prohibiting slavery. The state began admitting that the Afro-Colombian population had the highest index of unmet basic needs due to the “historical disadvantage resulting from the enslavement to which they were subjected in the past” (CERD/C/332/Add.1 1998). In this report, the state also acknowledges the existence of some “reprehensible forms of behavior, inherited from our colonial history” that influence Colombian society's imaginary and social practices (CERD/C/332/Add.1 1998).<sup>18</sup> Except for these two brief references, subsequent reports do not mention slavery. The systemic silence of the Colombian state concerning the history of slavery in these official reports seems to be a regional trend.

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<sup>17</sup> Article 22 of the 1886 Constitution reads: “There will be no slaves in Colombia. Whoever, being a slave, steps on the territory of the Republic, will be free.”

<sup>18</sup> In other reports the Colombian state marginally refer to the development of some institutional programs related to the commemoration of the abolition of slavery in the country (CERD/C/COL/14, 2008), and the creation of the *Collection of Documents on Blacks and Slaves* by the National Archives (CERD/C/COL/14 2008).

Given the nature of the reports, while the denial of racism and racial discrimination by some states may generate concern among members of the Committee, silencing the history of slavery and its legacy in today's racial inequalities does not produce the same reaction. Whereas reports demonstrate that governments can recognize racism in multicultural societies, the history of slavery is usually hidden in a paradox that is constitutive of the *racial grammar of white liberalism*. The progressive recognition of racism and racial discrimination by the Colombian state does not imply that it systematically acknowledges the legacy that slavery still has in the social dynamics and rationale of the state institutions

### **Racism and Violence: Deracializing the Armed Conflict**

Two articles of the Convention set out states' commitments regarding violence based on race, color, or ethnic origin. On the one hand, Article 4 refers to the duty of states to punish "acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin." On the other hand, article 5 establishes that states must guarantee the enjoyment of "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution" (ICERD, Articles 4-5).

The different historical trajectories of Latin American and Caribbean countries reverberate in how states address these obligations in their reports. The dynamics and impact of social and state violence might be substantially diverse. Unlike other countries in the region, the armed conflict in Colombia has powerfully penetrated the country's institutions, culture, and social fabric for more than fifty years. Some of the early reports in the late '80s show the context of what the Colombian state defined as an "open bloody

war against the legitimate authorities of the country” waged by traffickers, preventing not only to ensure the enduring protection of all citizens but also “find the resources and utilize the institutional means to help, protect and encourage minorities” (CERD 2006: 174). The state has recognized how the armed conflict has generated the forced displacement of families and entire communities, most of them Afro-descendants and indigenous who are still forced to abandon their ancestral territories. This situation has worsened “the living conditions of many of these communities, thereby hampering government assistance and the implementation of the policies that have been worked out.” (CERD/C/332/Add.1 1998). In its 2008 report, the state argued:

Civilians, particularly from ethnic groups, were affected by the practice of restrictions on the transport of food, medicines, and people, sexual violence against women and girls, and the recruitment of children. Lack of respect for medical missions became a recurrent practice to guarantee territorial control of strategic corridors and zones of influence (CERD/C/COL/14 2008)

Above, the government clearly shows some of the strategies of territorial control exercised by the armed actors over the civil population, mainly over ethnic-racial groups. In the more recent reports, the Colombian state focuses on different issues related to individual reparation processes for Indigenous, Black, Afro-Colombian, Raizal, and Palenquero people, including women victims of sexual violence in the armed conflict. However, all the victims of the armed conflict are granted this type of reparation, and it does not take into account the historical particularities of the black population.

In this institutional narrative, the Colombian state is shown as an effective guarantor of the rights of the black people, showing in detail each of the institutional advances, legislative developments, and the implementation of plans, programs, and policies. The Committee, however, has expressed for decades its concern about the

persistence of violence and the absence of adequate institutional measures to protect all citizens, especially members of indigenous communities (CERD 2006),<sup>19</sup> that affect the complete application of the Convention in the country (CERD/C/304/Add.1 1996; CERD/C/COL/CO/14 2009). Concerns remained over reports that informed processes of “«social cleansing» in urban centers concerning the murder of prostitutes and Afro-Colombian street children, some of whom, apparently, have been selected as targets based on their race” (CERD/C/304/Add.76 2001). The Committee was also worried about the intensity of the armed conflict in the areas where the majority of indigenous and Afro-Colombian communities reside and because the fight against drug trafficking had led to the militarization of their territories and the destruction of their cultural autonomy and identity (CERD/C/304/Add.76 2001). Later reports address the inclusion and participation of ethnic groups in the Final Peace Agreement between the Colombian state and the FARC (Revolutionary Armed Forces of Colombia) guerrilla group, which resulted in the creation of an Ethnic Chapter “as part of the recognition of the struggle of ethnic groups in defense of their rights” (CERD/C/COL/17-19 2018)<sup>20</sup>.

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<sup>19</sup> In other countries of the region the Committee has raised some concerns regarding violence against black, indigenous, and mestizo populations in Brazil (CERD/C/304/Add.11 1996); against native communities and vulnerable groups in Mexico (CERD/C/304/Add.30 1997); the intimidation suffered by the indigenous populations in Guatemala (CERD/C/304/Add.21 1997) and Peru (CERD 2006); and the murder of indigenous and black people due to land conflicts in Venezuela (CERD/C/VEN/CO/18 2007). In the most recent concluding observations on the combined seventeenth to nineteenth periodic reports of Colombia, the Committee claimed: “The Committee is concerned about the violence that still persists following the signing of the Peace Agreement and that affects, and constitutes a serious threat to, indigenous peoples and communities of African descent. In particular, it is concerned about paramilitary incursions into territories inhabited by these population groups; the targeted killings of members of communities of African descent and indigenous peoples; the increase in massive forced internal displacement, and the lack of protection for these population groups; and the continuing recruitment of indigenous children and children of African descent by non-State armed groups.” (CERD/C/COL/CO17-19 2018).

<sup>20</sup> From the signing of the agreement, new institutions were created in charge of the implementation and monitoring of the agreements through a Comprehensive System of Truth, Justice, Reparation, and Non-Repetition, which include the truth clarification, the justice component, and the search for people reported missing due to the armed conflict, all of them having an ethnic and territorial approach.

An essential element to note is that reports mainly aim to describe the impact of the armed conflict on black people and do not critically address how racism and racial discrimination operate during wartime.<sup>21</sup> They do not examine the racial dimension of the armed conflict and how racist ideologies and discourses materialize in war dynamics. Reports explain the existing sanctions imposed by the Penal Code (Act No. 599 of 2000), especially Title II related to “Crimes against persons and property protected by international humanitarian law,” containing article 147, which punishes practices of racial segregation linked to the armed conflict<sup>22</sup> (CERD/C/COL/14 2008). Information provided by the Public Prosecutor’s Office about racial discrimination in the terms established by article 147 shows the deficiencies in implementing the criminal code.<sup>23</sup>

The state embraces a victim-centered approach that systematically ignores the historical connection between racism and violence. Even after enacting the anti-discrimination law in 2011, the state does not elaborate on how to enforce this law to protect black or indigenous people who have been victims of armed conflict. The data reflects the ineffectiveness of the penal code to account for the racial dimension of armed conflict and to understand the brutality of war on racialized and socially unvalued bodies.

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<sup>21</sup> In the most recent conversation between members of the Colombian Truth Commission and former president Alvaro Uribe, on August 16, 2021, Afro-descendant commissioner Leyner Palacios asked him about the relationship between racism and the armed conflict. The former president simply showed the affection and good relations between him and his family with the black and indigenous peoples of the country. Uribe sustained that he embraces the hope that racism is not a problem in Colombia, highlighting the diverse ethnic composition of the nation.

<sup>22</sup> The article reads: “ARTICLE 147. *Acts of racial discrimination.* Anyone who, on the occasion and during the development of an armed conflict, carries out practices of racial segregation or exercises inhuman or degrading treatment based on other distinctions of an unfavorable nature that involve outrage against personal dignity, with respect to any protected person, will incur in prison of five ( 5) to ten (10) years, a fine of two hundred (200) to one thousand (1,000) current legal monthly minimum wages, and disqualification for the exercise of rights and public functions of five (5) to ten (10) years.”

<sup>23</sup> There were only 6 complaint and only one of them ended in a sentence (CERD/C/COL/14 2008).

## **Defining Racism and the Legal Strategies to Confront Racial Discrimination**

Ultimately, the primary purpose of official reports sent to the Committee is to present a balance of the legal and institutional strategies developed by the state to confront racial discrimination in the way it is understood and defined by the CERD and the state itself. Although the Convention does not explicitly establish the obligation of states parties to define racism and racial discrimination, reports show the state's perceptions about both concepts and how they are described in the legal provisions that seek to criminalize racism following article 4 of the Convention.

It is essential to point out that initial reports and most of the concerns and recommendations of the Committee, at least until the examination of the fifth report in 1992, were specially directed towards indigenous populations. They focused on human rights violations, development, collective territories, land rights, social and political participation, application of the right to personal security and protection against violence, preservation of tradition and culture, respect for religious freedom, and socioeconomic indicators. Only a few times did they refer to "different racial groups," "other minorities," "other ethnic groups," or "black communities." Even when discussing the third and fourth periodic reports in 1989, the Committee refers specifically to the "indigenist policy" of the Colombian government (CERD 2006: 170). The institutional emphasis on indigenous people shows that the historical construction of otherness in the country was erected from the perception of the cultural differences associated with indigenous communities and not with the black people. Those perceived differences have historically mediated official discourses, public policies, and institutional strategies towards ethnic groups in the country. Despite the constitutional recognition of the

multicultural and pluriethnic character of the nation through the 1991 Colombian Political Constitution, both the Colombian state and the Committee itself began to make substantial references to the black population in 1996.<sup>24</sup> That is, only after the approval of Law 70 of 1993, also known as the Law of Black Communities. At this point, the category “Afro-Colombians” was used for the first time in this type of report to refer to the descendants of Africans. Later statements began to refer to indigenous, Afro-Colombian, and Roma communities.

Reports allow us to track the state’s transition from denying the existence of racism to its institutional recognition. In 1985, the government argued that no laws produced or perpetuated racial discrimination in the country. It also argued that there was an institutional trend to “stop treating indigenous people as minors and grant them a certain type of autonomy to conform to international standards of conduct” (CERD 2006: 176). In the concluding observations discussing the fifth report submitted by the government to the CERD, the Committee describes how the state argued that racial discrimination was not central to the Colombian society given the absence of grievances received by judges and due to the constitutional definition of Colombian society as multicultural:

Regarding article 4 of the Convention, the representative of the State party specified that the courts had never received any complaints of racial discrimination. The problem of racism was not of the same importance in multiethnic societies such as Colombia as elsewhere; even so, the government would be informed of the Committee’s wish that more attention is given to applying the provisions of article 4. (CERD 2006: 169).

Although the state minimizes the effects and the existence of racism based on the nation’s multicultural nature, two years later, it uses the same constitutional framework to

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<sup>24</sup> When the sixth and seventh reports were examined.

sustain that it has sufficient elements to provide legal guarantees to eliminate any form of discrimination against the indigenous and afro-descendant population. The state claims it can stimulate the development of both communities while respecting their “worldview and culture” (CERD/C/257/Add.1 1995). In 1998, the state tried to take a step toward the awareness of racial discrimination, arguing that it was in a “phase of institutional recognition” while black communities and civil society, in general, were just “beginning to realize the seriousness” of this set of thinking, behaviors, and practices (CERD/C/332/Add.11998). The government itself was aware that the stage of institutional acknowledgment of racism was facilitated by the new Political Constitution, its institutional adjustments, and the new logic that emerged from it:

The legal remedies available to the Black communities for acts of racial discrimination are as new as the incorporation into the Colombian legal system of specific rights in favor of this ethnic group, progress in the organization of these communities, and recognition by the state that racism, racial prejudice and racial discrimination exist in Colombia (CERD/C/332/Add.11998)

A few years later, in 2008, the state acknowledged that although there was not a national policy of segregation or a deliberate differentiation that would disadvantage specific communities, a “measure of passive discrimination exists concerning housing,” affecting mainly black people in the Colombian Pacific region given that it is the poorest region in the country with the most significant proportion of Afrocolombians (CERD/C/COL/14 2008). In the section *Recognizing the race problem in Colombia*, after admitting that Afro-Colombian and indigenous communities are victims of different forms of racial discrimination, the national government asserts that racial discrimination is not an act intentionally perpetrated by the State institutions but a “complex cultural problem” linked to Colombia and Latin American’s history that affect Afro-descendants and

indigenous populations through processes of marginalization, poverty, and violence (CERD/C/COL/14 2008).

Until the approval of the anti-discrimination law in 2011, the Committee insistently required the country's authorities to approve specific rules that prohibit racial discrimination, whether of a preventive or punitive nature. The Committee even requested detailed data on judicial cases related to acts of racial discrimination (CERD/C/304/Add.11996). In the combined sixteenth and seventeenth periodic reports (2014), the state finally showed its commitment to combat racial discrimination with the approval of Act No. 1482 of 2011, known as the anti-discrimination law. This law amends the Criminal Code to criminalize racism and racial discrimination against individuals, groups of individuals, communities, or peoples. Article 3 of the anti-discrimination law defines racism and racial discrimination as follows:

**Article 3.** *Acts of racism or discrimination.* Anyone who arbitrarily impedes, obstructs, or restricts the full exercise of people's rights on account of their race, nationality, sex, or sexual orientation shall be liable to a term of imprisonment of between 12 and 36 months and a fine of between 10 and 15 times the statutory minimum monthly wage.

Committee members were concerned because this definition does not comply with Article 1, paragraph 1, of the Convention (CERD/C/COL/CO/17-19 2019), and due to the Colombian state had not made the declaration established in article 14 of the Convention.<sup>25</sup> Even though the country has the most significant number of laws to protect black and indigenous populations, the state's fight against racial discrimination is still

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<sup>25</sup> Paragraph 1 of article 14 reads: 1. "A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration." (ICERD, Article 14). The Colombian state, however, argues that it has the legal mechanisms (such as *tutela*) to guarantee the protection of individuals or communities against racial discrimination complaints.

more nominal than substantive. Given the limited scope of the implementation of public policies of the Colombian state concerning black and indigenous people, it is not possible to refer to the existence of an institutional state of anti-racist politics to the extent that there is no recognition of the historical and structural dimension of racism. It is still perceived as a moral problem of individuals while systemic white/mestizo domination remains.

### **Implications of the Racial Grammar of White Liberalism**

Although official reports are a fundamental source to comprehend the specific logic of the state in understanding and combating racism, studies of the state and racism in Latin America regularly ignored them. Based on the three dimensions proposed to understand different fundamental dynamics of the *racial grammar of white liberalism* in the Colombian racial order, I develop three overarching empirical arguments that I discuss below:

First, I argue that the Colombian state systematically ignores the history of slavery and its implications on the living conditions of black people in the country. Throughout Latin American history, colonialism and the transatlantic slave trade have played a crucial role in the constitution and perpetuation of capitalism, leaving an aberrant legacy that has persisted over time in the form of violence, socio-racial hierarchies, land dispossession, and the fiction of white-mestizo superiority. Naming and understanding the historical centrality of slavery for today's societies would make it possible to comprehend the rationale of the contemporary dynamics of racial oppression to implement institutional strategies to fight racism and racial discrimination.

The paradox between recognizing racism and the camouflage of slavery illustrates Mills' concept of "racial opacity" (2011). A notion that embraces "a principled anti-transparency on matters related to race, the occultation and blocking from "sunshine laws" of the racial "partitioning" and "secret reservation" of the "first principles" on which the polity has actually been founded" (Mills 2011: 33). It shows the structural silence about the historical significance of racial oppression to the nation-state building process. The paradox demonstrates how the connection between history and power mirrors the unequal participation of collectivities and individuals in the formation of historical narratives, not only in academia but also in official documents where the voice of the state prevails.<sup>26</sup> I argue that the government's official reports to the Committee are part of a process of producing historical narratives and archives that results from the power of the state to forget and ignore. In this international context, by using a liberal discourse about the moral equality of the members of a racial contract, the state attempts to be the main relator of the history of black people's experiences and a voice that legitimizes institutional actions and creates the illusion of racial justice.<sup>27</sup> With the erasure of slavery, the state seeks to hide the roots of power structures associated with racial hierarchies, racial disparities, and the living conditions of the African diaspora in the region. Still, more importantly, the state conceals or normalizes the white-mestizo racial order in its composition and institutional practices. It is not a matter of negation

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<sup>26</sup> In other documents such as legislative procedures or court documents, the state seeks to incorporate the voices of other actors such as members of organizations, leaders and experts.

<sup>27</sup> NGOs and black organizations collectively present reports to CERD in so-called alternative reports. These reports evaluate the status of compliance with the commitments made by the Colombian state regarding the implementation of the Convention. It is a counter-narrative to the institutional voice with a strong right-based approach. In this sense, the CERD, like many other spaces, also end up being a disputed scenario regarding the way in which racism and racial discrimination are addressed by the state in the country.

where matters what the state negates, but a matter of silence where matters what the state chooses to ignore.

Second, the Colombian state cannot see the historical correlation between racism and armed conflict. It tends to perceive the racialized violence of the armed conflict in black territories as the aggregate of random situations throughout history that have placed them in a disadvantaged position. Contrary to this institutional perspective, the black intellectual Santiago Arboleda (2019) introduces the notion of *ecogenocidio* as an integrative approach to black people's experiences to describe the damage caused by the armed conflict and contribute to the historical construction of truth and the production of collective memory. This concept raises the relevance of grouping categories such as ecocide, genocide, and ethnocide as a "necrophiliac colonial pattern" (p. 94) that incorporates territorial, human, and cultural damage. *Ecocide* refers to the environmental damages caused by the armed conflict that produces dispossession, water contamination, and adverse effects on human health. Arboleda (2019) argues that according to the level of destruction generated by the armed conflict on the black and indigenous communities, it is important to discuss whether or not "*genocidal social practices*" took place in the armed conflict. Finally, although *ethnocide as cultural genocide* is not an international crime, it is ultimately connected to *genocide*. While genocide exterminates bodies, ethnocide eliminates culture (Arboleda 2019: 101).

Literature on the colonial heritage of violence shows how it governs the very existence of racially marked bodies. Anthropologists such as Jaime Alves (2019) argue that the historical persistence of colonial violence accounts for dispossession, displacement, and terror as part of the legacy of slavery. Therefore, he suggests the need

to understand the processes of victimization of what he calls the “colonial trajectory of terror” that continues to determine the killable populations, that is, the social groups whose lives are discarded and their status as full citizens is denied. In the same way that the laws can define the subjects of rights, the dynamics of the internal armed conflict define the subjects without rights. Emptying bodies and territories (Vergara 2014) implies what Dayan (2011) calls *civil death* to refer to a social status involving legal and social disenfranchisement of certain ethnic-racial groups. While the racialization of criminality depicts the idea of *civil death* framed by a historical continuum of dehumanization and dispossession in countries like de United States, the armed conflict in Colombia also produces forms of *civil death* due to an institutional politics of vulnerability in black territories and a devaluation of the lives of black people in the country.

The importance of including violence in the analysis of racial liberalism is evident in the long history of the Colombian armed conflict and all the possible manifestations of violence that have taken place there. Although the state introduces data on Black people who are victims of acts of violence, it does not have a comprehensive look at the racial dimension of the armed conflict. The United Nations special rapporteurs on racism and racial discrimination emphasized this aspect in one of its reports. In 2004, Doudou Diène, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, after evaluating the ethno-racial dimension of the armed conflict and its impacts on Afro-Colombians and Indigenous human rights, provided some recommendations to the Colombian government to confront the armed conflict: i) to recognize the historical legacy of racism and racial discrimination and its impact on economic, social and political spheres; ii) the democratic

elaboration of a national plan against racism and racial discrimination; and iii) the promotion of an “intellectual and ethic strategy” to put an end to the rooting of racism within Colombian society to foster an “interactive, democratic and solidary multiculturalism” (E/CN.4/2004/18/Add.3 2004: 18). For the rapporteur, overcoming the armed conflict meant overcoming racism.

Third, in liberal multiculturalism, white-mestizo elites agreed to promote, under formal equality discourses, the inclusion of non-white people in specific dimensions of the society where their participation does not jeopardize their interests. Colombia is one of the countries with the most laws to protect the rights of black people, and this has not necessarily implied a significant improvement in their living conditions. While the Convention rests on what Banton (1996) defines as a “noble lie” in terms of the impossibility of eliminating racial discrimination as it is described in article 1.1.; in the reports sent by the Colombian state, another lie emerges, the storytelling<sup>28</sup> that the state has done everything necessary to achieve the “inclusion” of the ethnic-racial groups in the country. Although we cannot deny that in terms of laws protecting the rights of black people or that today racism has gained greater social visibility through social networks, we are far from finding actual scenarios of racial justice in the country. Racial justice could not be reduced to the levels of social consciousness about a phenomenon, not even about what the state says it does or does to overcome racial inequities but about the fundamental transformations of material conditions of existence of negatively racialized individuals and communities. For the state, racial justice is not a core component in defining a democratic society, and it is not even yet a social ideal that radically guides

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<sup>28</sup> In terms of creating a hegemonic interpretation about the intervention of the state on racial issues.

public policies. However, the state represents itself as a guarantor capable of solving racism and racial discrimination without requiring the mediation of any international organization.

### **Conclusions**

After examining the racial discourses of the Colombian state in the last thirty-seven years, this paper argues that to understand the dynamics of racism and racial discrimination, we must critically address the liberal logic of multicultural states. The racial grammar of white liberalism offers a perspective that might contribute to a more comprehensive understanding of Latin American racial states. It implies, among other aspects, scrutinizing institutional discourses on the history of racial oppression, the relationship between violence and racism, and the institutional discourses on racism.

I have argued that the government systematically ignores the history of racial oppression in the country, reverberating how it interprets and manages racial issues. The government overlooks the racial subordination rationalized by the racial liberalism that the state promotes (Mills 2008). Thus, the Colombian state never defines itself as a structural and historical agent in reproducing racism and racial inequalities but as a neutral actor in regulating racial issues. Assuming that racism is not a historical and structural phenomenon but an individual moral problem, the state implements limited strategies to sanction the perpetrator's misbehavior without understanding (while protecting) the racialized social structure (Bonilla-Silva 1997) that grants systemic privileges to the white/mestizo population. Historical explanations of structural phenomena such as the dynamics of violence in the armed conflict are also absent in the discourses of the Colombian government.

I hope this paper's *racial grammar of white liberalism* approach will stimulate research on multicultural racial states and racism in Latin America. Although the *racial grammar of white liberalism* focuses on the state, future research should consider investigating the liberal logic of the racial ideologies that mediate everyday life in specific institutions. Some possible avenues for future research might involve a detailed analysis of different discursive artifacts to trace specific institutional logics that naturalize or hide the existing racial power structures in the country. We could analyze public presidential discourses, or National Development Plans to do this. Comparative analyses can also contribute to assessing the level of applicability of this concept and the nuances it has to explain different dynamics resulting from diverse historical trajectories in the region's countries.

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## CHAPTER 3

### CHASING RACISTS, PROTECTING RACISM: REVISITING THE ANTI-DISCRIMINATION LAW IN COLOMBIA

While scholars on multiculturalism have acknowledged that it constitutes a rhetoric of denial of racism, few scholarly studies have empirically scrutinized how multicultural states utilize, legitimize, or deny notions of race, ethnicity, and racism in an attempt to “protect” black people from discriminatory practices. This paper examines the background and structure of the Anti-discrimination Law in Colombia. Particularly, it asks: What discourses on race and racism prevailed during the legislative process to enact the anti-discrimination law? Does the anti-discrimination law contribute to making visible and preventing racism in the country? I address these questions by analyzing the complete legislative procedure for the law’s approval. This paper demonstrates how this act and its implementation to date mirror the restricted nature of multicultural racial states to confront racism and racial discrimination. In the legislative debates, I find that there is a substantial lack of the history of slavery to comprehend the logic of racism and that the anti-discrimination law also illustrates the *racists without racism* model, where perpetrators are persecuted but not racism nor the structure that facilitates the reproduction of racial hierarchies. This paper contributes to the studies on anti-racist politics in Latin American racial states.

#### Introduction

In May 2012, delegates of the Departmental Assembly of Antioquia<sup>29</sup> discussed a draft of the regional development plan. In the meeting, members of the Departmental Assembly debated one of the plan’s financial components regarding future investments in the municipalities from the border areas between the departments of Antioquia (inhabited mainly by white and mestizo people) and Chocó (mostly settled by black population).<sup>30</sup> During the debate, white councilman Rodrigo Mesa Cadavid said that “investing money

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<sup>29</sup> Department Assemblies in Colombia are administrative corporations whose representatives are popularly elected. There are in total thirty-two Department Assemblies in the country.

<sup>30</sup> Chocó and Antioquia are two of the thirty-two departments of the country. According to the 2005 Census, while in Chocó 82 percent of its population is Black/Afro-Colombian, in Antioquia almost 89 percent is white/mestizo.

in Chocó is like putting perfume on excrement” (*El Espectador* May 8 2012). The media broadly covered this racist incident, which provoked political reactions from different actors around the country. People from some municipalities of the Chocó Department protested and marched against the racist expression of the public official. One of the senators who co-authored the so-called anti-discrimination law asked the Prosecutor to investigate the councilman for racial harassment (*El Tiempo* May 9 2012). The president of the Liberal Party, the political association councilman Mesa was affiliated with, traveled to Chocó to apologize to the highest administrative authority of the department, given that the councilman would have committed an ethical fault with his expression (*Semana* May 14 2012). For being an official, Mesa could have faced as much as a three-year prison sentence according to the Colombian penal code. Councilman Mesa, however, received not a criminal sanction but a disciplinary measure, being suspended from his duties for five months for using “disrespectful, inappropriate and unjustified” expressions (*Procuraduría General de la Nación* 2012).

This racist incident and other cases of racial discrimination take place in the context of Latin America’s state-endorsed multiculturalism. Since the mid-1980s, most countries in Latin America adopted new constitutions or made substantial constitutional reforms to officially recognize their cultural and ethnic diversity in a phenomenon that scholars call “Multicultural Constitutionalism” or the “New Latin American Constitutionalism” (Paschel 2013; Ng’weno 2007; Van Cott 2000; Rodríguez Garavito, Alfonso y Cavelier 2009; Uprimny 2011; Rodríguez and Baquero 2015; Hernández 2019). In these new “multicultural citizenship regimes” (Hooker 2008), there was a move from legal color-blindness to ethno-racial legislations (Pachel 2010, Rahier 2019), where

multicultural discourses displaced the monocultural racial ideology of mestizaje (Rahier 2012). Many Latin American nations passed ethno-racial legal instruments to protect Indigenous and Afro-descendants' rights. These legal instruments not only included the recognition of "multicultural collective rights" (the right to be different) but also the enactment of "racial equality laws" or "anti-discrimination laws" (the right to be the same) (Paschel 2016) aimed at criminalizing hate crimes and acts of racial discrimination through constitutional articles and special laws (Rodriguez and Baquero 2015; Rahier 2019). Following this regional trend, Colombia passed Law 1482 in 2011 to protect the rights of people violated through acts of discrimination.

This paper examines the background and structure of Act 1482 of 2011. It is primarily concerned about the racial discourses that emerged during the enactment process of this law and discusses to what extent laws that prohibit racial discrimination are the most appropriate anti-racist strategy in multicultural societies. Mainly, this paper seeks to answer the following questions: What discourses on race and racism prevailed during the legislative process to enact the anti-discrimination law in Colombia? Does the anti-discrimination law contribute to making visible and preventing racism in the country? I address these questions by analyzing the complete legal procedure for the approval of the anti-discrimination law in Congress, including debates in the Senate and the House of Representatives, one public audience convened by the Congress; reconciliation reports; presidential objections to the bill; and one general audience arranged by the Constitutional Court. I also conducted four interviews with black leaders and academics involved more or less directly in this legal initiative and knew its dynamics and conflicts.

While scholars on multiculturalism in Latin America have acknowledged that multiculturalism constitutes a sort of rhetoric of denial of racism (Hernández 2016; Vasquez-Padilla and Hernández-Reyes 2020), few scholarly studies have empirically scrutinized how states utilize, legitimize, or deny notions of race, ethnicity, and racism in an attempt to “protect” black people from discriminatory practices. By considering the interplay between race and law as co-constructed categories (Gomez 2010), I find that legal discourses on racism and racial discrimination for enacting the anti-discrimination law institutionalize an individualist perspective that obscures the systemic and structural character of racism. Given that members of the Colombian Congress understand racial discrimination as an individual-based issue, the anti-discrimination law aims to chase racists without opposing the institutional and structural dimensions of racism, reproducing what I call the *racists without racism* model. This paper contributes to the studies on anti-racist politics in Latin American racial states.

In the following, I first examine the link between race and law as two correlated categories. Second, I discuss multicultural politics in Latin America by focusing on the region’s multicultural turn and the development of anti-discrimination laws. Third, I introduce the background of the anti-discrimination law in Colombia, highlighting the previous legal experiences that sought to oppose or penalize racial discrimination. Then, I describe the legislative process for enacting Law 1482 of 2011, its different outlooks on racism, and the variation on its purposes and scopes. Finally, I discuss some of the limitations of the law and its implications for the politics of anti-racism.

### **Race and Law as Co-constructed Categories**

Race and law are mutually constructed dimensions constitutive of an interdependent process that reproduces racial stratifications (Gómez 2010). Critical legal scholars contend that race and racial domination are exercised, produced, and represented through legal mechanisms whereby law shapes and is shaped by race and race relations (Crenshaw, Gotanda, Peller, and Thomas 1995; Gómez 2010; Haney-López 2006). Race constitutes “a modern mode of differentiating humans and forming identities” (Jung 2015: 31) and a mechanism of classification based on the naturalization, essentialization, and hierarchization of differences at a multi-scale level (Winant 2000). Laws are critical for the institutional practices of the racial state by defining the meaning and content of racial categories through censuses (Paschel 2013; Martinez 1997), collecting ethno-racial statistics (Telles 2007), and producing racialized social systems that develop mechanisms of control over populations identified in racial terms (Goldberg 2002). Law is never a neutral mediator of racial conflicts (Crenshaw, Gotanda, Peller, and Thomas 1995), and it does not exist apart from race, racial classifications, racial ideologies, and racial inequalities (Gómez 2010). To be more accurate, race is a socio-historical product and a legal construction (Haney-López 2006; Martinez 1997). Thus, it is essential to understand the racial character of the modern state as an agent of racialization and a site of struggle in a racial order where the law is a constitutive element of race itself (Crenshaw, Gotanda, Peller, and Thomas 1995).

Unlike overtly racist legal systems in which written laws are essential for the organization and enforcement of racial hierarchies, in Latin America has prevailed a racial grammar that provides the social logic and the common sense that naturalizes and

justifies racial inequalities without even requiring codified laws (Bonilla-Silva 2012; Vásquez-Padilla and Hernández-Reyes 2020). Tanya Katerí Hernández refers to this idea as “customary law” to denote “how the social norm of racial exclusion effectively [operates] as a legal regime in which state resources and coercion [are] utilized to enforce the marginalization of persons of African descent” (Hernandez 2013: 15). This type of law establishes “the set of values, beliefs, and practices” employed by the state “to implement, reproduce, and administer a particular socioeconomic and racial order for the longstanding benefit of identified white and white-mestizo elites in multiracial and multi-ethnic societies” (Rahier 2019: 218). Consequently, customary laws are not about the social existence of a racial order without overtly racist laws, which is not always the case, but mainly about how they structure racial hierarchies articulated to anti-blackness as an “extreme social condition of possibility” of the modern social world (Jung 2019:165). In recent decades, racialized subjects’ experiences and life chances, along with the persistence of systematic racial inequalities and the ongoing violence on black territories, demonstrate how customary laws continue to enforce racial hierarchies despite multicultural reforms and ethno-racial legislations.

### **Multicultural Politics in Colombia**

Scholarship on race and racism has examined the historical emergence and variations of mainstream racial ideologies and their relation to racialized power structures. Since the late 20th century, after several decades of discourses around scientific racism, eugenics, and mestizaje, multiculturalism emerged in Latin America as the new paradigm to conceptualize human difference through a new ethno-legal framework that recognizes collective rights and encourages the inclusion of indigenous

and Afro-descendant communities. The multicultural constitutionalism adopted in Guatemala (1985), Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), Perú (1993), Argentina (1994), México (1994), Venezuela (1999), Ecuador (2008), and Bolivia (2009), share some ideological principles related to the recognition of cultural differences, the protection of groups that have been historically targets of discrimination, and the definition of their nations as multicultural and pluri-ethnic (Uprimny 2011).

Colombia's Constitution of 1991 describes the country as a rule-of-law state that protects the right to equality before the law. It prohibits discrimination on the grounds of sex, race, national or family origin, language, religion, and political or philosophical opinion (Col. Pol. Const. art. 1, 7, 13). Colombia has a long tradition of excessive laws to regulate a wide-ranging variety of behaviors and social fields (Angarita 2018), including topics related to Black, Afro-Colombian, Raizal, and Palenquero people (Mosquera Rosero-Labbé, León, and Morales 2009). Some laws incorporate a group of international treaties signed by the Colombian state to the national legal framework.<sup>31</sup> In the domestic terrain, it is worth mentioning three of the most important laws concerning black people: a) the 1993 Law of Black Communities addresses Black communities' collective territorial rights and the protection of their cultural identity. It also establishes that Black communities must be involved in designing, implementing, and coordinating economic and social development plans, programs, and projects for their benefit. However, this law is not fully regulated, and therefore its implementation is quite limited. b) Law 649 of 2001 develops Article 176 of the Constitution, establishing two special seats for Afro-descendant communities, indigenous communities, political minorities, and Colombians

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<sup>31</sup> Law 22 of 1981 and Law 21 of 1991 approved the International Convention on the Elimination of All Forms of Racial Discrimination and Convention No. 169 about indigenous and tribal peoples, respectively.

residing abroad. c) More recently, Law 1752 of 2015, as we will see later on, modifies Law 1482 of 2011 (Anti-discrimination Law) to “punish acts of discrimination based on race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation, disability and other reasons of discrimination” (Law 1752 of 2015).

Despite institutional and legislative arrangements for ethno-racial groups, multiculturalism has been subject to powerful critiques. For example, Rodriguez and Baquero (2015) introduce the concept of *hegemonic multiculturalism* to account for the radical separation between demands on recognition and redistribution by denying historical reparations and reinterpreting material equality demands in terms of promoting discourses on “diversity” (Rodriguez and Baquero 2015: 42). Similarly, from a critical perspective, Lentin (2005) argues that as a form of anti-racism, multiculturalism not only dehistoricizes racism by replacing race with culture but it is the result of “culturalist responses to racism that depoliticize anti-racist discourses and obscure the link between ‘race’ and state” (Lentin 2005: 383). In some reviews of the body of work on multiculturalism, scholars across disciplines have examined the persistence of racism after Latin America’s turn to multiculturalism (Paschel 2016; Hernández-Reyes 2019; Rahier 2019), thus showing that black people are still socially alienated from full citizenship.

The absence of overtly racist legislation analogous to the U.S. Jim Crow racial system or South Africa’s apartheid regime led to Latin American societies believing that racism is a foreign issue that has no substantive repercussions in the region and the life experiences of black people (Dulitzky 2005; Hernández 2013; Rahier 2019). Hernández (2019) has called this reasoning the Latin America’s rhetoric of “racial innocence” to

signify the social and institutional denial of racism by comparing Latin American's racial orders to the United States' racial regime. Despite the legal recognition of cultural rights and the limited access to material opportunities through multicultural policies, neoliberal governance maintains strong logics of exclusion by reaffirming political and economic hierarchies (Hale 2002). Multiculturalism has not involved a rupture of the deep structures of racialization that create and maintain different regimes of oppression and scenarios of discrimination that substantially affect the material equity of racialized subjects. Violence and dispossession are everyday events in the lives of black people in the country (Escobar 2003; Alves 2019; Hernandez-Reyes 2019; Vergara-Figueroa 2018).

In Colombia, development statistics have illustrated how racism has disadvantaged the Afro-Colombian population. In a 2015 report evaluating Colombia's performance in achieving the Millennium Development Goals, the regions inhabited mostly by black people show poverty rates above 50%, five times the rate in Bogotá (PNUD 2015). The report notes that between 2001 and 2013, 24% of the maternal mortality rates in the country affected indigenous and Afro-Colombian populations. According to data from UNICEF, regions with the most significant percentage of black and indigenous people also tend to have the highest infant and maternal mortality rates (UNICEF 2014). As a consequence of the armed conflict, 7.7 million people have been victims of forced displacement in Colombia. 21.2% are Afro-descendants, 6.2% are indigenous, and 42.4% are children and youth (UNHCR 2018). More recently, Black activists have denounced the statistical genocide of black people in Colombia through the 2018 Census, whose figures show a reduction of the Afro-Colombian population by more

than 30% compared to the 2005 Census. These systematic vulnerabilities show how the multicultural governance of the Colombian racial states ends up protecting and reproducing structural racial inequalities.

### **The Colombian Context: Failed Legislative Attempts to Penalize Racial Discrimination**

On August 1 of 2006, the black congresswoman and former athlete Maria Isabel Urrutia Ocoró introduced to the House of Representatives<sup>32</sup> the first bill penalizing racial discrimination in the country.<sup>33</sup> She was a member of the *Alianza Social Afro-Colombiana* (Afro-Colombian Social Alliance) and representative of one of the particular constituencies for Afro-Colombian communities. The draft act PL No. 041 proposed a new chapter in the Colombian criminal code toward the penalization of racial discrimination, racial segregation, and “harassment for reasons of race or national, ethnic or cultural origin.” In this bill, prison sentences ranged from 1 to 4 years and fines from 5 to 20 legal minimum wages (Congress Gazette No. 267 2006).<sup>34</sup> In the bill’s explanatory

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<sup>32</sup> In Colombia, the Congress is composed of the Senate (102 members) and the House of Representatives (166 members). It is defined as the highest representative body of the legislative power in the country that has the statutory responsibility to reform the Political Constitution, enact laws, and exercise political control over the government and administration (Col. Pol. Const. art. 114). The legislative process that bills must travel to become enacted into law consists of four debates: the first two debates take place in the chamber of origin (Senate or the House of Representatives) and the last two debates in the remaining chamber, like in the United States. Each bill is assigned one or more speakers for each debate to issue a concept (parliamentary committee report) about the draft act, and recommend its approval, modification, or rejection. When one chamber modifies what the other has done, accidental commissions are formed to prepare a reconciliation report that is subsequently sent to each of the chambers for approval. After the bill is approved by the Congress (both chambers), it is sent to the President for review. The President approves or vetoes the bill considering its inconvenience or unconstitutionality. In this case, the bill goes back to Congress (Col. Pol. Const. art. 166) or to the Constitutional Court to decide on the feasibility of the bill due to the insistence of one of the chambers (Col. Pol. Const. art. 167).

<sup>33</sup> This initiative might mirror a genuine interest in working on laws that protect the fundamental rights of the Afro-Colombian population. However, this is not always the case. Some of these representatives make alliances with traditional political parties that represent the interests of national elites to support laws that undermine the quality of life of black people and their territories.

<sup>34</sup> This bill uses the same definition of racial discrimination utilized in the International Convention on the Elimination of All Forms of Racial Discrimination. (See Congress Gazette No. 267 2006).

statement, the author argued that individuals would not be protected based on their specific characteristics but because they are members of a group or community that require special constitutional protection.<sup>35</sup> The Conservative Party, the Liberal Party, and the right-wing Social Party of National Unity (U-Party) submitted the first parliamentary committee report reviewing the bill.<sup>36</sup> After considering the convenience of the draft Act, the representatives proposed a few changes and presented a positive statement for the first congressional debate. The bill, however, was shelved on June 20, 2007, according to the process established by Law 5 of 1992.<sup>37</sup>

Almost one year later, on July 29, 2007, two members of the U-Party, Senators Gina Parody D'Echeona and Alberto Armando Benedetti Villaneda, presented to the Senate the draft act PL No. 040. The purpose of this bill was to develop Article 13 of the Political Constitution<sup>38</sup> and “prevent, eradicate and punish all forms of discrimination” (Congress Gazette No. 364 2007). This was the second anti-discrimination bill introduced to Congress. The bill established a catalog of discriminatory acts that should be explicitly

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<sup>35</sup> In the final section, the author explains that the protected groups “are those that have been clearly established in the legal norm, that is, ethnic or racial groups, among which are included the groups based on color, ancestry, and lineage, and national groups understood not from a legal point of view but sociological” (Congress Gazette No. 267 2006: 16). It is interesting to find that in this draft act race and color constitute two possible categories of discrimination.

<sup>36</sup> The only left-wing political party at that time was the *Polo Democrático Alternativo*, the rest were center-right to right-wing political parties, including the Afro-Colombian Social Alliance, Green Alliance, U-Party, Independent Movement of Absolute Renovation, Conservative Party, Liberal Party,

<sup>37</sup> In Colombia, the legislative procedure of a draft act takes place in two (2) regular and consecutive periods: the first, begins on July 20 and ends on December 16; and the second, from March 16 to June 20 (art. 224, Law 5 1992).

<sup>38</sup> Article 13 reads: “All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy. The State will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups that are discriminated against or marginalized. The State will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction the abuses or ill-treatment perpetrated against them” (Col. Pol. Const. art. 13). In cases where there are acts of discrimination on the basis of any of these suspect classifications, *tutela* becomes the best resource that citizens have for the protection of their fundamental rights.

prohibited. It also penalized two prohibited behaviors (instigation to discrimination and denial of public service)<sup>39</sup> with prison sentences ranging from 3 to 5 years and fines between 13.33 and 150 legal minimum wages (Congress Gazette No. 364 2007). When Senator Gina Parody D'Echeona submitted the first parliamentary committee report (November 1, 2007), the Ombudsman's Office had introduced another initiative through a statutory bill on a similar matter<sup>40</sup>. This last initiative was the third anti-discrimination draft bill. The board of directors of the Senate decided to put together both bills, given that they were not antithetical and dealt with the same subject (Congress Gazette No. 547 2007).

The Ombudsman's Office proposed a statutory law resulting from a collective effort known as the "Anti-discrimination Group." More than twenty community organizations participated in the initiative, including people with disabilities, LGBT and Trans organizations, women organizations, and Afro-Colombian and indigenous organizations<sup>41</sup> (Congress Gazette No. 391 2007). This bill went beyond the penalization of racial discrimination, proscribing social and institutional practices that oppose the

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<sup>39</sup> "for reasons of sex, race, national, family or social origin, language, religion, political and philosophical opinion, including affiliation to a party or political movement, economic position, age, gender identity, marital status, health status, disability, physical appearance or any other social condition" (Congress Gazette No. 364 2007: 2).

<sup>40</sup> The statutory bill was submitted to the Senate on August 15, 2007.

<sup>41</sup> The organizations that participated in this process were the following: Federación de Discapacitados Físicos, Fecodif (Federation of Physically Handicapped); Federación Nacional de Sordos de Colombia, Fenascot (National Federation of the Deaf of Colombia); Asociación Colombiana de Sordociegos, Surcoe (Colombian Association of Deafblind); Asociación Colombiana para Discapacitados Motrices, Ascopar (Colombian Association for Motor Handicapped); Centro de Atención para el Lesionado Medular, Calem (Spinal Injury Care Center); Instituto Nacional de Ciegos, Inci (National Institute for the Blind); Instituto Nacional de Sordos, Insor National Institute of the Deaf); Ketlénan National Association; Palway Foundation; Cor Pro Adulto Mayor; Fundación Eudes; Proyecto Colombia Diversa (Colombia Diversa Project); Red de Apoyo a Transgeneristas TRANSER (Transgender Support Network); SISMA Mujer – Red Nacional de Mujeres (National Network of Women); Organización Nacional de Indígenas de Colombia, ONIC (National Organization of Indigenous People of Colombia); Proceso Comunidades Negras PCN (Black Communities Process); Universidad del Rosario (Rosario University) (Congress Gazette No. 391 2007).

constitutional values of human dignity and equality. The bill also established a catalog of prohibited discriminatory actions based on sex, gender identity, and sexual orientation; ethnicity; national, regional, or local origin; origin or family situation; religion; political or philosophical opinion; age; disability; and social and health conditions (Congress Gazette No. 391 2007). The bill underwent the same fate as the first anti-discrimination bill, and Congress decided to shelve the proposed act on June 20, 2008.

A week before the Ombudsman's Office submitted the statutory bill to the Senate, just at the beginning of the new regular legislative period, the black congresswoman Maria Isabel Urrutia Ocoró introduced, with few variations, the same bill she had previously presented to the House of Representatives in 2006. This was the fourth attempt to enact an anti-discrimination law. The new bill toughened sanctions and fines. It proposed prison sentences ranging from 3 to 6 years; fines between 10 to 20 legal minimum wages; and included interdiction of rights and public functions varying from 2 to 6 years if the perpetrator is a public official (Congress Gazette No. 378 2007). The first parliamentary committee report was assigned to one member of the U-Party, while representatives of the Green Alliance Conservative Party, Liberal Party, and U-Party led the second. Both reports stated positive statements for the first and second debate of the bill and included only a few variations to the original text (Congress Gazette No. 624 2008). The House of Representatives approved the bill and sent it to the Senate for its first debate. Gustavo Petro, a member of the leftist political movement *Polo Democrático Alternativo*, submitted the initial parliamentary report in this chamber, proposing a positive statement for the first debate (Congress Gazette No. 166 2009). However, as it occurred to the first bill submitted by the black representative and the

statutory law proposed by Ombudsman's Office, this bill did not complete the legislative procedure. The Senate shelved it on June 20, 2009. This was the fate of the four anti-discrimination bills presented to the Colombian Congress in three consecutive years.

Black Representative Maria Isabel Urrutia and Senator Gina Parody D'Echeona led three of the above initiatives. These failed legislative processes reveal what the black ex-Senator Piedad Cordoba (2002) called the *machista* bias of Congress that mirrors the mentality that politics is a men's issue and that women participate in a space where they do not belong. They also demonstrate the lack of political will by members of both chambers for passing a law dealing with racial discrimination and other forms of discrimination. Although it could not be strictly defined as anti-black solidarity, it expresses an institutional perception of the irrelevance of racism in the public sphere while reproducing the social and institutional devaluation of black people as second-class citizens in the country.

In July 2010, Representative Gloria Stella Diaz Ortiz and Senator Carlos Alberto Baena introduced to the Senate the last bill dealing with racial discrimination before the enactment of the Anti-discrimination Law. The representative and the Senator were members of the Independent Movement of Absolute Renovation, MIRA (by its acronyms in Spanish), a small religious-oriented party created in July 2000. The draft act PL No. 05 aimed at "preventing and eradicating all forms of racial discrimination and racism against Black, Afro-Colombian, Raizal and Palenquero people" (Congress Gazette No. 459 2010, 4). While it did not penalize racism and racial discrimination, it suggested adopting a set of measures to promote equal opportunities, including the "Afro-Colombian ethnic variable" as an integral component of the national census and the national and territorial

budgets and development plans. In the statement of reasons for enacting the law, the authors recognize that the National Constituent Assembly, which preceded the 1991 Political Constitution, failed to overcome society's social and political debt to Black, Afro-Colombian, Raizal, and Palenquero people (Congress Gazette No. 459 2010). The authors finally withdrew the proposal, also known as the Equal Opportunities Law. By that date, they had already introduced the bill Congress finally passed, later known as the Anti-discrimination Law

### **Law 1482 of 2011: From Racial Discrimination to All Forms of Discrimination**

The so-called Anti-discrimination Law was part of a legislative package introduced to the Senate by two members of the Independent Movement of Absolute Renovation, MIRA. It was presented at the beginning of the new legislative period, in July 2010, by Representative Gloria Stella Diaz Ortiz and Senator Carlos Alberto Baena. The Afro-Colombian leader Luis Ernesto Olave, a member at that time of the MIRA, along with Senator Baena and other candidates of this political party, had agreed that whoever came to the Congress in the representation of MIRA would commit to carrying out the Anti-discrimination Law and the Equal Opportunities Law.

### **First and Second Debate in the Senate**

The Anti-discrimination Law's original purpose was to protect the fundamental rights of Black, Afro-Colombian, Raizal, and Palenquero people that are usually violated by two "manifestations of society": racism and racial discrimination. The bill defined both concepts in the following way:

**Racism:** It is understood as any act of physical and/or verbal aggression, intolerance, abuse, contempt, or any attitude to which an individual or group of persons belonging to the **Black, Afro-Colombian, Raizal, and Palenquero** people are subjected on the grounds of their origin, skin color and/or phenotype;

that affect their behavior and the exercise of their fundamental rights. (Congress Gazette No. 459 2010, 10, emphasis added)

**Racial Discrimination:** It is understood as any act of inferiority, exclusion, rejection, xenophobia, segregation, and all kinds of actions to which an individual or group of people belonging to the **Black, Afro-Colombian, Raizal, and Palenquero people** are subjected that impede, affect or limit the human development and quality of life of this population. (Congress Gazette No. 459 2010: 10, emphasis added)

The bill incorporated, with some nuances, the rest of the articles of the first bill introduced by the Black Representative Maria Isabel Urrutia four years earlier. Following the legislative procedure, the first parliamentary committee report was assigned to the Black Senator Hemel Hurtado Angulo, a member of *Opción Ciudadana* political party. The statement included some modifications to the original version related to reducing prison sentences ranging from 3 to 6 years to 1 to 3 years. The Senator considered that racial discrimination was not too severe enough to have such harsh punishment and believed that an educational and pedagogical perspective was fundamental to address it (Congress Gazette No. 799 2010). He also claimed that the anti-discrimination law should not focus exclusively on Black, Afro-Colombian, Raizal, and Palenquero people, but on other social groups affected by racism and racial discrimination (Congress Gazette No. 799 2010). Indeed, during the first debate in the Senate in November 2010, the Senator raised some cases of overtly anti-black racism and included other situations where there is a hostile reaction of black people to racial teasing or even to the murder of a member of the black community. He wanted to demonstrate that an anti-racist law must protect not only the black population but also white-mestizo groups. Contrary to prevailing social beliefs, the Senator argued that racism “is not exclusive to affect the black race, but it is [also] generated by a position of retaliation of the black race towards

the white race, although to a lesser extent” (Congress Gazette No. 36 2011). This conceptual understanding of racism affected subsequent debates, as I will demonstrate later.

The second parliamentary committee report was assigned again to the black Senator, Hurtado Angulo. The Senator maintained most of the modifications suggested during the first debate. For the second debate, the black leader Luis Ernesto Olave created the “I’m Afro-Friend” (“Soy Afro Amigo”) campaign to raise public awareness on the phenomenon of racism through social media, especially to non-black populations. Luis Ernesto explains the movement in this way:

It was the first social media strategy created in Colombia to promote anti-discrimination. So, in that campaign, we collected signatures. Many people in several cities sent us their signatures. Then, in the debate, we arrived with 57 thousand signatures collected throughout the country supporting the bill that penalizes racial discrimination and racism. We came with some T-shirts, “I’m Afro-Friend,” we delivered them to the Senators, they all said like... What? [surprised] It generated a significant impact, so they could not say no, and passed in plenary. (Interview, Luis Ernesto Olave 2019)

On December 15, 2010, the Constitutional Commission of the Senate unanimously approved the bill and sent it to the House of Representatives for its first debate in this chamber (Congress Gazette No. 80 2011). The agreed statement established the behaviors penalized by the Law, and defined racism, racial discrimination, and harassment as follows:

Article 134A. **Racism.** The person who through certain acts promotes, provokes, incites physical and/or verbal aggression, of intolerance, taunt, contempt, or any attitude of violence against a person, group of people, community or people, based on **racial or ethnic grounds**, will incur in prison from one (1) to three (3) years and a fine of ten (10) to fifteen (15) current monthly minimum legal wages. (Congress Gazette No. 24 2011: 19, emphasis added)

Article 134B. **Racial Discrimination.** The person who promotes, provokes, incites, or executes certain acts of distinction, segregation, or arbitrary restriction

that have as an object or result, consciously or unconsciously, undermine or override the recognition, enjoyment, exercise, and enjoyment of the Human Rights and fundamental freedoms of a person or group of people because of their **racial or ethnic condition**, will incur in prison from one (1) to three (3) years and a fine of ten (10) to fifteen (15) current legal minimum monthly wages. (Congress Gazette No. 24 2011: 19, emphasis added)

Article 134C. ***Harassment on the grounds of Race or National, Ethnic or Cultural Origin.*** The person who, for reasons of racial discrimination, performs or promotes acts or behaviors constituting harassment, aimed at causing physical, psychological, moral, or property damage to a person, group of people, community or people, **based on racial or ethnic grounds**, will incur in prison from one (1) to three (3) years and a fine of ten (10) to fifteen (15) current monthly minimum legal wages. (Congress Gazette No. 24 2011:19, emphasis added)

Unlike the first version of the bill, the approved bill in the Senate did not aim at protecting Black, Afro-Colombian, Raizal, and Palenquero people, but any person, group of people, community, or people based on racial or ethnic grounds. Unaware of the nation-state's formation process and the power relations that result from racial ideologies and racial hierarchies, the speakers assumed that anyone could be racially discriminated against. The bill offers no special legal protection to minimize the effects of anti-black or anti-indigenous racism.

### **First and Second Debate in the House of Representatives**

The legislative process in the House of Representatives shows a radical rupture with the original motivation of the draft act approved by the Senate. Representatives Alfonso Prada, Coordinator (Green Party), Camilo Andrés Abril (Conservative Party), Alfredo Rafael Deluque (U-Party), Gustavo Puentes (Radical Change Party), Heriberto Sanabria (Conservative Party), and Hugo Velásquez (Liberal Party) submitted the first parliamentary report to the House of Representatives. In this new version of the bill, the authors argued that the anti-discrimination law constituted a historic opportunity for

Congress to eradicate all forms of arbitrary discrimination that prevailed in the country, going beyond prejudices based on race (Congress Gazette No. 406 2011). Representative Alfonso Prada considered that the inclusion of other actors who also suffer from acts of discrimination constituted a strategy that would facilitate the law's approval. The new version of the bill omitted the article that defined racism as a prohibited behavior in the first version approved in the Senate. Similarly, the penalization of racial discrimination, which was previously at the center of the law, became just a type of discriminatory act. Instead of two articles defining racism and racial discrimination, the new bill includes an article that describes acts of discrimination from a broader perspective that integrates a variety of categories of differentiation:

Article 134A. *Acts of Discrimination*. Anyone who arbitrarily prevents, obstructs, restricts, or in any way impairs the entire exercise of the rights of persons because of their race, religion, **nationality, political or philosophical ideology, sex, or sexual orientation**, will incur in prison from twelve (12) to thirty-six (36) months and a fine of ten (10) to fifteen (15) current legal minimum wages (Congress Gazette No. 406 2011, 7, emphasis in original).

The authors of this new version mentioned the cases of Mexico, Bolivia, Argentina, Uruguay, Perú, Germany, and Spain to show an international trend to enact laws that penalize multiple forms of discrimination that affect members of different social groups. They argued that although indigenous and Afro-descendant communities are one of the “most discriminated” communities in the country, they are not the only social groups affected by acts of discrimination. Therefore, they proposed broadening the concept to include all forms of arbitrary discrimination (Congress Gazette No. 406 2011). Black leader Luis Ernesto Olave details how the state, through the Ministry of Interior, conditioned the approval of the law to the inclusion of other communities:

The Ministry of Interior had to give a concept to this. At that time, it was Germán Vargas Lleras. Germán called Prada and sat him down and said, “this will be approved if you include the issue of antisemitism.” I assume he already had some commitment to Jewish people. He created a particular chapter for antisemitism. It was not just a part of it [the bill], it was a chapter that strongly condemned antisemitism. This is how the law came out of this chamber. In the first debate it went like this (Interview, Luis Ernesto Olave 2019)

Given the political pressure exerted by the Minister of Interior and following the model of the Spanish criminal code, representatives included an article that prohibits advocating genocide by spreading ideas or doctrines that promote it or justify it (Congress Gazette No. 406 2011). It is striking that penalties and fines are comparatively much higher than those established for acts of discrimination in the previous article.

Article 102. *Advocating Genocide*. Who by any means disseminates ideas or doctrines that propitiate **or promote** genocide, **or in any way justify it, either by supporting or denying a genocide committed at any time or place**, or seek the rehabilitation of regimes or institutions that support the practices that generate them, will incur in prison from ninety-six (96) to a hundred and eighty (180) months, fine of six hundred sixty-six point sixty-six (666.66) to one thousand five hundred (1500) current legal minimum wages, and disqualification for the exercise of rights and public functions of eighty (80) to one hundred and eighty (180) months. (Congress Gazette No. 406 2011: 7, emphasis in original)

On May 26, 2011, key actors had already participated in a public audience. In the extensive hearing, twelve speakers contributed,<sup>42</sup> including institutional actors at the national and local level and representatives of Black, Islamic, and Jewish organizations. In particular, members of the Jewish and Islamic organizations, the Vice-Minister of Interior, and Representative Alfonso Prada Gil, agreed that the law should also include

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<sup>42</sup> The Ministry of Interior and Justice; the president of the Colombian Confederation of Jewish Communities; the Executive Director of the Colombian Confederation of Jewish Communities; the Director of the Association of Afro-descendant Professionals; a Judge of the Criminal Chamber of the Superior Court of Bogotá; the National Director of the Afro-Colombian Human Rights Movement, Cimarrón; the president of the Afro-descendant Development Corporation; the Director and one black women leader of Fundesarrollo Afro; one member of the District Advisory Committee of Bogotá for Black, Afro-Colombian, Raizals and Palenqueras communities; a Human Rights defender; and the Director of the Islamic Cultural Center (Congress Gazette No. 693 2011).

discriminations based on religion, nationality, political or philosophical ideology, and sex or sexual orientation. Following the public hearing, some representatives were concerned regarding the changes made to the bill in the House of Representatives. Congressman Hugo Velásquez Jaramillo, a member of the Liberal Party, proposed to keep only the racial component of the draft act, excluding any reference to discrimination based on sex and sexual orientation. Representative Orlando Velandia Sepúlveda, a member of the Liberal Party, pointed out that modifying the bill's original purpose by including other populations affected by discrimination would bog down the bill. Finally, Representative Prada Gil stated that Afro-Colombian communities had historically led the battle against discrimination and that other “minority” groups in the country were just joining this fight. In particular, he highlights that it is the Afro-Colombian communities and not LGBT communities who led this legislative initiative (Congress Gazette No. 571 2011).

The final text approved in the plenary session (second debate) of the House of Representatives modified two aspects of the bill. First, it changed the title of the third article from “Discriminatory Acts” to “Acts of Racism and Discrimination,” bringing back the concept of racism although in a broader context articulated with other categories of discrimination. Second, it removed one of the seven conditions of “punitive aggravation” associated with discriminatory acts that prevent victims from enjoying their fundamental rights (Congress Gazette No. 668 2011).

### **Reconciliation Reports and Presidential Objections to the Bill**

Given that the House of Representatives modified the final draft act approved in the Senate, an accidental commission was created to prepare a reconciliation report to each chamber for its approval. Surprisingly, although the authors of the reconciliation report

argued that they affirmed the final text approved in the plenary session of the House of Representatives, they arbitrarily decided to include another condition of “punitive aggravation.” This new condition referred to discriminatory acts that prevent, individual or collectively, the enjoyment of the territorial rights of ethnic groups or black communities (Congress Gazette No. 660 2011; Congress Gazette No. 661 2011). This condition, however, did not remain in the enacted law.<sup>43</sup>

After both chambers approved the reconciliation report, the government presented an objection of unconstitutionality against the use of the expression “religion” and “political or philosophical ideology” in the third article of the bill, and the phrase “people in the exercise of their duties” in the fifth article. First, the president considered that, in many cases, the principle of autonomy of the will is exercised based on some suspect categories in an arbitrary and discretionary individual process. This behavior, however, should not be regarded as unlawful insofar as it is part of the social condition of any human being. Accordingly, protecting this discretionary conduct constituted a way to defend the “liberal regime” founded on the individual right to choose the people they want to connect with according to their political, ethical, religious, educational, and ideological vision of the world (Congress Gazette No. 799 2011). Second, regarding the expression “people in the exercise of their duties,” the president points out that in the exercise of the delegated obligations, some people have to differentiate individuals based on some of the suspect categories prohibited by law. The president maintained that

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<sup>43</sup> This is a common practice in Colombia when the law is about to be approved. In the country they are known as “monkeys”, that is, as hanging elements that are intentionally included in some parts of the law and that intend to go unnoticed to benefit certain sectors.

neither the state nor any criminal law should intervene on this matter to the extent that it would be contrary to the constitutional principles (Congress Gazette No. 799 2011).

In the parliamentary report responding to presidential objections, Senator Hemel Hurtado Angulo and Representative Alfonso Prada ask to the plenary of the Senate (Congress Gazette No. 837 2011) and the plenary of the House of Representatives (Congress Gazette No. 838 2011) to accept the presidential objections regarding the use of those expressions. The House of Representatives (Congress Gazette No. 1000 2011) and Senate (Congress Gazette No. 12 2012) unanimously approved the report. Congress passed Act 1482 on November 30, 2011. Following the enactment of the law, two citizens asked the Constitutional Court to declare it unenforceable due to lack of prior consultation to the black population and because of the violation of the principles of consecutiveness (also known as the *rule of the four debates*) and flexible identity (*single-subject rule* in the legislative process). None of these reasons were taken into account by the Court, which decided to declare the constitutionality of the law (Constitutional Court, Ruling C-194 of 2013, Reporting Judge: Luis Ernesto Vargas Silva).

In sum, Law 1482 of 2011 had three main phases. First, the bill prevented anti-black racism and discriminatory acts against Black, Afro-Colombian, Raizal, and Palenquero people based on their origin, skin color, and phenotype. The bill's initial spirit aimed at protecting especially black people from racism and racial discrimination. In the second stage, the bill aimed at defending the rights of any person, group of people, community, or people based on racial or ethnic grounds. The bill still focused on race and ethnicity but expanded legal protection to other populations beyond black people. Third, the bill became a law that penalizes different forms of discrimination, including race,

ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation, and dimensions of social and historical discrimination (Baena 2015). According to the Constitutional Court, the enacted law maintained not only the substantive purpose of the original bill, but it also showed an appropriate interpretation of the constitutional principle of equality (Constitutional Court, Ruling C-194 of 2013, Reporting Judge: Luis Ernesto Vargas Silva).

However, the approved law did not include all possible scenarios of discrimination. In 2015, the Anti-discrimination Law was modified by Law 1752 to incorporate the protection against discrimination based on disability in three new articles. It even rephrased the purpose of the law to aim at sanctioning “criminal acts of discrimination based on race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation, disability and other reasons for discrimination” (Law 1752 art. 1). It not only incorporates a new suspect category that requires legal protection but also includes the expression “and other reasons for discrimination” as a way to give more steadiness to the law and avoid recurring amendments in the future. Article 3 also changed and stopped referring to racism or discrimination to include general acts of discrimination.

### **Implementation, Implications, and Challenges of Act 1482 of 2011**

To what extent is Act 1482 of 2011 an anti-racist law? Does this law contribute to making visible and preventing racial discrimination in the country? Answers to these questions depend on the restricted legal nature of anti-discrimination laws and how members of Congress, as a constitutive institution of the Colombian multicultural racial state, comprehend racism and racial discrimination. In this section, I first discuss the

progress and limitations in implementing the law in the country. Then, I examine discourses on race, skin color, and racism that prevailed during the legislative process to enact the Anti-discrimination Law and its implications to confront racism. Finally, I move to discuss to what extent the anti-discrimination law has contributed to making visible and preventing racism and whether or not it is the most suitable anti-racist mechanism in multicultural societies.

### **Implementing the Anti-discrimination Law**

In 2016 the Office of the Prosecutor arranged the First International Meeting on Racial Discrimination Crime Investigation Techniques as an instructional process designed for prosecutors of the 35 offices throughout the national territory (CERD/C/COL/17-19). It was part of a strategy of “training, promoting, monitoring and accompanying” all investigations carried out due to racial discrimination. However, data on the number of complaints filed and the sanctions imposed give an account of the persistence of high levels of impunity in the Colombian justice system concerning racial discrimination.<sup>44</sup> According to the Office of the Prosecutor, between 2012 and 2016, the Office received “524 complaints about Acts of Racism and Discrimination and Acts of Racial Discrimination” as well as “183 complaints about Harassments on the grounds of Race, Religion, Political Ideology, and National, Ethnic or Cultural Origin” (Response to Representative Carlos Eduardo Guevara, Office of the Prosecutor 2016). Additionally, as reported by the Colombian government to the Committee on the Elimination of Racial Discrimination (CERD), in 2018, the Office of the Prosecutor carried out 227 investigations for acts of racism or discrimination and 141 for harassment. Out of the

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<sup>44</sup> Impunity that also extends to the murders of social leaders, including members of indigenous and black communities, femicide, and state corruption.

total number of cases investigated, nine passed the preliminary investigation stage, three were still under investigation, five were in court, and just one case had a prison sentence (CERD/C/COL/17-19).

Interestingly, while discussions on racism and racial discrimination are regularly considered not to be related to the political agendas of indigenous communities in the country, the single legal case that had an initial condemnatory sentence was the result of a complaint filed, in April 2013, by a spokesperson of the Embera Chamí indigenous community.<sup>45</sup> Similar to the case of councilman Rodrigo Mesa, while members of the Municipal Council of Marsella (Department of Risaralda) discussed the possibility of granting a small piece of land to a displaced indigenous reservation belonging to the Embera Chamí community, councilmember Fernando Antonio Delgado asserted: “being honest, hard-to-manage groups such as displaced, blacks and indigenous people, are cancers that have the national and world government.” (*BBC Mundo* November 28 2014). On February 27, 2015, the judge considered that the councilman was responsible for “aggravated harassment” and sentenced him to 16 months of prison. The decision also banned the councilman from holding public office for the same period and fined 13 legal minimum monthly wages.<sup>46</sup> The defense attorney appealed the judge’s decision, and the appellate Court acquitted the councilman’s discrimination charges. Then, the Prosecutor filed an “extraordinary appeal” to invalidate or cancel the appellate Court’s judicial decision, a remedial measure that had to be resolved by the Supreme Court of Justice. After almost six years of the original complaint by the indigenous leader, the Supreme

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<sup>45</sup> The indigenous leader, however, considered that this would be the first case in which discrimination for ethnic reasons would have a legal classification, that is, he focused on the ethnic dimension of the anti-discrimination law (Cassation No. 48.388, Colombian Supreme Court, 2019).

<sup>46</sup>A little more than 3000 dollars at that time.

Court definitively acquitted the councilmember in January 2019. Following the jurisprudence of the Constitutional Court, the Supreme Court maintained that hate speech is only unacceptable when it constitutes incitement to harass vulnerable groups. According to the Supreme Court, the defendant never intended to instigate council members or the community to cause physical or moral harm against the displaced indigenous families. This corporation stated that the label “cancers” constituted an “abstract, generic and imprecise” expression that, although aiming at indigenous, Afro-Colombian, and displaced communities, it does not have a specific recipient that affects the honor and good name of a particular person (Cassation No. 48.388, Colombian Supreme Court, 2019).

The fact that this has been one of the few cases of discrimination that had an initial condemnatory sentence speaks to how the state does not adequately enforce the anti-discrimination law in Colombia. The absence of actual legal protection of black populations by fully implementing the anti-discrimination law results from multiple factors. Some of my informants maintain that many people are unaware of the anti-discrimination law and the institutional mechanisms to protect victims of racial discrimination. They contended that judges are unfamiliar with the law and prioritize other behaviors and crimes considered more relevant than those related to racism and racial discrimination. The general ignorance of anti-discrimination laws by the population, law enforcement officers, and operators of the justice system is a trend identified in Bolivia (Busdiecker 2019), Venezuela (Rivas and Ruetten-Orihuela 2019), and Ecuador (Rahier and Sanchez 2019). Hernandez (2019) argues that in the Latin American criminal justice system, racism and racial discrimination have low priority

because they are overloaded with violence or crimes against property (Hernandez 2019, 9).

### **Implications of the Anti-discrimination Law**

I have illustrated that parliamentary reports and congressional debates for enacting Act 1482 of 2011 provide a picture of how the state understands racial dynamics at a specific time. The law is an artifact that represents and interprets race relations. It also facilitates understanding how the state frames its anti-racist politics and the ability to fight anti-black racism. I identify at least three implications of the law that demonstrate that Colombia lacks an adequate legal framework to address racism and racial discrimination. First, in the debates for the law's approval, there is a substantial lack of the history of slavery to comprehend the logic of racism. Thus, dehistoricizing racism is a means to erase the detrimental effect of the afterlife of slavery evidenced through Colombia's racialized social structure and "racialized regime of rights" (Alves 2019). In fact, during the first debate for the law's approval, Black Senator Hemel Hurtado Angulo considered that the law should not include higher penalties to confront racism because it was not a significant issue in the country. He also claimed that the law should protect other groups different from the black populations who experience racism, such as the white-mestizo people. This belief mirrors a loose and unreflective understanding of the contemporary effect of the transatlantic slave trade and a limited view of racism as a simple manifestation of racial prejudice and racial hostility that denies its systematic character. Reverse racism, or the idea that assumes that whites are victims of racism, is not only a misunderstanding of the political nature of racism but also an artifice that functions to recreate the white-mestizo racial order. It normalizes asymmetric

relationships between white-mestizo and black people because race relations are considered ahistorical and unrelated to power structures.

Second, in *Racism without Racists*, Bonilla Silva (2006) introduces the concept of color-blind racism as a racial ideology that tends to be utilized by white Americans to explain and justify racial inequalities without considering the effect of race and white privilege. According to Bonilla Silva, color-blind racism is racism without racists. Colombian anti-discrimination law shows a complementary logic through the *racist without racism model*. The law illustrates a scenario where perpetrators are persecuted but not racism nor the structure that facilitates the reproduction of racial hierarchies (Rodríguez and Baquero 2015; Hernández 2019). That is, “racists are criminals rather than representatives of longstanding racist cultural norms” (Hernández 2013: 8). I follow here some of the questions posed by Strand (2019) concerning the commitments of an anti-discrimination law beyond the criminalization of racist behaviors: “What would be the configuration of an anti-discrimination law that grapples with actions that have racist effects even when those actions are undertaken without racist intent? And what would anti-discrimination law look like if it challenged racial injustice that results from the interwoven actions of many?” (Strand 2019: 156). These questions are intended to account for how the law should face racism and the broader effect of actions regardless of their alleged non-racist intent given that “race-neutral” practices may generate racially disparate consequences. The most common examples show how race mediates hiring, firing, and promoting people through personal social networks or the use of admission exams or state standardized tests to get access to the country’s leading public universities. Although both cases are supported on neutral discourses on meritocracy, in reality, they

do not consider how, for example, an individual's social networks are affected by their cultural and social capital. In the particular case of the educational system, many of the universities' admission requirements discriminate against students from schools located in historically excluded regions, especially black territories. There, the violence of the armed conflict shapes their daily lives, where teachers are regularly underpaid, and school infrastructure is precarious. Anti-discrimination law, however, does not protect black people from the unintended racial consequences of a set of institutional and social practices.

Third, the law assumes racial discrimination as an individual pathology and a distinct behavior that is considered socially undesirable. Critical legal scholars oppose the anti-discrimination model that has prevailed in American jurisprudence and legal scholarship. While this hegemonic model assumes that the existing jurisprudential rules could mitigate racism and racial discrimination as individual deviant behaviors, critical legal scholars understand both phenomena as systematic, pervasive, and resistant to anti-discrimination laws (Gómez 2004). The literature on anti-discrimination laws has widely criticized the scope of this type of legal instruments because they tend to maintain and reproduce structural racism, racial hierarchies, and the material conditions of black people (Crenshaw 1988; Delgado 1993; Freeman 1977). The law is just an individualized legal remedy against the most external form of historical structural injustices. Even difficulties navigating the judicial system mirror a more structural phenomenon that accounts for the unequal distribution of privileges and resources. I argue that to actively dismantle racism, not only racist behaviors and languages must be penalized, but it is fundamental to overcome the historical material conditions that facilitate the persistence

of exclusion, marginalization, poverty, stigmatization, and exploitation, as well as those that reproduce persecution, violence, forced displacement, and confinement of black people.

### **Challenges of the Anti-discrimination Law**

Does the anti-discrimination law contribute to making visible and preventing racism in the country? One could argue that the law makes legible some overtly racist behaviors but not the racialized social structure of the country, thus diluting radical claims for racial justice (Rodriguez and Baquero 2015) and postponing the articulation between recognition and redistribution. In a strict sense, Act 1448 is not an anti-racist act, and its purpose is not to transform the Colombian racial order. Members of Congress simply decided to standardize all forms of discrimination within a formal equality framework guaranteed by the 1991 Political Constitution.

The legal logic of the multicultural racial state lies in the social rule of law and blind faith in the law's potential to achieve social cohesion. Comaroff and Comaroff (2000) refer to the *fetishism of the law* to show the belief in "the capacity of constitutionalism and contract, rights and legal remedies, to accomplish order, civility, justice, empowerment" (Comaroff and Comaroff 2000: 328). As a fetish, laws could not bring racial justice by themselves. Laws do not transform models of thought on racial issues or the social understandings of racial equality. Criminal laws establish individual sanctions that seek to discipline some individual's behaviors. Racial justice, on the contrary, requires overcoming systematic racial subordination and carrying out the construction of relationships that did not exist before through a new form of humanism. It implies a change of the current racial governance of the multicultural racial state and the

implementation of a new racial contract not in search of a post-racial society but a society that is aware of race as part of the path to overcoming racial injustice.

### **Conclusion**

Through national legislation and high-level Court decisions, multicultural states get involved in different tasks of the racial state related to the organization and interpretation of race (Omi and Winant 1994). The law is an artifact that imposes an official mode to represent and interpret race and race relations. This paper demonstrates how the anti-discrimination law and its implementation to date mirror the restricted nature of multicultural racial states to confront racism and racial discrimination. During the legislative procedure for the approval of the anti-discrimination law, members of Congress did not refer to the colonial history of racism. Dehistoricizing racism is a means to erase the detrimental effect of the afterlife of slavery, leading to a vague understanding of the contemporary effect of the transatlantic slave trade and a limited view of racism as a simple manifestation of racial prejudice and an individual pathology considered socially undesirable. By complementing Bonilla-Silva's notion of racism without racists (2006), the anti-discrimination law illustrates the *racists without racism* model, where perpetrators are persecuted but not racism nor the structure that facilitates the reproduction of racial hierarchies.

Unlike countries such as Bolivia, where there is a National Committee Against Racism, or Mexico, where there is a National Council for the Prevention of Discrimination, Colombia has no solid institutional structure to fight anti-black racism. The Colombian state created in 2012 the *Observatory Against Racial Discrimination and Racism*, which is part of the Ministry of Interior, as the body in charge of documenting

practices of racism, monitoring acts or practices of racism and racial discrimination, and advising black populations on reporting acts of racism and discrimination according to Law 1482. The Observatory, however, has minimal capacities not only to dismantle racism but even to make it visible to society.

Despite the existence of different state actions addressing racial discrimination, the constitutional recognition of the multicultural character of Latin American nations, and the apparent *anti-racist turn* (Viveros 2020), we are far from having a rupture of the historical structures of racialization that create and maintain different regimes of oppression that substantially affect Afro-descendants. Act 1482 of 2011 does not protect black people from the unintended racial consequences of a set of institutional and social practices that appear to be neutral and devoid of racial prejudice. It does not affect society's moral and ethical standards by transforming racial ideologies. Still, it seeks to discipline some individual behavior without considering the history and the structures that create and reproduce them. The multicultural racial state ends up passing laws that do not threaten the neoliberal project, do not jeopardize the privileges of white-mestizo elites, and illustrate the state's alleged inclusive and protective character as a way to demobilize more radicalized anti-racist claims. Anti-discrimination laws are symbolic victories that that does not necessarily produce material equity.

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## CHAPTER 4

### ***“THE CONSTITUTION IS NOT ‘MULTIRRACIAL’ OR ‘PLURIRRACIAL’”*: THE LEGAL FETICHISM OF ETHNICITY AND THE AMBIGUITY OF SKIN COLOR IN THE COLOMBIAN CONSTITUTIONAL COURT**

Administrators of justice play a critical role in recognizing and protecting plural national identities and citizens' fundamental rights. This chapter offers a deep insight into how the Constitutional Court produces, interprets, and appropriates different discourses on race, ethnicity, and racism. I identify three general tendencies in the racial discourses of the Constitutional Court: First, following the experience of the United States, the Court defines race as a 'suspect category' to show that it is not a legitimate distinction to redistribute services or rights. According to the Court, it is possible to use the "racial factor" only for compensatory reasons in situations of positive discrimination and affirmative actions. Second, the Court argues that skin color is an inconclusive category to provide differentiated rights and define who belongs to the Black communities. Finally, the Court recognizes the significance of the Haitian Revolution as a historical event usually ignored in Latin American and Caribbean historiography on nation-states' building process. I argue that the Constitutional Court is the first guardian of the multicultural regime through a color-blind politics of recognition and what I call the legal fetishism of ethnicity as an interpretative and discursive framework to protect cultural differences and secure the model of differentiated citizenship. This paper contributes to the analysis of Court's judgments as a scenario of racial contestation that configures a form of rational domination that legitimates a liberal conception of justice.

#### **Introduction**

On April 24th, 2010, during a class in the Department of Telecommunications Engineering at the Francisco José de Caldas District University (FJCDU)<sup>47</sup>, a faculty member made an overtly racist comment while introducing a new topic to the class. The professor took the example of a parking lot attendant to explain how a communication channel could take values analogous to the situation where an employee would remain busy directing vehicles towards the parking areas. The professor claimed: "that would be

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<sup>47</sup> A public university located in the city of Bogotá.

a *trato negrero*, they would have him working like a black! [...] like a slave whose master must whip him to work” (*Tutela Action, Heiler Ledezma Leudo v. FJCDU*, July 28th, 2010; T-2868287, Notebook # 1, Folio 1). The professor mimicked the lashes the person would receive to force him to work while looking with mocking laughter at Heiler, the single black student in the classroom, and the only student who dared to ask the professor to avoid his dismissive attitude.

Four days after the racist incident, Heiler requested the Department Council and the Dean of the College of Engineering to transfer him to another class group with another professor. He also asked them to take the corresponding disciplinary measures to “guarantee the harmony of all ethnic groups and cultures” and comply with the Political Constitution, the national legislation, and the internal rules of the university (*Tutela Action, Heiler Ledezma Leudo v. FJCDU*, July 28th, 2010; T-2868287, Notebook # 1, Folio 3). Although members of the Department Council denied Heiler the opportunity to take the class with another professor, they delegated the Program Director to carry out the disciplinary investigation to clarify the facts reported by the student. After one month of the racist incident, the Program Director’s disciplinary research report unsuccessfully suggested the Department withdraw the class extemporaneously. The report also argued that “the professor acted without intent or premeditation, although in an incautious manner [...], due to the use of an analogy that is, usually, unfortunately, racist [...] to illustrate a topic of the class,” and claimed that the use of the example does not diminish the character of the professor “since, according to generalized testimonies, he has been characterized by his quality and unimpeachable personal, professional and academic performance” (*Disciplinary Research Report, Investigator*, June 1st, 2010; T-2868287,

Notebook # 1, Folio 38). Finally, based on the assessment of the facts investigated, the Program Director concluded that the case did not merit the opening of a disciplinary process against the professor “as a way to reconcile and vindicate the ethical and moral solvency of the individuals concerned” (Disciplinary Research Report, Investigator, June 1st, 2010; T-2868287, Notebook # 1, Folio 38). This recommendation was accepted by members of the Department Council, who decided not to impose any sanctions on the professor.

In July 2010, the black student filed a *tutela* action against the FJCDU, arguing that this educational institution had not adequately sheltered him from the discriminatory treatment, violating his right to equality and education as a member of a protected ethnic group. The first-instance judge decided to deny the protection of Heiler’s fundamental rights, claiming that a judge could not evaluate the differentiated treatment between professors and students since it is an exclusive competence of the university, under the university’s constitutional right to institutional autonomy<sup>48</sup>. Heiler appealed the decision of the first-instance judge, claiming that the university permanently violated his human dignity due to the “premeditated creation of racist scenarios” against him. He also denounced that the university did not protect him from the discriminatory act despite tacitly recognizing the racist episode in the Program Director’s disciplinary research report. Heiler asked the judge to help him “abolish the remnants of slavery and racial discrimination that redound in the collective memory of a large part of the faculty members” of the FJCDU (Appeal Letter to First-Instance Judge, Heiler Ledezma,

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<sup>48</sup> The Dean of the College of Engineering required the first-instance judge to refuse the *tutela* action presented by the student for being “inappropriate and disrespectful” to the faculty members of the university (Communication to the First-Instance Judge, Dean of the College of Engineering, August 10<sup>th</sup>, 2010).

September 1st, 2010; T-2868287, Notebook # 1, Folio 187). In the appeal process, the second-instance judge confirmed the first-instance decision. The judge claimed that the professor's behavior did not constitute a discriminatory act insofar as there was no evidence of constant and repetitive behaviors targeting Afro-descendants or a marginalization related to a "racial condition." Both judges agreed that the student could not demonstrate the violation of any fundamental right or the differentiated treatment by the professor.

In December 2010, Heiler sent his first communication to the Constitutional Court. He asked them to study his case for having been subject to "acts of discrimination based on race" as a member of a university that did not have the mechanisms to investigate and respond to racial discrimination cases. Heiler argued with fervor: "I am black, by color, by upbringing, by conviction, [and] in many scenarios I have perceived that because of my race I receive a sullen treatment." (Communication to the Constitutional Court, Heiler Ledezma, December 16th, 2010; T-2868287, Notebook # 2, Folios 31-32). In January 2011, and considering the first and second-instance judgments, the Ombudsman's Office petitioned the Constitutional Court to review the case since there was evidence that the black student was racially discriminated against. In the communication, the Office argued that, through the analysis of the case, the Constitutional Court would have the opportunity to specify the jurisprudential guidelines on the matter of racial discrimination in the country (Communication to the Constitutional Court, the Ombudsman's Office, January 11th, 2011; T-2868287, Notebook # 2, Folios 3-18). At the end of the same month, the Court accepted the case for review and randomly assigned it to Judge Maria Victoria Calle Correa, the second

woman holding this position in the history of the Court. Heiler's case led to Ruling T-691 of 2012 of Colombia's Constitutional Court.

Drawing on material from this emblematic case (more than 600 pages) and other rulings on racial discrimination since 1996 (See Appendix D), I ask: What do the jurisprudence of the Constitutional Court, particularly this ruling, tell us about the racial state in the country? Specifically, how do the Constitutional Court and the different actors who participate in the judgment "talk" about race, ethnicity, skin color, and racism within the multicultural constitutional framework? This chapter offers a deep insight into how the Constitutional Court produces, interprets, and appropriates different categories of differentiation and power. I identify three general tendencies in the racial discourses of the Constitutional Court: First, following the experience of the United States, the Court defines race as a 'suspect category' to show that it is not a legitimate distinction to redistribute services or rights. According to the Court, it is possible to use the "racial factor" for compensatory reasons in situations of positive discriminations and affirmative actions. Second, the Court argues that skin color is an inconclusive category to provide rights and define who belongs to the Black communities. Finally, the Court recognizes the significance of particular historical events usually ignored in the region's historiography concerning the Afro-descendant population. As this chapter will demonstrate, the Constitutional Court is the first guardian of the multicultural regime through a color-blind politics of recognition through what I call the *legal fetishism of ethnicity* as an interpretative framework that protects cultural differences to secure the model of differentiated citizenship.

This chapter proceeds as follows: First, I illustrate the connections between critical race theory and critical legal studies to approach Constitutional Court's rulings. Then, I review the Court's jurisprudence on racial discrimination between 1996 and 2017 to describe the nature of the cases that this corporation examines. Later, I scrutinize the different interpretations of the racial incident by all the actors that participated in Heiler's case. Finally, I discuss how the Constitutional Court produces, interprets, and talks about race, racism, and skin color.

### **Critical Race Theory Perspective for the Analysis of Constitutional Court Rulings**

This chapter does not survey the internal dynamics of the Colombian legal system nor provide a technical analysis of the legal doctrine on racial discrimination. The legal system is the independent variable (Gómez 2010) that I use to examine how different actors "talk" about race, ethnicity, and racial discrimination in legal cases. I subscribe some of the basic tenets of Critical Race Theory (CRT) proposed by Delgado and Stefancic (2017) that are related to: a) understanding racism as "the usual way society does business, the common, everyday experience of most people of color" (Delgado and Stefancic 2017: 7) so, it tends to be socially and institutionally denied or naturalized as an usual experience; b) assuming the "interest convergence" dilemma or "material determinism" to explain how some institutional decisions that may seem progressive are not intended to benefit Afro-descendant communities but to protect specific interests of those who benefit from racism (Bell 1980; Ladson-Billings 1998; Delgado and Stefancic 2012) defining race as a sociohistorical construct (Winant 2004; Bonilla-Silva 1997; Hering 2006), having both a discursive expression and a material dimension that reproduces social disparities and hierarchies; and d) incorporating the notion of

intersectionality insofar as “[e]veryone has potentially conflicting, overlapping identities, loyalties, and allegiances” (Delgado and Stefancic 2017: 9).

Crenshaw (2011: 126) argues that CRT “is not so much an intellectual unit filled with natural stuff -theories, themes, practices, and the like- but one that is dynamically constituted by a series of contestations and convergences about the ways that racial power is understood and articulated in the post-civil rights era.” Among many other aspects, CRT challenges the liberal vision of race reforms to the extent that it unsuccessfully addresses the institutional, structural, and ideological dimensions of racial hierarchy, focusing instead on discourses around bias and colorblindness (Crenshaw 2011). As Stefancic and Delgado (2007: 138) put it: “critical race theory writers are discontent with incremental, color-blind liberalism as a cure for the nation’s racial ills because it has only served to sidestep the major issues.”

Critical legal scholars contend that race and racial domination are exercised, constructed, and represented through legal mechanisms whereby law shapes and is shaped by race relations (Crenshaw 1995; Gómez 2010; López 2006). Research on the role of tribunals addressing racial issues highlights how corporations like the Supreme Court in the United States have historically protected the country’s racial and social order that devaluates blacks and places whites in a superior position. This literature focuses primarily on how the Supreme Court uses the anti-discrimination doctrine to legitimize racial discrimination (Freeman 1977) and its colorblindness as a strategy to go beyond race to protect white privilege (Siegel 2000; Trucios-Haynes & Powell 2007; Powell 2008; Crenshaw 1998, 2019).

Scholars analyzing the Colombian Constitutional Court have recently examined racial discrimination and its intersection with gender-based discrimination and forced displacement due to the armed conflict (Meertens 2008). Others point to the law as a *discursive apparatus* that contributes to the reproduction of black people's subordination in the country (González 2010) or address the legal conceptualization of ethnicity (Ng'weno 2007). The literature analyzes Rulings T-422/1996, T-1090/2005, and T-375/2006<sup>49</sup> (Meertens 2007; González 2010; Ng'weno 2007). Meertens (2007) has noted the absence of analysis, by constitutional judges, about how racism has a gender dimension that deepens some discriminatory practices articulated with the armed conflict and forced displacement. She proposes the development of intersectional analysis of everyday routines that articulates race, gender, and forced displacement. González (2010) has identified how, by considering race as a suspect category, the constitutional jurisprudence embraces color-blind multiculturalism that may have a similar effect to that of the ideology of mestizaje by making invisible racial issues. He contends that "the color blindness raised by constitutional judges in some of their rulings eradicates racial discussions, just as mestizaje did during the nineteenth century" (González 2010: 719). Ng'weno (2007) studies the legal distinction between ethnic and racial rights and shows how the Court has contradictory ideas about race and ethnicity "to integrate marginalized groups while retaining cultural specificity" (Ng'weno 2007: 431). She concludes that while racial groups are not eligible for different legal treatment, ethnic groups are entitled to have separate legislation to claim particularly land rights.

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<sup>49</sup> See Appendix D.

Extending the diverse literature on race-related talks (Bonilla-Silva 2006; Alegria 2014; Nelson 2020; Appiah, Eveland, Bullock, & Coduto 2021), I approach legal texts as discursive units where the Constitutional Court, and other actors, get involved in an institutional race talk to intervene, interpret, and decide over particular cases of racial discrimination. Some scholars recognize that decision-makers legislate ethnicity while conceptualizing race (Ng'weno 2007); however, in Latin America, existing literature offers no specific critical and comprehensive analysis concerning the different ways in which courts and other actors “talk” about race and racism when interpreting court cases involving racial issues. It is worth scrutinizing whether the Constitutional Court has been consistent in solving the role that race, ethnicity, and skin color play in protecting the principle of non-discrimination or if, on the contrary, there are contradictory discourses in its analytical framework. Court rulings contribute to what critical race theorists define as legal storytelling (Delgado and Stefancic 2007). They construct the social facts that we perceive as reality (González 2006), constituting legal discursive artifacts that account for the contingent meaning assigned to different categories of differentiation and power. They create social legitimacy concerning the state intervention on race relations and racial conflicts as a rational and neutral institution part of the judicial system. This chapter is about the discursive strategies utilized by members of the Constitutional Court to protect black people from racial discrimination in an institutional context that embraces multicultural discourses and the legal protection of cultural diversity.

### **The Constitutional Court's Jurisprudence on Racial Discrimination: An Overview**

The Constitutional Court is the judicial entity responsible for ensuring the integrity and sovereignty of Colombia's 1991 Political Constitution (Col. Pol. Const. art.

24). It is considered one of the more progressive corporations in Latin America, even having for some scholars an emancipatory potential (Uprimny and Garcia-Villegas 2004). Members of the Court (nine in total), who have been historically white men, are selected by the Senate from lists of three candidates submitted by the President, the Supreme Court, and the Council of State (Col. Pol. Const. art. 239). Some of the Constitutional Court functions are associated with abstract constitutionality control and the evaluation of ordinary judicial decisions related to actions of protection of constitutional rights (*acción de tutela*). In both cases, the Constitutional Court should respond to constitutional citizens' actions in two different types of rulings. In the first type (C-cases ruling), any citizen may request the Court to declare the unconstitutionality of a law or decree or part of them. The Court decides whether or not the demanded norm conforms to the Political Constitution. Citizens have the power to participate in defending or challenging the constitutional interpretation of the norm under revision. In socially controversial topics such as abortion, the Constitutional Court received thousands of citizen interventions for or against the abortion penalty law (Maldonado 2014).

In the second type (T-cases rulings), citizens have the right to claim before judges the protection of their fundamental constitutional rights when these are violated or threatened by the action or omission of any public authority, organization, or institution. In the hypothetical case the first and second instance judges decide that there is no violation of any fundamental right, citizens may appeal such decision and require the Constitutional Court, as the superior judicial entity within the Colombian state, to evaluate the judges' decision. Independently and autonomously, the Court decides which cases will be examined. To evaluate ordinary judicial decisions, the Court may invite

public entities, private organizations, and experts (Decree 2067 of 1991) to provide their opinion on relevant aspects for the elaboration of the ruling.<sup>50</sup> In this chapter, I study Ruling T-691 of 2012 (T-case ruling) and other judgments of the Colombian Constitutional Court to discuss the racial and ethnic discourses adopted by this corporation.

Before and after the revision of Heiler's case, the Constitutional Court issued several rulings addressing different topics related to the Afro-Colombian population. This group of decisions involves discussions about a) the right to collective territories<sup>51</sup>; b) prior consultation<sup>52</sup>; c) ethnic communities' rights to free determination and autonomy<sup>53</sup>, and d) the action of unconstitutionality against the use of the expression "Comunidades Negras"<sup>54</sup> (Black Communities). However, I pay particular attention to the Constitutional Court's jurisprudence related to racial discrimination in this section.

Five years after enacting the 1991 Political Constitution, in the Ruling T-422 of 1996, the Constitutional Court addressed what some black leaders define as the first case of racial discrimination reaching tribunals<sup>55</sup>. The plaintiff, a member of the black

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<sup>50</sup> In general, T-cases rulings are structured in four parts: i) Background; ii) Considerations and Fundamentals; iii) Decision; and iv) Dissenting Opinions. In the first part of the ruling, the Constitutional Court introduces the facts, the arguments and requirements of the plaintiff, summarizes the judicial decisions subject to revision (First and Second-Instance Judges' decisions), and specifies the natural and legal persons who would participate in the case by request of the Review Chamber. In the second part, the Court discusses the legal competence to review the case and extensively analyzes and solves the legal problems and tensions that the case embraces, including the constitutional principles and jurisprudence applied to the legal analysis. The Court also establishes the set of orders that emerge from the analysis of the case and that are related to the plaintiff's petitions. Finally, the Constitutional Court presents the final decisions based on the previous section.

<sup>51</sup> Constitutional Court, Ruling T-955 of 2003, Reporting Judge: Alvaro Tafur Galvis.

<sup>52</sup> Constitutional Court, Ruling T-1045A de 2010, Reporting Judge: Nilson Pinilla Pinilla; Constitutional Court, Ruling T-366 of 2011, Reporting Judge: Luis Ernesto Vargas Silva; Constitutional Court, Ruling T-576 of 2014, Reporting Judge: Luis Ernesto Vargas Silva.

<sup>53</sup> Constitutional Court, Ruling T-823 of 2012, Reporting Judge: Jorge Ignacio Pretelt Chaljub.

<sup>54</sup> Constitutional Court, Ruling C-253 of 2013, Reporting Judge: Mauricio González Cuervo.

<sup>55</sup> In an interview with the director of the National Organization *Cimarrón*, Juan de Dios Mosquera, he highlighted the fact that it was a local leader of this organization who filed the *tutela* action that led to the

organization *Cimarrón*, requested the contribution of a member of the black communities in the District Board of Education of the city of Santa Marta. After several months, emerged divided institutional opinions on the subject. On the one hand, the district authority on educational matters told the plaintiff that, unlike Indigenous communities, “there are no historical records in the city that black communities live there,” accordingly they could not have a seat in the Board of Education. Another local office on human rights, on the other hand, verified that black communities were located in some neighborhoods of the city and were involved in different informal sectors of the economy. The first-instance judge refused the *tutela* action arguing that the presence of black people in some neighborhoods does not imply the existence of a community with cultural traits given their high levels of integration to the dominant community life of mestizo groups. In the appeals process, the Labor Chamber of the Supreme Court of Justice supported the first-instance decision. It specified that the *tutela* action was not the appropriate mechanism to protect the constitutional rights of judicial persons (National Organization *Cimarrón*). Finally, the Constitutional Court revised the case. This corporation decided to preserve the right to equality of the plaintiff and the black population and ordered the city mayor to appoint a representative autonomously selected by the black communities. According to the Court, the existence of a specific “spatial base,” or a “socioeconomic physical-unit,” or a legally constituted association, are not persistent elements to identify the presence of a community in a territory. The Court considered that, in this particular case, the constitutional protection is not given in function of the collective occupation of ancestral territory, as it is stipulated by Law 70 of

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Constitutional Court’s ruling T-422 of 1996, constituting the first case of racial discrimination revised by this corporation.

1993, but as a result of the recognition of a context of social marginalization that systematically affects black people (Constitutional Court, Ruling T-422 of 1996, Reporting Judge: Eduardo Cifuentes Muñoz). Ng'weno (2007) contends that in this particular ruling, the Constitutional Court does not protect black people based on ethnicity (pure races do not exist and no spatial differentiation is needed) but because of their social marginalization and due to black people could “benefit from general protection measures” (Ng'weno 2007: 430).

The Constitutional Court's ruling T-1090 of 2005 examines a case involving racial discrimination when accessing a public establishment. During the Christmas celebration of 2004, two nightclubs in the city of Cartagena denied entry to two black sisters because of their skin color. One of the sisters filed a *tutela* action against the two nightclubs claiming that they violated her fundamental right to equality. The document describes that one of the doormen told them that “our white and blonde friends were allowed to enter,” but not the two young black women. The other security guard admitted that “the owners of the establishment forbid us to let people of your color enter unless they are people who have a lot of recognition or a lot of money.” (Constitutional Court, Ruling T-1090 of 2005, Reporting Judge: Clara Inés Vargas Hernández). The Court decided to protect the plaintiff's fundamental rights to equality, free development of personality, honor, and human dignity, and suggested both discotheques “to refrain from preventing the entry of any person [...] because of their race.”<sup>56</sup> The Court also ordered the Ombudsman's Office to organize a workshop that addressed issues related to human

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<sup>56</sup> While the second instance judge directly ordered the two-night clubs “to refrain from preventing the entry of persons... because of their skin-color”, the Constitutional Court rephrase the statement including the notion of *race* instead of *skin-color*.

rights, the roots of Afro-Colombian communities, the importance of cultural diversity, and the rights of ethnic communities. The legal representatives, partners, and employees of both nightclubs should participate in the formative program. The corporation also demanded the Ombudsman's Office, with the support of local authorities, to verify that in the future discriminatory practices would not be repeated in both nightclubs. Finally, the Court ordered the indemnification for the moral damages caused by the pattern of discrimination and called upon Congress to process a bill aimed at punishing "practices or behaviors of racial segregation" according to the principles of the International Convention on the Elimination of All Forms of Racial Discrimination. (Constitutional Court, Ruling T-1090 of 2005, Reporting Judge Clara: Inés Vargas Hernández).<sup>57</sup> Meertens (2008) argues that this ruling constitutes the beginning of the Constitutional Court's jurisprudence on the matter of racial discrimination that recognizes, for the first time, a manifestation of everyday racism that is systematic, historical, socially reproduced, and associated with skin color (Meertens 2008). In a critical look at the ruling, Meertens contends that the Court did not make any substantial reference to the fact that the person who was racially discriminated against was also a black woman.

Just four months after the constitutional revision of the previous case, which is considered by the Constitutional Court one of the most substantial rulings on racism<sup>58</sup>, in Ruling T-131 of 2006, the corporation reviewed another case of racial discrimination that took place in the same two nightclubs from the city of Cartagena. As in the earlier ruling,

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<sup>57</sup> The two sisters also filed a civil suit in which each of the two nightclubs were obliged to pay, after a long process, 50 million colombian pesos (more than 20 thousands dollars each). The same night they were notified of the judicial decision, one of the sister received threatening telephone calls by a man claiming that "she was not going to be alive to receive the money." (Redaccion El Tiempo 2009). Both nightclubs declared bankruptcy.

<sup>58</sup> See Ruling T-015 of 2015.

the security guards expressed identical arguments in denying entry to a black woman originally from Cali, who worked in a multinational company based in Houston. (Constitutional Court, Ruling T-131 of 2006, Reporting Judge: Alfredo Beltrán Sierra). In the ruling, the Constitutional Court does not provide any critical analysis of the non-compliance by the two nightclubs regarding the orders issued in the previous sentence. The corporation decided to protect the plaintiff's fundamental rights to equality and human dignity and warned the legal representatives of both nightclubs to refrain from restricting people's access because of their race. The Court sent copies of the legal process to the Office of the Inspector General, the Ombudsman's Office, and the Mayor's Office of the Tourist and Cultural District of Cartagena de Indias to adopt the necessary measures to prevent racial discrimination in both nightclubs.<sup>59</sup>

The Constitutional Court also analyzes two cases on Affirmative Actions in the field of education. Rulings T-375 of 2006 and T-586 of 2007 review *tutela* actions where two universities denied special admission to self-identified Afro-descendant women. In the first case, Ruling T-375 of 2006, the University of Magdalena<sup>60</sup> denied an applicant the special quota admission for Afro-Colombians, arguing that she was not a black woman given her light complexion. The Court examined whether or not being rejected from the medical school of a self-identified Afro-descendant woman with a lighter skin tone, under the quota system for Afro-Colombians, constituted a violation of the right to equality. This corporation maintained that "talking about the protection of the black community, exclusively [...] on the basis of its skin color, is a discriminatory act"

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<sup>59</sup> There were also other cases of racial discrimination in three nightclubs in the city of Bogota that did not allow the entry to six Afro-descendants. The Supreme Court of Justice declared that the three bars were involved in acts of racial discrimination (Observatory on Racial Discrimination et al. 2005).

<sup>60</sup> Located in the city of Santa Marta in the Colombian Caribbean coast.

because the consciousness of belonging to such a community is more relevant. This corporation decided to protect the plaintiff's fundamental rights to equality and education and ordered the university to grant the applicant a place in the university's medical program. It also warned the institution not to use the physiognomic criterion as a means of determining whether or not an applicant belongs to the Afro-Colombian community (Constitutional Court, Ruling T-375 of 2006, Reporting Judge: Marco Gerardo Monroy Cabra).

In the second case, Ruling T-586 of 2007, the plaintiff filed a *tutela* action against the Academic Secretary of the Universidad of Tolima<sup>61</sup>, arguing that the university did not grant her admission to the business administration program through the quota system for ethnic minorities. She considered that the university violated her fundamental rights to education, equality, due process, and free development of personality. As in the previous case, the academic institution argued that she was not a black woman, not because of her skin color<sup>62</sup>, but because Indigenous and Afro-Colombians applicants should have graduated from high schools in the same geographical areas where the communities are located. The lower court ruling decided to deny the protection of the plaintiff's fundamental rights because she did not demonstrate her belonging to the black communities. On the contrary, the Constitutional Court pointed out that the "existence of an Afro-descendant community does not depend on the location of its members in a specific area of the territory." After revising this judicial decision, the Constitutional Court ordered the university to immediately assign the plaintiff an "ethnic minority

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<sup>61</sup> Located on the central mountain range of the Colombian Andes.

<sup>62</sup> According to the Court, the applicant's physical appearance defines her as a woman who is part of the Afro-Colombian community.

quota” if that was still her desire (Constitutional Court, Ruling T-586 of 2007, Reporting Judge: Nilson Pinilla Pinilla).

Six years later, in the Ruling T-366 of 2013, after Heiler’s case, the Constitutional Court examined a case of racial discrimination in Medellin where a black woman was not permitted access to the ICETEX<sup>63</sup> while she was trying to carry out a procedure in this institution. Though the Institute argued that the security guards denied entry to the student because she participated in a demonstration at the main front door of the building, the student clearly stated that she was racially discriminated against. The Constitutional Court applied to this case the criteria utilized in Ruling T-691 of 2012 (Heiler’s case) to identify discriminatory acts based on race and racist stereotypes: i) power relationship between the discriminated person and the discriminating agent; ii) social environment where the person was discriminated against; iii) the physical space where the discriminatory act takes place; iv) the continuity and reiteration of the discriminatory act. The Court demonstrated that the plaintiff was racially discriminated against by the ICETEX’s officials and decided to protect her fundamentals rights to equality, good name, and habeas data. The Court also ordered the ICETEX to write a letter apologizing for its “improper act,” to facilitate in the future the peaceful exercise of the right to protest and, to “refrain from engaging in discriminatory practices of any kind.” (Constitutional Court, Ruling T-366 of 2013, Reporting Judge: Alberto Rojas Rios).

Finally, in the Ruling T-572 of 2017, a black worker from A.R. Los Restrepos S.A.S. issued a *tutela* action against the industrial company he worked for and asked the Ministry of Labor to protect his fundamentals rights to equality, work in decent

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<sup>63</sup> ICETEX is the Colombian Institute for Student Loans and Technical Studies Abroad, which offers forgivable loans to Indigenous and Afro-Colombian students.

conditions, and due process. The plaintiff was permanently a victim of racist, stereotyped and discriminatory language against his humanity as a black man. The complainant asked the judge, concerning the company, to apply all the decisions from Ruling T-1090 of 2005 and the symbolic act proposed in Ruling T-691 of 2012 to generate a scenario of reconciliation between the plaintiff and the company. Regarding the Ministry of Labor, the plaintiff petitioned the judge to require the formulation and implementation of a national policy that promotes equal employment opportunities, including addressing the complaints about racial discrimination. The Constitutional Court protected the plaintiff's fundamental rights to human dignity, equality, non-discrimination, and due process. The corporation also ordered the Ministry of Labor to create a specialized commission to elaborate a document that analyzes the implications of ignoring the principle of non-discrimination in the workplace and recommends different strategies to avoid this behavior. Based on this document, the Ministry of Labor should issue a memo to all the officials that established "the guidelines, recommendations, and eventually the mechanisms" to address cases of racial discrimination integrally. The Court also compelled the company, as it did with the legal representatives of the nightclubs, to develop a workshop about the protection of the principle of non-racial discrimination in the workplace. An essential aspect of this case is that the Constitutional Court revised it after enacting the Law 1482 of 2011 (Anti-Discrimination Law). Surprisingly, while the plaintiff presented the case before the Office of the Prosecutor, it did not have the precise form to classify it as an act of racial discrimination according to the law's definition. Therefore, it was legally processed as a "crime against moral integrity." Despite this fact,

the Court did not make any suggestion to the Office of the Prosecutor regarding the formal reception of complaints about racial discrimination.

In the following sections, I focus on Ruling T-691 of 2012. I first describe how different actors interpret the case and create discourses and analytic tools that attempt to persuade both the legal analysis and the judicial decision of the Constitutional Court. Then, I focus on the different frameworks utilized by the Constitutional Court to interpret and “talk” about race and racial discrimination.

### **Ruling T-691 of 2012: Rulings as Scenarios of Racial Contestation**

Unlike the first cases of racial discrimination, in this ruling, the Constitutional Court asked the intervention of a variety of actors to give an opinion on two particular aspects: the legal problem and the compensatory measures concerning discriminatory discourses in a university context. The participation of various actors suggests that the Court recognizes the existence of several analytical frameworks, experiences, and motivations to analyze this case. These multiple interpretations allow us to survey the various ways in which race, ethnicity, and racism are socially, analytically, and legally defined while responding to the requirements of the Court.

Apart from the responses of the professor involved in the case and the Provost of the FJCDU, the Constitutional Court requested the participation of the Observatory on Racial Discrimination of the University of Los Andes (ORD); the Center for the Study of Law, Justice, and Society Studies Center (DeJusticia); the RedAfro Corporation; the Conference of Afro-Colombian Organizations; the Center for Justice and Action against Racism; the National Organization Cimarrón; Law Schools of the University of Valle and

the National University of Colombia; and the Colombian Association of Universities.<sup>64</sup> In general terms, this group of actors could be classified as follows: a) main actors who were directly involved in the case; b) legal experts belonging to projects or study centers (*think tanks*) that have addressed the analysis of racism and racial discrimination in the country; c) experts of grassroots Afro-Colombian organizations who could offer a situated knowledge of the dynamics of anti-black racism and the remedial measures to face racial discrimination; e) legal experts belonging to universities or academic associations that could provide a legal and constitutional analysis of the case. I identified two common ways these actors discussed and “read” Heiler’s case while responding to the main aspects requested by the Constitutional Court. While one group clearly described the student's situation as a racially motivated incident, the other group just minimized or denied that the incident involved a racist dimension.

### **Minimizing/Denying racism and racial discrimination**

From all the participants, the professor involved in the racist incident, the Provost of the FJCDU, and the executive director of ASCUN, denied that Heiler faced a racially discriminatory act. In their accounts, the expression *trato negrero* did not have any racist implication or assumed that the term was not relevant to evaluate a situation as racist. For them, it was more pertinent to protect the professor and the institution than the right not to be discriminated against. The naturalization of racist expressions or the minimization/denial of racist incidents was the typical pattern for this group of actors. Some of them even denied the racial dimension of the case while using denigrating expressions that still undermined the student’s dignity.

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<sup>64</sup> The University of Valle Law School and the Conference of Afro-Colombian Organizations did not respond to the Court request.

The responses presented by both the professor and the Provost of the FJCDU aimed at demonstrating the nonexistence of any discriminatory act by suggesting that the student wanted to take advantage of the situation to overcome his academic failure. According to the professor, “the problem lies in the student himself who has neglected his academic duties and in his belief that he must be subject to preferences for belonging to the Afro-descendant communities or for having received distinctions in the past” (Response Letter to the Constitutional Court, Professor, March 29th, 2011; T-2868287, Notebook # 2, Folio 74). After pointing out that the student’s narrative was “spurious, tendentious and mendacious,” the professor concluded that the language he used in the classroom had an educational value and could not be defined as racist. Then, using a racial innocence logic (Hernández 2019), he indignantly added that “there were [in the classroom] forewarned people who believe that the white community is forbidden to use the word black or any of its equivalents.” The professor also contended that the student acted improperly for having defamed him before the university’s authorities. Thus, he requested the Court to refer the case to other state institutions so they could open investigations against the student for his allegedly false statements (Response Letter to the Constitutional Court, Professor, March 29th, 2011; T-2868287, Notebook #2, Folios 72-86).

In a similar vein, the Provost of the FJCDU claimed that this educational institution prohibits all forms of discrimination based on sex, national origin, language, religion, and political or religious opinion. He mentioned the different programs offered by the university in favor of Afro-descendant students. Based on the testimonies of a group of students, the Provost stated that there was never a discriminatory racial

discourse in the classroom and that the use of the word *negrero* did not have any racial implication. The Provost maintained that the professor had been recognized in the university for his “good behavior, good morals and sound habits” and therefore asked the Court not to impose any sanction since there was no violation of any fundamental right. (Response Letter to the Constitutional Court, Provost of the FJCDU, March 29th, 2011; T-2868287, Notebook # 2, Folios 87-126).

Finally, the executive director of the Colombian Association of Universities, ASCUN (by its acronyms in Spanish), was the only external participant who claimed that the university implemented all the corresponding actions. The director argued that there was no violation of the right to equality or education, given that the professor’s comment was “marginal” and its “interpretation and scope should be defined within the institution.” According to ASCUN, an organization that associates 88 universities and educational institutions of the country, the presence of Afro-Colombian students in the FJCDU constituted an expression of respect towards the constitutional norms and the institutional will to solve these types of incidents (Response Letter to the Constitutional Court, Colombian Association of Universities, April 1st, 2011 T-2868287, Notebook # 2, Folios 145-159).

### **Towards a Critical Analysis of Racism: Black Organizations and Think Tanks**

On the contrary, the rest of the actors find it reasonable to argue and conclude that the professor’s discourse was racist. In some of their interventions, they used the notions of race, color, ethnicity, and culture interchangeably to examine the case and evaluate the character of the discriminatory act. In other words, for this group of actors, these categories reflected and reproduced group differences that may lead to the violation of

the principle of non-discrimination and constituted possible factors of constitutional protection. Few participants contributed to the case with a historical perspective about the institution of slavery and structural racism as an analytical strategy to situate, from a radical perspective, the analysis of racist discourses in educational institutions.

The Constitutional Court invited different black organizations to participate in the analysis of the case. In the intervention of the RedAfro Corporation, a black organization that seeks the integral and sustainable development of Afro-descendant communities in Colombia<sup>65</sup>, they discussed how acts of racism generate human behaviors that violate fundamental rights and produce “unlawful damage.” This organization noted that the university should have exercised greater control to protect Heiler’s fundamental rights. The university could have used the constitutional non-discrimination principle and the Statute of the Faculty that prohibits acts of racial, political, religious, and other forms of discrimination (Response Letter to the Constitutional Court, RedAfro, April 1st, 2011; T-2868287, Notebook # 2, Folios 139-144). The National Organization *Cimarrón*<sup>66</sup> and the Center for Justice and Action against Racism sent a joint response letter. *Cimarrón* and the Center defined racial discrimination as a human rights violation and racism as an ideology that emerged during the institution of slavery that promoted the racial superiority of Europeans over Africans.<sup>67</sup> They stated that this ideology generates prejudices over people of Afro-descendant that are daily reproduced through language, the media, education, religion, and jokes, among other dimensions, arguing that the use of

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<sup>65</sup> See: <http://www.redafro.org/>.

<sup>66</sup> Cimarrón “is the national association that promotes social organization, ethno-education, ethnic rights and citizen and political participation of the Afro-Colombian population for the real and effective exercise of their human rights and the elimination of racism and forms of racial discrimination that affect them within the nation and in all spheres of Colombian society” (Response Letter to the Constitutional Court, Cimarrón, March 28<sup>th</sup>, 2011; T-2868287, Notebook # 2, Folio 56).

<sup>67</sup> These were the only organizations that referred to the phenomenon of slavery in the analysis of racism.

the racist expression *negro* (black) to refer to people of African descent, should be contested challenge “a term that is inherited from slavery.” The response letter demonstrated the incompatibility between the content of the class and the example used by the professor. They argued that the university did not have the institutional mechanisms to protect the student’s right to non-discrimination. Both organizations considered that the right to academic freedom is not absolute, so it should not facilitate reproducing discourses of racial superiority (Response Letter to the Constitutional Court, National Organization Cimarrón, March 28th, 2011; T-2868287, Notebook # 2, Folios 56-71).<sup>68</sup>

The independent think tank DeJusticia, Center for the Study of Law, Justice and Society Studies, sent a collective intervention with the Observatory on Racial Discrimination (ORD).<sup>69</sup> DeJusticia and ORD initially addressed the Court’s request by analyzing the scopes of the rights in tension: academic freedom and freedom of expression, on the one hand, and the right to equality and non-discrimination, on the other. They discussed the need for establishing the limits to freedom of expression proposing four indicators that should be considered to determine whether or not a discourse of a professor constitutes a discriminatory speech: a) the discourse emerges

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<sup>68</sup> Although the Constitutional Court did not request the participation of the Multi-Ethnic Collective Alliance, ACME (by its acronyms in Spanish), this student organization decided to send a communication to the Court that was incorporated to the case. In the document, ACME ratified Heiler’s testimony and argued that racism refers “to the discrimination suffered by an individual on the grounds of his/her ethnicity”. The Alliance maintained that this is a phenomenon that affects not only the Department of Telecommunications Engineering but the entire university. In the text, they antagonized the response letters submitted to the Constitutional Court by the Provost of the FJCDU and the College of Engineering’s Student Representative in which they refuted that Heiler faced a scenario of racial discrimination (Communication to the Constitutional Court, ACME, June 1<sup>st</sup>, 2011; T-2868287, Notebook # 3, Folio 221-250).

<sup>69</sup> This is a project constituted by the *Proceso de Comunidades Negras* (Process of Black Communities), DeJusticia and the Program on Global Justice and Human Rights at the University of Los Andes.

from a scenario in which the professor represents a figure of authority; b) the discourse is not relevant to the topic in question; c) the discourse deepens racial segregation; and d) it is motivated by hate and social prejudice (Response Letter to the Constitutional Court, DeJusticia and ORD, April 25th, 2011; T-2868287, Notebook # 3, Folios 175-193). By applying these indicators to Heiler's case, they concluded that the expressions used by the professor in the classroom corresponded to a discriminatory discourse that produced a violation of the right not to be discriminated against. In an attempt to critically analyze the phenomenon of racial discrimination in the country, DeJusticia and ORD described the tensions between the legal advances in favor of the black communities and the lack of interest of the Colombian state to face racial discrimination integrally. The document also referred to the nonexistence of an anti-discrimination law at that time, the absence of robust studies on the impact of racial discrimination in the country, and the denial of racism through the myth of the *mestiza* nation.

Similarly, the National University of Colombia Law School addressed the tension suggested by the Court between three constitutional principles: academic freedom, university autonomy, and the prohibition of racial discrimination, contending that the first two principles do not constitute absolute rights and cannot stand above the protection of fundamental rights. The Law School stated that the second-instance judge's decision did not focus on the core issue of the case, which was the race-based discriminatory act in a classroom, but on a minor aspect associated with Heiler's academic performance. Thus, the Law School suggested that the Court discuss how to remedy the damage caused by discriminatory behaviors that violate constitutional principles and persist over time. This academic institution considered that the existence of a "racist system of segregation" had

to be “detected,” like the “system of racial discrimination” that took place at the FJCDU. For them: “The practice of discrimination carried out by professors affects not only fundamental rights but also ignores the existence of Afro-Colombians as individuals and collectives that make up the Colombian multicultural society” (Response Letter to the Constitutional Court, National University of Colombia Law School, April 1st, 2011; T-2868287, Notebook # 2, Folio 154).

### **Racial Discourses of Colombia’s Constitutional Court**

In Ruling T-691 of 2012, the Constitutional Court recognized three crucial elements: first, that everyone, especially those persons who are subject to special constitutional protection, has the right that whoever has teaching authority does not reproduce racist stereotypes in class; second, that the black student was subjected to a scenario of discrimination; and third, that the university ignored the rights of protection to non-discrimination and due process of the black student. After an extensive analysis, the Constitutional Court decided to protect the rights to equality, non-discrimination, education, due process, and the student's dignity. The Court also ordered the university to develop a symbolic act to recognize the Afro-Colombian community's contributions and adopt the appropriate and necessary measures to avoid future scenarios of discrimination in general, and due racism in particular, among the different members of the university.

While race-related talks are examined by researchers through interactional processes in focus groups (Alegria 2014) or interviews (Bonilla-Silva 2006), in this section, I approach legal texts as discursive units that intervene, interpret, and decide over particular cases of racial discrimination. Thus, it is not a “talk” that voices a personal sentiment that the Constitutional Court has regarding a case of racial discrimination, but a

specialized and institutional racial discourse that overcomes a common-sense understanding of race and racism. I coded and analyzed the different definitions of race, skin color, ethnicity, and racism, as well as the legal, historical, and analytical frameworks that situated the protection of the rights of black communities. I identify three different ways the Constitutional Court discussed and framed its analysis of a racially motivated incident. First, I selected passages from Ruling T-691 of 2012 and other rulings<sup>70</sup> illustrative of how the Court defines race as a suspect category that could be used for compensatory reasons in particular situations. Second, there were also discourses concerning what I call the *ambiguity of skin color* to designate that skin color is an inconclusive category to define who belongs to the Black communities and protect black people's rights. Third, I found that the Court implemented some methodological avenues that somehow contributed to making visible epistemic racism. In the following sections, I discuss each one of them.

### **Suspect Categories and the “Racial Factor”**

The use of the notion of suspect category dates back to the 14th Amendment (Crenshaw 1995), particularly the Clause of Equal Protection, ratified in 1868 and aimed at preventing discrimination practices based on race. More than a century later, the American Convention on Human Rights, also known as the “Pact of San Jose,” established in 1969 a set of prohibited grounds of discrimination (Dulitzky 2007), among which are race, color, sex, language, religion, political opinion, national or social origin, economic status, birth, or any other social condition. Scholars and an extensive international jurisprudence have defined these grounds of discrimination as suspect

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<sup>70</sup> Most of them cited in Ruling T-691 of 2012, as part of the existing jurisprudence on the matter.

categories. Colombia's Constitutional Court embraces this tradition throughout its constitutional jurisprudence by following article 13 of the 1991 Political Constitution<sup>71</sup> and the jurisprudence of the Supreme Court of Justice of the United States.<sup>72</sup> The Court refers to suspect classifications based on the next interpretative model<sup>73</sup>:

i) [suspect categories] are based on permanent features of people, from which they cannot prescind by their own at the risk of losing their identity; ii) those characteristics have been subjected, historically, to patterns of cultural value that tend to underestimate them; and iii) they do not constitute, *per se*, criteria from which it is possible to make a distribution, or rational and equitable allocation of properties, rights or social charges (Constitutional Court, Ruling T-481 of 1998, Reporting Judge: Alejandro Martínez Caballero).

The first criterion comprehends immutable physical characteristics of a person and the idea that some individual traits derive from an “accident of nature.” The Court refers particularly to markers or physical signs that mediate the production of stereotypes and social expectations. The second aspect is related to the prevalence of hegemonic cultural values that determine the parameters, regularly through binary categories, to evaluate the knowledge, epistemologies, memories, aesthetics, and bodies of those who

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<sup>71</sup> “All persons are born free and equal before the law, given equal protection and treatment by the authorities and shall enjoy the same rights, freedoms and opportunities without any discrimination on grounds of sex, race, national or family origin, language, religion, political or philosophical opinion. The State shall promote conditions to make equality real and effective and shall adopt measures in favor of discriminated or marginalized groups. The State shall especially protect those who for their economic, physical or mental condition, are in obviously vulnerable circumstances and punish any abuse or ill-treatment perpetrated against them.” (Col. Pol. Const. art. 13). In cases where there are acts of discrimination on the basis of these suspect classifications, *tutela* becomes the best mechanism that citizens have for the protection of their fundamental rights.

<sup>72</sup> Ruling C-481 of 1998 cites the following cases: *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In fact, in the United States,

<sup>73</sup> If we track the use of the notion of suspect categories in the Constitutional Court's jurisprudence, we find that it goes back to Ruling C-481 of 1998 which examines a partial claim of unconstitutionality of the Decree 2277 of 1979, given that sexual orientation (the ruling use the word “homosexuality”) was considered as a cause of school teachers misbehavior. By considering sexual orientation as a suspect category, the Constitutional Court argued that in the Colombian constitutional order it was not relevant to know whether sexual orientation was biologically determined or an individual option since in both cases the Political Constitution provides the same level of protection.<sup>73</sup>

are socially defined as subalterns. Lastly, the third feature suggests that suspect categories are not the primary criteria for redistributing services, properties, or rights. For this reason, suspect categories imply strict scrutiny of any case of discrimination in order not to violate the principle of non-discrimination and preserve the rule of law in democratic systems.

The Court contends that in some situations that involve positive discrimination (affirmative actions or reparations), using specific suspect categories of differentiation constitutes a legitimate means to provide special protection to some groups when they have an explicit “compensatory purpose.” According to the Court, only in those specific situations, it is possible to perceive race as a principle of classification to protect the rights of black communities that have been historically denied:

the use of race as a criterion to make a positive differentiation in terms of access to education, far from transgressing the Constitution, is consistent with it insofar as it seeks to improve the situation of an ethnic group such as Afro-Colombian communities that have been historically treated as marginal groups, excluded from the benefits and rights of the other members of the social organization (Constitutional Court, Ruling T-586 of 2007, Reporting Judge: Nilson Pinilla Pinilla).

Although for the Constitutional Court a word (for example, *race*) could not be defined as constitutional or unconstitutional, it recognizes that race cannot currently be described as a biological category as it occurred at the end of the 18th century and the beginning of the 19<sup>th</sup> (Constitutional Court, Ruling T-586 of 2007, Reporting Judge: Nilson Pinilla Pinilla). This corporation highlights the risks of giving race an independent legal character<sup>74</sup>. In fact, in the first ruling on racial discrimination (Ruling T-422 of

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<sup>74</sup> The Court embraces a conceptual differentiation between ethnicity and race that is also associated with the individual and collective dimension of racial discrimination: “It was then explained that the concept of race is individualizable because it is a morphological issue that refers to a particular person, and that the ethnic concept, in contrast, is communitarian, because it assumes a set of individuals who share common values

1996), when discussing the criteria for the configuration of a community, the Court examines the inappropriateness of using the idea of “pure races” as a condition to identify an ethnic group:

The requirement that [a community consists of] [...]“a race without mixtures or with the least number of them,” ignores that the idea of “pure race,” apart from not being historically sustainable, cannot be decisive in the configuration of an ethnic group [...] The racial factor is only one of the elements that, together with the fundamental cultural values and other social features, allow distinguishing and individualizing an ethnic group (Constitutional Court, Ruling T-422 of 1996, Reporting Judge: Eduardo Cifuentes Muñoz).

Above, the Constitutional Court does not establish a mutually exclusive relationship between the so-called “racial factor” and culture. The “racial factor” is necessary but not a sufficient element to identify ethnic groups. However, throughout Ruling T-422 of 1996, the Court does not define the notion of “racial factor.” Nine years later, in one of the rulings on affirmative actions (Ruling T-576 of 2014), the Court explained the generation of a scenario of discrimination by an educational institution as a result of having overlooked the “racial factor,” a concept associated unambiguously with the physical features of a person and that is “only valid to determine the existence of an ethnic group when it seeks to make a measure of positive differentiation” (Constitutional Court, Ruling T-576 of 2014, Reporting Judge: Luis Ernesto Vargas Silva):

the university incurs in the act of discrimination since it ignores that the natural ethnic-genetic condition of belonging to the black race, that is, the racial factor, as physiognomically can be ascertained [...] it is also a relevant element along with fundamental cultural values and other social traits, that allow to distinguish and individualize the ethnic group called “Afro-descendant community” (Constitutional Court, Ruling T-586 of 2007, Reporting Judge: Nilson Pinilla Pinilla, emphasis added).

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and, under them, they are recognized as a diverse group. These arguments explain that ethnic rights do not address individuals but communities” (Ruling T-576 of 2014).

In the in-between of both legal interpretations, in the Ruling C-169 of 2001, the Constitutional Court revised the constitutionality of what would be later known as Act 649 of 2001, a law that establishes the unique constituency for “ethnic groups, political minorities, and Colombians living abroad.” In this ruling, it is possible to find the corporation’s contradictions concerning the use of race as a legal category. The Court stated there that the use of “race” challenges the constitutional order insofar as it imposes colonial classifications based on racial purity and obliterates the necessary protection of ethnic groups’ identities:

It should be noted, however, that the recognition of special rights to black communities is not made in terms of their “race,” since this would imply that, in a country with such a high degree of miscegenation as Colombia, there are even “pure races,” [it would imply going] back to the Colombian state at the time of the significant colonial classifications based on the different degrees of the mixture of blood, which supported an excluding caste system, something frontally incompatible with a constitutional democracy [...] Article 176 of the Constitution only refers to ethnic groups, and not to “racial” groups. (Constitutional Court, Ruling C-169 of 2001, Reporting Judge: Carlos Gaviria Diaz).

In Heilers’ case, the Court also refers to the notion of miscegenation as a sign of the impossibility of the existence of “pure races,” thus highlighting the difficulties of talking about race in the country. In sum, the Court jumps between interpretations where the definition of ethnic groups depends on the articulation of race and culture to others reasoning where race is completely denied. While in 1996 the Court argued that both the “racial factor” and culture constituted essential components in defining an ethnic group; in 2001, the corporation dismisses race to enhance the significance of identity and culture. Later, in 2007, the Court returns to the initial argument about the integration of race and culture to define an ethnic group; and finally, once again, turns back to a scenario of denial of race in Heiler’s case.

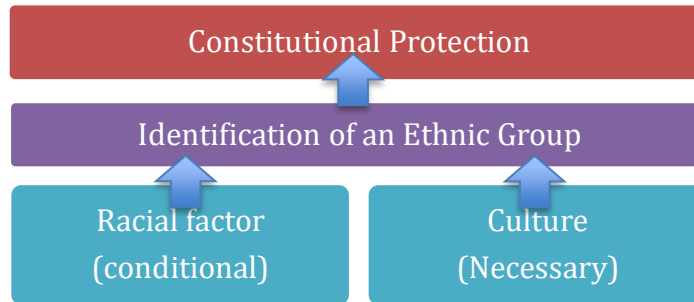


Figure 1. Criteria for legal protection according to the Constitutional Court

### **The Ambiguity of Skin-Color for the Constitutional Court**

In this section, I introduce how the Constitutional Court addresses the analysis of skin color in the definition of who belongs or not to the black communities, that is to say, regarding the role of skin color concerning the protection of fundamental rights and the allocation of goods and properties. The following quote summarizes how the Court evaluates its jurisprudence regarding race and skin color:

The constitutional jurisprudence has highlighted the fact that the Afro-Colombian population does not have a single skin color. While mentions are made of ‘black communities’ or people of ‘black race’ -although, for some people, perhaps it is an improper way of speaking in scientific and academic terms- the Constitution is multi-ethnic and multicultural. In a literal sense, the Constitution is not ‘*multiracial*’ or ‘*pluri-racial*’; on the contrary, it considers suspects of discrimination to use the ‘*race*’ criterion to classify persons or to derive legal consequences from it (emphasis in the original). (Constitutional Court, Ruling T-691 of 2012, Reporting Judge: María Victoria Calle Correa)

The Court presents here one of the arguments raised by the Afro-Colombian leader Juan de Dios Mosquera regarding the idea that afro-descendant communities have “varied, beautiful and different colors” (Constitutional Court, Ruling T-691 of 2012, Reporting Judge: María Victoria Calle Correa). This discussion, however, has several edges. On the one hand, this statement aligns with the idea that ethnic-racial categories are fluid given the skin-color variability among those who self-identify as blacks or Afro-Colombians. On the other hand, one of the consequences of this variability has to do with

the differential effects of racialization based on skin color, in which darker-skinned people are systematically penalized in numerous social fields, including health, education, occupational status, and income. The Court, however, does not examine the consequences of skin color in the living conditions of black people, in the existence of social hierarchies, and even in the construction of individual and collective identities.

According to the Court, being part of a culturally differentiated ethnic group instead of having a particular skin color is what defines the constitutional protection of black people's collective rights:

it should be clear that the collective rights of black communities in Colombia are a function of their status as an ethnic group, bearer of an identity worthy of being protected and enhanced, and not because of the color of the skin of its members. (Constitutional Court, Ruling C-169 of 2001, Reporting Judge: Carlos Gaviria Diaz)

In the International Convention on the Elimination of All Forms of Racial Discrimination, skin color is defined as a prohibited ground of discrimination, along with race and national origin. In the Constitutional Court's rulings and the Anti-discrimination Law, on the contrary, skin color is a category that requires no constitutional protection even though it is a sign of perceived racial difference (Telles and Paschel, 2012) and a permanent factor of exclusion and hierarchization. This is not, however, an isolated position of the Constitutional Court. This corporation shows the existence of an agreement among the Ministry of Interior and Justice, the Constitutional Court's jurisprudence, and domestic rules concerning the non-recognition of skin color as a definitive or a determinant component for identifying an ethnic group.

The jurisprudence of this Court, the constitutional and legal norms, and the concept of the Vice-Director of the Black Communities, Ethnic and Cultural Minorities of the Ministry of Interior and Justice, support the criterion of non-primacy of skin color as a determinant for the recognition of a subject as

belonging to an ethnic community and the protection of their rights under such quality (Judgment T-375/2006).

According to the Constitutional Court, however, using skin color as one of the markers that should be legally protected constitutes a “discriminatory act” (Constitutional Court, Ruling T-375 of 2006, Reporting Judge: Marco Gerardo Monroy Cabra). While recent studies argue that skin color is a significant explanatory factor of socioeconomic inequality among black Americans from the eighteenth century until today (Monk 2014) as well as in Latin America (Bonilla-Silva and Dietrich, 2009; Telles 2014), including Colombia (Urrea, *Viáfara*, and Viveros 2014), the Court does not recognize that skin color plays a central role in different processes of racialization, classification, and hierarchization of individuals and communities.

### **Overcoming Epistemic Racism? Afromodernities and Black People’s Agency**

This category emerges from the Constitutional Court’s attempt to recognize the significance of particular historical events related to the participation of Afro-descendants in the independence process, something that the historiography of the region usually ignores. In Ruling T-691 of 2001, this corporation integrates specialized literature to develop or strengthens its interpretations on race, ethnicity, and racism, and other topics related to Afro-Colombian history and discriminatory language. The Court builds its arguments using a system of citations and references, as academic documents usually do, including a group of authors that could be classified as follows: anthropologists<sup>75</sup>;

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<sup>75</sup> Pereachalá, Rafael (2007) *De la ideología racista. Comisión de Equidad Racial. Documento soporte argumental ponente de ley contra discriminación racial en Colombia*. Bogotá; Triana y Antorveza, Humberto (1997) *Léxico Documentado para la historia del negro en América, (Siglos XV-XIX)*. Tomo I: *Estudio preliminar*. Instituto Caro y Cuervo. Bogotá, 2006; Restrepo, Eduardo (2012) *Racismo y discriminación en Intervenciones en teoría cultural*. Universidad del Cauca. Colombia, Popayán, 2012; De Friedemann, Nina S. (1984) “Estudios de negros en la antropología colombiana: presencia e invisibilidad”; en: Jaime Arocha y Nina S. de Friedemann (eds), *Un siglo de investigación social: antropología en*

sociologists<sup>76</sup>; journalists, writers, and intellectuals<sup>77</sup>; historians<sup>78</sup>; philologists or linguistic experts<sup>79</sup>; legal experts on gender studies<sup>80</sup>; and even the Dictionary of the Royal Spanish Academy. The Court also lists a set of references of more than twenty books or articles on historical issues.

Molinarés-Hassan (2013) highlights the “education work” developed by some of the judges’ dissent opinion in Ruling SC-931/2009. In the ruling, the Constitutional Court declares itself inhibited to assume a constitutional revision of the Law of May 21st of 1851 (Slavery Abolition Law) since the law was no longer in force in the constitutional order. The Reporting Judge in Heiler’s case, Dr. Maria Victoria Calle Correa, elaborated one of this dissent’s opinions of Ruling SC-931 to account for the historical context in which the law emerged. The Judge cites one of the books of the black intellectual Manuel Zapata Olivella<sup>81</sup> to explain the material limitations of the Slavery Abolition Law, the

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*Colombia. Etno. Bogotá, 1984; De Friedemann, Nina S. & Patiño Rosselli, Carlos (1983) Lengua y sociedad en el Palenque de San Basilio. Instituto Caro y Cuervo, Pub. LXVI. Bogotá, 1983.*

<sup>76</sup> Giddens, Anthony (2009) Sociología. 6ª Ed. Alianza Editorial. España.

<sup>77</sup> Ndongo-Bidyogo, Donato (2009) Acerca de los estereotipos sobre África en Imaginar África, los estereotipos occidentales sobre África y los africanos. A. Castel y J. C. Sendín (ed). Catarata & Casa África. Madrid, 2009; Mosquera, José E. (2006) *Historia de los litigios de límites entre Antioquia y Chocó, siglos XVI-XXI*. 2006; Artel, Jorge (1940) *Yanga en Tambores en la noche*. Ministerio de Cultura. Colombia, 2010.

<sup>78</sup> Arrázola Caicedo, Roberto (1970) *Palenque, primer pueblo libre de América*. Casa Editorial, Impresión Digital. Colombia, 2003; Arciniegas, Germán (2009) *La libertad: el destino de América*. Planeta. Bogotá, 2009; Pérez Ramírez, Gustavo (2011) *Todos somos afrodescendientes*. Academia Nacional de Historia. Quito, 2011; Muñoz Rojas, Catalina (2011) Más allá del problema racial: el determinismo geográfico y las ‘dolencias sociales’. Universidad del Rosario. Bogotá, 2011.

<sup>79</sup> De Granada, Germán (1971). Un afortunado fitónimo bantú: macondo en Thesavrus, Boletín del Instituto Caro y Cuervo. Septiembre – Diciembre 1971, N° 3; Soler Castillo, Sandra (2009) “Racismo y discurso en los textos escolares”, en *Nina S. de Friedemann: cronista de disidencias y resistencias*. Jaime Arocha (Ed.). Colección CES, Universidad Nacional de Colombia. Bogotá, 2009.

<sup>80</sup> Cook, Rebecca J. & Cusack, Simone (2009) *Estereotipos de género. Perspectivas legales transnacionales*. Profamilia, 2010.

<sup>81</sup> Zapata Olivella, Manuel (1989). *Las Claves Mágicas de América*. Editorial Plaza & Janes. Bogotá.

racism that implies the exclusion of Haiti as a historic landmark, and the importance of black people's intellectual production.

Given this background, I contend that the Judge's critical perspective on historical issues has much to do with the character and arguments deployed by the Court in Heiler's case. Ruling T-691 of 2012 contextualizes historical demands for differentiated citizenship, gives voice to historically subalternized communities, and criticizes the invisibility of black and indigenous populations: a) The ruling describes the search for constitutional protection against discriminatory practices by quoting the representative of the National Indigenous Organization in the NCA, Francisco Rojas Birri. He highlighted the existence of a politics of discrimination and exclusion by the "dominant culture" that explains much of the historical violence that persists in Colombian society. The representative also considered the importance of recognizing the "hidden history" of blacks, indigenous and raizals communities who share the same patterns of silencing, violence, and resistance (Constitutional Court Ruling T-691 of 2012, Reporting Judge: María Victoria Calle Correa). b) The Corporation recognizes that school texts contribute to the distortion of historical facts and the reproduction of racists perspectives through the concealment of the institution of slavery or by presenting it as an "inevitable" fact, as well as by ignoring Afro-descendants' libertarian agency as political subjects and their influence on emancipatory processes in the region. c) The Court explicitly vindicates the voices of Afro-Colombian leaders who demand the rewriting of history in such a way that the stories and discourses that have been systematically excluded from the national memory come to light. According to this Corporation, the process of rewriting history would imply recognizing, for example, i) the possibility of a black presence in the

Americas before the European colonization; ii) the afro-descendent presence in Europe (Spain) before they were forcedly brought to the Americas; iii) black and indigenous resistance to slavery and colonialism; iv) the expansion of the transatlantic slave trade in countries like Argentina, where social imaginary deny black presence; v) that black territories are always in dispute given that historical exclusions usually imply territorial exclusions, and vi) the historical significance of the Haitian Revolution. (Constitutional Court Ruling T-691 of 2012, Reporting Judge: María Victoria Calle Correa). This last point is of particular interest to the Reporting Judge, who places the Haitian Revolution in an emblematic historical position for the region and the country:

It is necessary to highlight the example and decision that the independence revolution of the Afro population in Haiti meant for the whole continent. The spiritual and ideological importance represented by that revolution, but, at the same time, its material, real and effective importance [...] Afro-Colombian people, far from being a beneficiary of the independence struggle of the criollos, were inspirer, promoter, and architect of the feat. In addition to courage and physical force on the battlefield, they helped consolidate the concept of 'independence,' absolutely inherent in Colombian republicanism and constitutionalism (Constitutional Court Ruling, T-691 of 2012, Reporting Judge: María Victoria Calle Correa).

As such quote illustrates, the Constitutional Court does not hesitate in recognizing the subversive role of black people in the struggles for independence and in embracing the radical critical tradition of the Black Atlantic that breaks with the Eurocentric narratives that privilege the French Revolution and the American Revolutionary War as the primary sources of modern democracy.

**Seeing Like a Court: The Legal Fetishism of Ethnicity, Interest Convergence and Nonstructural Racism**

This chapter examines the contradictory and ambiguous discourses of the Constitutional Court in mediating racial conflicts and deciding over cases of racial

discrimination. Despite being the country with the largest Afro-descendant population in the Americas after the United States and Brazil, Constitutional Court's discourses on race and racism have received little attention. Some of the questions that guided this chapter have to do with how the Constitutional Court and different actors who participate in Ruling T-691 of 2012 "talk" about race, ethnicity, skin color, and racism within the multicultural constitutional framework.

This chapter has three empirical arguments that I summarize below: First, the definition of black communities as ethnic groups guides the legal analysis of the Constitutional Court to identify the subjects of differentiated citizenship. While previous research argues that "the Colombian state never institutionalized any notion of race or ethnicity through legislation, and formal citizenship was never granted or restricted based on ethnicity or race" (Paschel 2010:737), I found that in the Constitutional Court's rulings prevail the idea of becoming citizens through the notion of ethnic group and a dismissive view of racial identities. In the judgments where race is considered, it is only assumed as a criterion in the definition of an ethnic group but with no independent legal autonomy. Given its definition as a suspect classification, race is not, per se, a legal category that can be considered to protect a person's fundamental rights.

The Constitutional Court clearly defines differentiated citizenship based on ethnicity and establishes the appropriate language that black people should use to frame their demands on the state. Thus, one can argue that national legislation and Court's rulings have contributed to the social and institutional routinization of the de-racialization of the concept of citizenship, leading to what I call the *legal fetichism of ethnicity* to designate that the constitutional protection of black and indigenous communities is granted insofar

as it can be demonstrated that a victim of a racially discriminatory act belongs to an ethnic group. While the racial factor is contingent and is only used in reparative actions, culture and the sense of belonging to the community are fundamental elements. The *legal fetishism of ethnicity* brings about the instrumentalization of ethnicity as a distinctive category of group-making and rejects any political project structured around the concept of race. Thus, according to this institutional perspective, race is never understood as a “mode of constructing political communities” (Moon-Kie 2009).

Second, following CRT, I assume the idea of “interest convergence” to explain how some institutional decisions are mediated by a temporal alignment between the interests of the state and black people. This notion was introduced by critical race theorist Derrick Bell (1980) to explain how the Supreme Court’s decision on *Brown v. Board of Education* shows that civil rights triumphs result from black people and the state gaining some political benefits. More recently, this notion has been applied to explain various issues like the Law of Free Birth Law of 1814 and 1821 in Nueva Granada (Hernández-Reyes 2018), or even the election of Barack Obama as the President of the United States (Delgado 2015). In the case of constitutional court jurisprudence, we could also affirm that the analysis of these cases also results from the convergence of interest between the state and black people. The primary purpose is to show the Afro-Colombian population and society that the state is intervening in cases of racial discrimination without affecting the existing racialized social structure.

Perhaps due to the limitations and nature of its work, the Constitutional Court is one of the leading guardians of the multicultural regime that is recognized in the Constitution, and its decisions do not question the existing racial order. It addresses cases

of racial discrimination to offer a set of remedial actions that are regularly oriented to restore the damage caused to the victim, but that in no way affects the structural conditions that systematically generate scenarios of racial discrimination. Decisions of the Court on racial discrimination cases have a pedagogical dimension. They mandate the development of workshops on human rights, the non-discrimination principle, and Afro-Colombians' rights. The Court does not refer to the need to substantially change black people's material conditions as part of the path to overcome the contemporary effects of the Trans-Atlantic slave trade over Afro-descendants' life experiences.

Third, the Court focuses on everyday racism and in one dimension of institutional racism, while structural racism remains outside its analysis. The discrimination cases that reach the Court contribute to creating a social imaginary about how racism operates. Rulings on racial discrimination refer to situations where black people are denied access to local spaces of representation, recreational areas, or state offices. They also involve circumstances where the Court has to define who belongs to the black communities to benefit from affirmative action programs, discriminatory language, and racial stereotyping in the workplace. Although these cases are somehow a daily manifestation of some of the layers of the Colombian racial order, they could lead an unsuspecting reader to believe that racism does not substantially affect the black population in the country. They do not account for structural patterns of racism that mirror the systematic unequal distribution of state resources, and the effect of war on their bodies and territories.

Although some rulings<sup>82</sup> recognize that petitioners are part of a collective group called the “black community,” the constitutional protection of their fundamental rights is guaranteed on an individual basis. For example, it is not necessary to be part of an ethnic group to ensure the constitutional protection of the rights to equality, free development of personality, honor, human dignity, education, good name, habeas data, non-discrimination, and due process. Although in cases of racial discrimination the Court seeks to provide constitutional protection by identifying whether the petitioner belongs or not to an ethnic group, this corporation does not refer to any collective right to protect black people from racial discrimination or racism.<sup>83</sup>

There is an enduring social denial and normalization of racist practices and languages. Some rulings show that those accused of being racists were inclined to naturalize the stereotyped language they used to refer to a black person or the Afro-descendant community in general. They usually denied being involved in any racist incident and accused the victims of being paranoid or hypersensitive, as in Ruling T-572 of 2017 and Heilers’ case. The denial can even be accompanied by other racist languages and statements that deepen the racist act. Hernández has noted that “limiting the idea of racism to biased words uttered by those labeled as aberrant racists overlooks the structural and institutional aspects of discrimination that operate in the absence of racist commentary” (Hernández 2019: 8).

While this study focuses on judgments where it is possible to identify different discourses on race, skin color, ethnicity, and racism, future research should explore

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<sup>82</sup> Rulings T-1090 of 2005, T-131 of 2006, T-691 of 2012, T-366 of 2013, and T-572 of 2017.

<sup>83</sup> I refer here explicitly to racial discrimination and racism, and not to issues related to prior consultation, access to collective territories, or political participation.

decisions in which eventually the Court prioritized only one dimension of discrimination, leaving aside the racial component of the plaintiff. It would be fundamental to analyze the legal discourses used by the Court to prioritize other elements, different to race, in protecting the right to equality and the principle of non-discrimination. Additionally, analysis of other administrators of justice before and after the enactment of the Political Constitution of 1991 may provide a new and more complete perspective about the institutional discourses on race from the perspective of another state institution. Future research may also study the racial discourses of the Constitutional Court in other rulings that are not directly associated with racism and racial discrimination but that seek to protect certain collective rights of black or indigenous people, especially those related to the collective right to ancestral territories and prior consultation.

### **Conclusion**

This chapter offers an insight into how the Constitutional Court produces, interprets, and appropriates diverse categories of differentiation and power. It also provides some tools for examining court rulings as legal storytelling (Delgado and Stefancic 2007) and scenarios of racial contestation where the Court institutionalizes a form of rational domination that legitimates a particular perspective on race, skin color, ethnicity, and racism. This study contributes to our understanding of the racial state in Colombia through the analysis of the different mechanisms utilized by the Constitutional Court to interpret and regulate race and racial relations.

Although some scholars argue that the recognition of cultural differences within national states implied a transformation of the well-known model of color-blind racism (Paschel 2010), I contend that in Colombia, the de-racialization of legal discourses by the

Constitutional Court still constitutes an expression of color-blind multiculturalism (González 2010) through what I call the *legal fetishism of ethnicity*. This notion is an interpretative framework to protect cultural differences and secure the model of differentiated citizenship while deracializing citizenship. As Goldberg argues: “racelessness is the war not on racism but on racial reference, not on the condition for the reproduction of racially predicated exclusion and discrimination but on the characterization of their effects and implications in racial terms” (Goldberg 2002: 233)

The transition from mono-ethnicity to pluri-ethnicity (Arocha 1998), from monocultural mestizaje to multiculturalism (Muteba 2012) or from legal colorblindness to ethno-racial legislation (Pachel 2010) does not involve a substantial transformation of the racialized social structure and hides how the Colombian pigmentocratic system operates to recreates patterns of racial inequality. The structural inequalities that are socially arranged by skin color have also been displaced in the legal analyzes of the Constitutional Court.

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Decree 2067. 1991. Whereby the procedural regime for trials and proceedings before the Constitutional Court is established.

**Ruling T-691 of 2012**

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Disciplinary Research Report, Investigator, June 1st, 2010; T-2868287, Notebook # 1, Folio 38.

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Response Letter to the Constitutional Court, National University of Colombia Law School, April 1st, 2011; T-2868287, Notebook # 2, Folio 154.

## CHAPTER 5

### CONCLUSION

This dissertation focused on the Colombian multicultural state's racial project and the institutional strategies to combat racism and racial discrimination. Official reports submitted to the Committee on the Elimination of Racial Discrimination-CERD, the Anti-discrimination Law, and Constitutional Court's rulings on racial discrimination reflect and structure the official, but contested, meaning assigned to race, skin color, ethnicity, and racism. They create social legitimacy concerning the state's hegemonic interpretation, administration, and representation of race and race relations. This dissertation recognizes that the state is not a monolithic institute because it is composed of multiple institutions and a diverse group of officials that differentially interpret and enforce its policies.

Each empirical chapter in this dissertation examines how the executive, legislative, and judicial branches of public power interpret and regulate different categories of differentiation and power. Chapter 2 approaches the *racial grammar of white liberalism* in the Colombian state and its implications for racial justice and anti-racism. It mainly addresses how slavery, the armed conflict, and racism, as three possible avenues to survey racial states, are represented in the reports submitted by the state to the CERD. The *racial grammar of white liberalism* might contribute to recognizing how the Colombian government systematically ignores the history of slavery and its implications in today's living conditions of black people in the country. By neglecting slavery, the state conceals white-mestizo domination and the roots of the power structures associated with racial hierarchies, racial disparities, and the living conditions of the African diaspora

in the region. The government also refuses the possibility of providing historical explanations for phenomena such as the armed conflict, assuming the violence in black territories as the aggregate of random situations that have placed them in a disadvantaged position and not the result of structural racism. This Chapter also demonstrates that the Colombian state never defines itself as a structural agent in reproducing racism and racial inequalities but as a neutral actor in regulating race relations and racial discrimination capable of solving racial issues without requiring the mediation of any international organization.

Chapter 3 demonstrates that in the debates for the approval of the Anti-discrimination Law, there is also a substantial lack of the history of slavery to comprehend the logic of racism. I argued that de-historicizing racism is a mean to erase the detrimental effect of the afterlife of slavery evidenced through Colombia's racialized social structure and "racialized regime of rights" (Alves 2019). By complementing Bonilla-Silvas's notion of racism without racist (2006), the Anti-discrimination Law illustrates what I call the *racists without racism* model, where perpetrators are persecuted but not racism nor the structure that facilitates the reproduction of racial hierarchies. Members of the Congress assume racial discrimination as an individual pathology and a distinct behavior considered socially undesirable. Act 1482 of 2011 does not protect black people from the unintended racial consequences of a set of institutional and social practices that appear to be neutral and devoid of racial prejudice. I argued that to actively dismantle racism, not only overtly racist behaviors and languages must be penalized, but it is fundamental to overcome the historical material conditions that facilitate the persistence of exclusion, marginalization, poverty, stigmatization, and exploitation, as

well as those that reproduce persecution, violence, forced displacement, and confinement of black people.

Chapter 4 shows the ambiguities of the racial discourses of the Constitutional Court. While the Court defines race as a ‘suspect category’ to show that it is not a legitimate distinction to redistribute services or rights, this corporation also recognized that it is possible to use the “racial factor” for compensatory reasons in situations of positive discriminations and affirmative actions. In the rulings, there is a de-racialization of the concept of citizenship, leading to what I define as the *legal fetishism of ethnicity* to designate that the constitutional protection of black and indigenous communities is granted insofar as it can be demonstrated that a victim of a racially discriminatory act belongs to an ethnic group. While the racial factor is contingent and is only used in reparative actions, culture and the sense of belonging to an ethnic group are fundamental and necessary elements for constitutional protection. On the contrary, the Court argues that skin color is an inconclusive category to provide rights and define who belongs to the Black communities.

As a whole, this dissertation provides an understanding of the contested scenario of production, interpretation, and appropriation of race and ethnicity by scrutinizing the racial grammar, the liberal logic, and the political praxis of different institutions that make up the public power in Colombia. The *racial grammar of white liberalism*, the idea of *racists without racism*, and the *legal fetishism of ethnicity* may contribute to our understanding of racial states in Latin America. Although they emerge from the analysis of different state institutions, they share three common patterns: the denial, minimization, or dehistoricization of structural racism; the individualization of racial phenomena; and the

priority of ethnicity over race and skin color to guarantee the protection of racialized communities. By unmasking the current Colombian state's racial project, this dissertation contributes primarily to the scant literature on how racial states operate in Latin America and complicates multicultural states' racial discourses and anti-racist practices.

## APPENDIX A

### SEMI-STRUCTURED INTERVIEWS DATA

<b>Name</b>	<b>Type of actor</b>
Eliana Rosero	Black activist, member of the Racial Discrimination Observatory
María Isabel Mena García	Black activist and scholar
Rudy Amanda Hurtado	Black activist and Advisor to the Delegate Attorney for Ethnic Affairs of the Office of the Attorney General of the Nation
Juan de Dios Mosquera	Black activist, member of the black organization <i>Cimarrón</i>
Luis Ernesto Olave	Black activist, member of the Latin American and Caribbean Network for Democracy
John Jack Becerra	Victim of racial discrimination, Ruling T-572 of 2017
Eduardo Restrepo	White scholar cited by the Constitutional Court

## APPENDIX B

### INTERVIEW SCRIPT

*\*To begin, I would like to ask you to read and if you agree, sign the informed consent form. Do you have any questions for me before we begin?*

#### **General Questions**

1. Who is (interviewed name)? Could you provide a brief description of your background?
2. In general, what do you know about Afro-Colombian, Black, Palenquera and Raizal population? (Economic, political, and cultural conditions).
3. In your opinion, what explains the situation of marginalization of the black population in the country? How important is the history of colonialism and slavery?

#### **Role of the State**

4. What should be the role of the State in confronting the situation of historical marginalization of Afro-Colombian, Black, Palenquera and Raizal population?
5. How does the Congress address the problems of Afro-Colombian, Black, Palenquera and Raizal population? And the Commission of which you are part of?
6. What have been the main achievements of the Congress to protect black people in the country?

#### **Racism and Racial Discrimination**

7. In your opinion, how does racism operate in Colombia?
8. What experience do you have about cases of racial discrimination?
9. How visible is the problem of racial discrimination and racism for the Colombian state? And for the Congress?
10. Why do you think citizens do not denounce racist practices?

#### **Definitions**

11. From your experience, how do you understand and define race?
12. From your experience, how do you understand and define ethnicity?
13. From your experience, how do you understand and define multiculturalism?
14. Who is a black person in Colombia? What characteristics should they have? (skin color, ancestry, sharing a territory, etc.).
- 15.

#### **Race versus Ethnicity**

16. In your opinion, what are the advantages and disadvantages of defining Afro-Colombians as an ethnic group? What would happen if they were defined as an ethnic-racial group or just as a racial group?

#### **Skin Color**

17. In your opinion, how important is skin color in the debates about black people in Colombia?

### **Perception of Laws**

18. What balance do you make of Law 70 or Law of Black communities?
19. What balance do you make of the Anti-Discrimination Law? Do you think it is possible to overcome racism with the Anti-Discrimination Law that we have today?
20. In the case of black people in Colombia, what is the role of laws to confront marginalization and historical exclusions?
21. What has been the role of black leaders in the construction of laws that affect black communities?
22. What has been the role of experts in the construction of the legislation that affect black communities? (i.e. in the way race, ethnicity, and racism are defined)

### **Citizenship**

23. Who is a citizen in Colombia? Based on your definition and given the conditions of marginality of black people in the country, do you believe that Afro-Colombian, Black, Palenquera, and Raizal population enjoy a condition of citizenship?

### **Afro-Colombian Congressional Bench**

24. What do you think of the special constituency for black communities?
25. What is your relationship with the members of the Afro-Colombian Congressional Bench?

### **Racial Justice**

26. What does racial justice mean to you? (Distributive justice, cultural recognition justice, territorial justice, etc.) Does it make sense for you to talk about racial justice in the context of post-conflict society?

### **Ending Questions**

27. If I have any further questions for you, is it OK if I contact you for clarification?
28. Finally, is there anything that I have not asked that you think I should?

Thank you for your time!

## APPENDIX C

### ANTIDISCRIMINATION LAWS IN LATIN AMERICA

<b>Country</b>	<b>Law</b>	<b>Year</b>
Brazil	Law 1390/ Law 7,716	1951/1989
Argentina	Law 23.592	1988
Peru	Law 27270, modified by Law 28.867	2000/2006
Mexico	Federal Law to Prevent and Eliminate Discrimination	2003
Uruguay	Law 17.817	2004
Nicaragua	Law 641 (Criminal Code)	2007
Bolivia	Ley 045	2010
Chile	Ley Zamudio	2012

**APPENDIX D**

**SELECTED JURISPRUDENCE OF THE CONSTITUTIONAL COURT**

<b>Judgment</b>	<b>Year</b>	<b>Geographical zone</b>	<b>Case</b>	<b>Judge Rapporteur</b>
<b>T-422</b>	<b>1996</b>	Department of Magdalena, Santa Marta city	<b>Germán Sánchez Arregoces vs. Administrative Department of District Educational Service of Santa Marta –DASED.</b> They requested the inclusion of a representative of Black communities in the District Board of Education of the city of Santa Marta according to the provisions of the district regulations.	Dr. Alejandro Martínez Caballero
<b>C-169</b>	<b>2001</b>	National territory	<b>Constitutional revision</b> of the bill number 025/99 Senate and 217/99 Chamber, "for which the Article 176 of the Constitution of Colombia is regulated."	Dr. Carlos Gaviria Díaz
<b>T-1090</b>	<b>2005</b>	Department of Bolívar, Cartagena city	<b>Johana Luz Acosta Romero vs. La Carbonera LTDA QKA-YITO:</b> Skin color discrimination in public places.	Dr. Clara Inés Vargas Hernández
<b>T-375</b>	<b>2006</b>	Department of Magdalena, Santa Marta city	<b>Nellys Marina Mejía Moreno vs. University of Magdalena.</b> The University of Magdalena denied the admission of a black woman through a program of affirmative action (quotas) arguing that she was not part of the Afro-Colombian community.	Dr. Marco Gerardo Monroy Cabra
<b>T-586</b>	<b>2007</b>	Department of Tolima, Ibagué city	<b>Viyorlaniz Ortiz Borja Vs. University of Tolima.</b> Plaintiff presented a <u>tutela</u> against the Academic Secretary of the Universidad of Tolima, arguing that her fundamental rights to education, equality, due process and free development of personality were violated by this institution.	Dr. Nilson Pinilla Pinilla
<b>C-461</b>	<b>2008</b>	National territory	<b>Claim of unconstitutionality</b> against Law 1151 of 2007, "For	Dr. Manuel José Cepeda Espinosa

			which the National Development Plan 2006-2010 is issued"	
<b>T-691</b>	<b>2012</b>	Bogota city	<b>Heiler Yesid Ledezma Leudo vs District University Francisco José de Caldas-Facultad Tecnológica:</b> Plaintiff, a black student, presented a tutela against the District University Francisco José de Caldas, considering that this educational institution had not properly protected him against a discriminatory treatment by one of the professors, thus violating his right to equality and education as a member of a protected ethnic group.	Dr. María Victoria Calle Correa
<b>C-253</b>	<b>2013</b>	National territory	<b>Harold Javier Palacios Agresott.</b> Unconstitutionality demand against the use of the expression 'Comunidades Negras'	Dr. Mauricio González Cuervo.
<b>T-366</b>	<b>2013</b>	Department of Antioquia, Medellin city	<b>Leidys Emilsen Mena Valderrama vs. Colombian Institute of Educational Credit and Technical Studies Abroad (ICETEX).</b> Plaintiff argued that she was racially discriminated against and discriminated for participating in a demonstration.	Dr. Alberto Rojas Ríos
<b>C-671</b>	<b>2014</b>	National territory	<b>Claim of unconstitutionality</b> against articles 3 and 4 of Law 1482 of 2011, "by means of which the Penal Code is amended and other provisions are established."	Dr. Luis Guillermo Guerrero Pérez
<b>T-015</b>	<b>2015</b>	Barranquilla	Rafael Aguilar Quijano, Teresa Aguilar de Hidalgo, Rosa Aguilar de Quiñones, Ruth Aguilar Quijano, Luz Esperanza Hidalgo Aguilar, Adriana Hidalgo Aguilar, Martha Rosa Quiñones Aguilar y Ana Cielo Quiñones Aguilar vs. Project <i>Blanco Porcelana</i> .	Dr. Luis Ernesto Vargas Silva
<b>C-257</b>	<b>2016</b>	National territory	<b>Claim of unconstitutionality</b> against articles 58.3, 134A and 134B of Law 599 of 2000, "By which the Penal Code is issued"	Dr. Luis Guillermo Guerrero Pérez

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