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Racial Heteroidentification Committees in Brazil: Reflections on Self-Identification and Self-Declaration

Comités de Heteroidentificación Racial en Brasil: Reflexiones Sobre la Autoidentificación y la Autodeclaración

Bruno Camilloto [α] & Ludmilla Camilloto [σ]

Abstract- We intend to discuss the heteroidentification committees in competition for racial quotas for black people to ingress in a public university in Brazilian Higher Education. Firstly, we begin with a brief presentation of this educational system and the context of the affirmative action policy in racial markers in Brazil. Secondly, we introduce the conceptual differentiation between "self-identification" (of the dimension of '*to be*') and "self-declaration" (of the dimension of '*to do*'). Thirdly, we present Brazil's socio-legal context of racial affirmative action policies. Finally, we argue that the result of heteroidentification committees does not invalidate racial self-identifications but only self-declarations. That procedure is an essential method of social control of the public policy of racial affirmative actions in Brazilian Higher Education.

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Resumen- Pretendemos discutir los comités de heteroidentificación en competencia por cuotas raciales para el ingreso de negros a una universidad pública en la Educación Superior brasileña. En primer lugar, comenzamos con una breve presentación de este sistema educativo y el contexto de la política de acción afirmativa en marcadores raciales en Brasil. En segundo lugar, introducimos la diferenciación conceptual entre "autoidentificación" (de la dimensión de "ser") y "autodeclaración" (de la dimensión de "hacer"). En tercer lugar, presentamos el contexto socio jurídico de las políticas de acción afirmativa racial en Brasil. Finalmente, sostenemos que el resultado de los comités de heteroidentificación no invalida las autoidentificaciones raciales sino sólo las autodeclaraciones. Ese procedimiento es un método esencial de control social de la política pública de acciones afirmativas raciales en la Educación Superior brasileña.

Palabras clave: educación superior brasileña. comités de heteroidentificación racial. autoidentificación. autodeclaración.

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I. Introduction[1]

Affirmative action policies are measures adopted to reduce inequalities in diverse social contexts. However, they cause some controversy in the societies that embrace them, and in Brazil, the main action concerns the policy of quotas for black people in Higher Education.[2] Some of the commonalities among the different affirmative action modalities are the political dimension, the struggle for recognition of marginalized social parcels,[3] and the effective action of the State regarding the allocation and distribution of goods, resources, and opportunities to citizens.[4] In the latter sense, affirmative actions are public policies that aim to transform the structure of society, materializing some ideas of social justice.

Education is a fundamental right by the provision of the Brazilian Constitution (BRAZIL, 1988). Brazilian Higher Education consists of public and private universities.[5] Public Universities can be linked to the Federal Government, called Federal Universities, or to the governments of the member states that form the Brazilian Federation.[6] Federal Universities are

[1] We thank Ph.D. Adilson Pereira Santos (UFOP) and Prof. William de Castro Borges (UFOP) for this text's fraternal dialogue and review.

[2] Like the American society. Recently, the American Supreme Court decided the case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. In that case, the Supreme Court overturned decades of precedence when it judged the practice of considering the race of prospective students when determining admission violates the Equal Protection Clause of the 14th Amendment.

[3] By "marginalized parcels," we mean both people who are on the margins of access to the goods produced by society by appearing as outsiders of the capitalist system of production and those who, even economically included in that system of production, suffer some decrease in their citizenship status for other reasons, for example, issues of race and gender.

[4] In a synthetic way, we assume that distributive policies (distributive policies) are those aimed at a specific portion of the population; that is, they elaborate to meet the needs of a particular social group or situation.

[5] From now on, whenever we use the expression Higher Education, we will refer to the set of Federal Public Universities of the Brazilian Higher Education system because the normative effects of the federal legislation of the affirmative action policy of racial cut apply primarily to them.

[6] Like the USA, Brazil is a federation with Member States. Currently, 26 (twenty-six) member states and the federal capital, Brasilia, form the

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responsible for attending 15.25% of the demand for professional training of the population (BRAZIL, 2022, p. 25). They have a public nature, are fully funded by the Federal Government, and their students do not pay any fee, enrollment, or any other form of charge to access Higher Education. In addition to not paying any amount to study, students have an extensive network of support for developing their activities: learning scholarships, research, extension, permanence, students' houses, and university restaurants subsidized by the Federal Government.[7] According to the Brazilian Ministry of Education indicators, primarily the General Course Index (IGC), Public Universities are generally the best institutions of Brazilian Higher Education (BRASIL, 2022).

The Federal Universities are administrative, organizational units that are part of the Federal Public Administration (Federal) and that have, by the provision of Art. 207 of the Brazilian Constitution, "didactic-scientific autonomy, administrative and financial and asset management, and will obey the principle of inseparability between teaching, research and extension" (BRAZIL, 1988). The Federal Universities are public[8] autarchies in the Brazilian Public Administration. Brazil has 65 Federal Universities, and in the second edition of 2023, they will offer 51.277 vacancies to students.[9] Considering that the Brazilian population is approximately 220 (two hundred and twenty) million inhabitants (IGBE, 2023), the number of public vacancies the federal government offers is still tiny. This implies that at the level of Higher Education, education provided by the State free of charge is a scarce public good in Brazil.

Education has always been related to individuals and society's human and social development. In this sense, in the face of 388 years of enslavement in Brazil, we must assume our intergenerational ethical responsibility for this humanitarian tragedy.[10] For any consideration of the rights of the black people in Brazil, it is necessary[11] to begin with the enslavement of people forcibly taken to that country on the occasion of the colonization of exploitation.[12] Brazil was a slave society that bequeathed to contemporaneity a form of social life that constitutes and structures its social relations. This phenomenon, as a form of production and reproduction in social life, is linked initially to the capitalist state of the material output of life; after all, "without the slave, the economic structure of the country [Brazil] would have never existed" (NASCIMENTO, 2016, p. 59). As part of the structure of Brazilian social relations, racism is implicit (and often open) in interpersonal and institutional relations, being naturalized as a social order inherent in the culture itself.

An important distinction between the Brazilian and North American racial contexts is that Oracy Nogueira (1985) pointed out in his study[13] "Race Relations in the Municipality of Itapetininga" of 1955. From the sociology of ideal types, Nogueira proposed his central thesis on ethnic-racial relations: racial prejudice in Brazil is of '*the mark*' while racial discrimination is of '*the origin*' in the USA. In the author's words:

> 1. In the society under study [Itapetininga][14], the existence of a prejudice that can be called "color" prejudice or "racial mark" because it contrasts with racial prejudice that can be called "origin" by not implying an exclusion or unconditional segregation of the members of the discriminated group, but a preterition of them when in competition, on equal terms, with individuals of the discriminating group. (NOGUEIRA, 1985, p. 243)

From the generalization of the study's results on ethnic-racial relations, racial prejudice and exclusion in Brazil are more related to people's physical characteristics than biological or ethnic origin. This means the darker the individual's skin color, the greater

(twenty-six) member states and the federal capital, Brasilia, form the Brazilian Federation. Both state and Federal governments have constitutional autonomy to offer Higher Education. For example, the State of São Paulo, the richest in the Federation, has the traditional University of São Paulo (USP), one of Brazil's best public universities. However, the Higher Education system in Brazil is historically offered and developed by the Federal government so that all 26 (twenty-six) States have at least one Federal University. The State of Minas Gerais has the most significant number of universities in its territory: eleven universities.

[7] Brazilian Federal government has a public service framework to support their students.

[8] The Brazilian Universities are Federal agencies, and they are part of the executive branch of the Brazilian government.

[9] According to Ministry of Education in Brazil' page: https://www.gov.br/mec/pt-br/assuntos/noticias/2023/junho/passo-a-passo-para-inscricao-no-sisu-disponivel

[10] We should remember that Brazil has a tragic history when we consider the colonization process, which can be called a genocide of black and indigenous people.

[11] Making racial classifications is not easy because the variables involved are many and depend on the culture and history of each country. For this work, we will adopt the IGBE (2023) terminology and its respective translation into English: black, brown, white, indigenous, and yellow. In addition, in Brazil, according to the Statute of Racial Equality (Law n. 12.288/2010), blacks and browns make up the socio-political category of blacks.

[12] Brazil and the USA have a similar experience exploiting black people: slavery. But those countries had different experiences with the process of colonization. Brazil was an exploitation colony, while the USA was a settler colony.

[13] Oracy Nogueira (1917-1996) was a professor at the Free School of Sociology and Politics (ELSP) in São Paulo. He was white, agnostic, and socialist, affiliated with the anthropological current called 'Community Studies' (NOGUEIRA, 2007, p. 298). He was a student of Donald Pierson, who obtained his doctorate from the University of Chicago in 1939 and whose thesis was on racial relations in Bahia. An interesting biographical passage of Nogueira is that he had the opportunity to study in the USA. Still, his visa was denied by his affiliation with the communist party in 1952, during American McCarthyism.

[14] Itapetininga is a small city in São Paulo, State of Brazil, where the author developed his research.

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the chance of suffering prejudiced actions.[15] For the author, there is a direct relationship between social opportunities and people's race/color, whose implication is that the blacker the individual, the fewer opportunities are in the social structure. This thesis reveals that in Brazil, skin color and phenotypic characteristics of individuals directly affect the acceptance of blacks in Brazilian society. According to Nogueira (2007, p. 292), "In the absence of more adequate expressions, prejudice, as presented in Brazil, was designated by mark prejudice, reserving for the modality in which it appears in the United States the designation of origin prejudice.".

From the structural point of view, in the USA, racial and ethnic relations have a more rigid separation among social groups, especially in status; in Brazil, there is a camouflage that covers the racial and ethnic relations and disguises mark bias both by the effects of miscegenation and by the impact of class prejudice. In Brazil, the borders between white and black people are somewhat blurred, and the "Social ascension is in the inverse ratio of the intensity of the marks of which the individual is bearer, leaving the prejudice of race disguised under the class, with which it tends to coincide ..." (NOGUEIRA, 2007, p. 303). Finally, Nogueira (2007, p. 297) highlights the ideological dimension that guides the two types of ideas of prejudice as follows: "As for ideology: where prejudice is mark, ideology is both assimilationist and miscegenationist; where it is of origin, it is segregationist and racist."(NOGUEIRA, 2007, 297).

Racism is a *polyglot chameleon*[16] with a high capacity for adaptation and perpetuation in the most diverse and inhospitable social environments for survival. At the same time that it adapts and camouflages to continue constituting and structuring social relations, it tries to go unnoticed, seeking the preservation of the privileges of whiteness[17] and the maintenance of the narcissistic pact. According to Maria Aparecida Bento (2002), it is a kind of implicit agreement between white people that implies denying and avoiding the racial problem, intending to maintain privileges and the lack of accountability for racial inequalities.

Changing color, tone of voice, and everything else, racism transits in Brazilian social environments, including federal public universities and their affirmative action policies, such as quotas reserved for black people. In this case, the polyglot chameleon is the basis that supports the improper applications by people who are not holders of this right, either by attempts of fraud in a clear usurpation of rights and understanding of the mechanisms of structural racism in Brazil.

Based on the empirical perspective that Brazil is a racist society, the argumentation will adopt the view of the antidiscrimination law (MOREIRA, 2020), whose principle is "[...] the need to eliminate social practices that produce disadvantages for people" (MOREIRA, 2017, p. 197) and

> [the] central point of this precept is its importance in protecting social groups. It establishes a direct correlation between social disadvantage and belonging to minority groups, which leads him to affirm that social existence as a member of specific communities has priority over social existence as an individual in the equality analysis (MOREIRA, 2017, p. 197).

As a result of the struggle of the Unified Black Movement (UBM) in Brazil,[18] affirmative actions to reserve vacancies in public institutions of Higher Education ultimately aim to reduce social inequalities with inclusion policies for black and poor people.[19] According to Santos (2021a, p. 14), in the affirmative actions implemented by Law 12.711/12, the reserve of places is initially social for public school students. Only in a second moment is the account applied to black people, so the author argues that they are undercoats.

The application of racial affirmative action policy brings numerous challenges to Federal Universities. The biggest one, perhaps, is the confrontation of the question: who is black in Brazil? The answer to this question is fundamental because the public policy of reserving places in Higher Education was built for a

[15] The author points to the relationship between race and class in the following conclusion: "4. Although specifically different from class prejudice, color or racial imprint tends to coincide with it, given the concentration of carriers of certain racial imprints in certain layers of society." (NOGUEIRA, 1985, p. 243).

[16] The term used here is the title of a book by Arísia Barros, teacher, black activist, and coordinator of the Instituto Raízes de Áfricas in Alagoas. The book Racism is a polyglot chameleon is in press.

[17] According to The National Museum of African American History and Culture: "Whiteness and white racialized identity refer to how white people, their customs, culture, and beliefs operate as the standard by which all other groups are compared. Whiteness is also at the core of understanding race in America. Whiteness and the normalization of white racial identity throughout America have created a culture where nonwhite people are seen as inferior or abnormal.".

[18] The Unified Black Movement (MNU) is a group of political, cultural, and social activism of relevant trajectory within the black movement in Brazil. It was founded in 1978 in São Paulo to fight for cultural self-affirmation and the encouragement of African culture. Since then, the MNU has contributed to the struggle to recognize black people's rights and culture.

[19] The arguments in favor of such a policy are, in short, three: 1) historical reparation concerning the past of enslavement in the country, in which ascendants of black people were deprived of any possibilities of labor development, educational and patrimonial because they were excluded from the very condition of human beings; 2) correction of distortions related to entrance examinations in universities due to the differences between training courses in high school; and 3) promoting greater diversity in the academic environment, ensuring that coexistence between white and black people can better represent the social structure and allowing everyone to learn from this coexistence and sharing, besides encouraging the entry of black professionals in the labor market after graduation, also making it more diverse and representative.

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specific group of people in Brazilian society: black people. They are the holders of that public policy. As we will see in sections II and III, according to the Statute of Racial Equality (Law n. 12.288/2010), the black people in Brazil consist of black and brown people. Therefore, an essential aspect of racial affirmative action, related to the social markers of difference, is the necessity to validate the racial self-declaration signed by people competing for reserved places in Higher Education.

We will analyze one effect produced by implementing the affirmative action policy provided for in Law n. 12.711/2012: adopting[20] racial heteroidentification committees in Brazil in the context of Higher Education.[21] For this analysis, we understand as necessary the distinction between the concepts of self-identification and self-declaration to produce an argumentation that implies the defense of racial heteroidentification committees as a social mechanism for controlling affirmative action policies.

II. Self-Identification and Self-Declaration: A Distinction

Reflecting on the possibility of people making statements about themselves as part of their 'Right of Being' is a starting point to think about the implications of self-identification and self-declaration in different contexts, especially racial ones, now under analysis.[22]

By "self-identification," we refer[23] to the subjective identification of one or more aspects of their identity. To self-define, it is enough for the person to identify themselves in a certain way, even if they do not externalize it. In the racial context, it is about their autonomous perception, feeling, and awareness of themselves as black people with dark or light skin. The self-identification of subjects comes from exercising the freedom to self-determination of any aspects of their identity, such as ethnic-racial, sexual and gender, or religious. Self-identification is the dimension of '*to be*'.

By "self-declaration," we refer to a manifestation beyond subjective identification, in which the subjects "publicly" manifest some aspect of their self-identification. In this case, they externalize their self-identification to the knowledge of others, declaring it at some opportunity in their life. Examples of self-declaration can be found in the census of the Brazilian Institute of Geography and Statistics (IBGE) in the information given by candidates in elections for purposes of access to party funds and candidacy for racial quota in a public university, occasions when the person informs their race/color. The self-declaration is the dimension of '*to do*'.

As belonging to the dimension of 'to do', self-declaration is a statement signed by a volitional act of the interested party that concerns a situation for a particular purpose. For this reason, the term "self-declaration" is provided for in Art. 1, item IV, of the Statute of Racial Equality (Law n. 12.288/2010), in Art. 3º of the law of quotas of Higher Education (Law n. 12.711/2012) and Art. 2º of the law of quotas in the public service (Law n. 12.990/2014).[24] The term is also present in Recommendation n. 41 of the National Council of the Public Prosecutor's Office (BRAZIL, 2016a) and, recently, in Normative Instruction n. 23 of the Ministry of Management and Innovation in Public Services (BRAZIL, 2023).

Self-declaration is a practice known and used by several fields of Brazilian law. For example, in the Brazilian judicial system, the statement of financial hypo-sufficiency is a self-declaration made by the citizens informing that they do not have economic and financial conditions to pay the procedural expenses charged by the State (BRAZIL, 2015). The first characteristic of this statement is that it has a relative presumption of truthfulness; that is, the self-declaration of "being poor in the legal sense"[25] can be impugned and invalidated during the judicial process. Second, its content does not mean the attestation of an absolute position on poverty. This is not about a detailed economic analysis or a fit in wealth and poverty standards established by government agencies (for example, IBGE). This statement concerns the understanding of the declarant concerning its economic reality in the face of the values charged by the Brazilian State for the development of

[20] We focus only on the racial heteroidentification committees in public institutions of Higher Education.

[21] On August 9, 2023, the Brazilian Chamber of Deputies approved Bill number 5.384/2020, which reformulates the system of quotas in federal education. The bill was sent for consideration in the Brazilian Senate. (https://www12.senado.leg.br/noticias/materias/2023/08/11/senado-recebera-reformulacao-da-lei-de-cotas).

[22] Some other contexts can offer us many possibilities to understand how the 'Right of Being' can work. To see that approach to the gender context, look at the book 'Right of Being: dialogues and reflections on the recognition of trans identities' by Ludmilla Camilloto (2019). To advertise to the reader, we have some difficulty in translating from Portuguese to English the first part of the title of the book 'O Direito de Ser'. The main difficulty occurred because of the usage of the verb 'to be'. We tried the expression 'Right to be' using the infinitive form as the title in Portuguese. In Portuguese, the infinitive form of 'to be' makes sense, However, after a great discussion with some colleagues, the expression 'Right of Being' makes more sense in English. So, we decided to use 'Right of Being' with capital letters to distinguish it from the usage of the infinitive form of 'to be'.

[23] We thank Professor Kassandra da Silva Muniz (UFOP) for the dialogue on the linguistic importance of the terms used in this debate.

[24] Affirmative action policies in Brazil go beyond Higher Education. Law 12.990/2014 also reserved "20% (twenty percent) of the vacancies offered in public tenders to provide effective positions and public jobs in the federal public administration, municipalities, public foundations, companies, and mixed economy companies controlled by the Union." (BRAZIL, 20214). More recently, the President of the Republic, Luis Inácio Lula da Silva, signed the Federal Decree 11.443/2023 that regulated "the filling by black people of minimum percentage of positions in commission and trust functions within the federal public administration".

[25] This is the technical law term.

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the judicial process. Thus, the self-declaration of poverty is a statement that configures a necessary condition. Still, more is needed to guarantee the benefits of free justice, which the judge may not accept.

Law n. 12.711/2012 brings the self-declaration for the securitization of black people to the reservation of places in Higher Education. The right to publicly self-declare as a black person is related to the autonomy every individual has to say something about themselves. Note, as appropriate, that the self-declaration of racial identity is a significant achievement of the Unified Black Movement (UBM), and it must be publicly recognized prima facie.

After the approval of the racial quota law, Higher Education began to implement it. Since then, the Federal Universities have worked on the political and legal challenges of executing affirmative action policy, facing the difficulties with the racially structured Brazilian social reality.[26]

In an administrative response to the complaints of fraud received, the racial heteroidentification committees emerged, whose proposal was to validate the self-declaration provided by the candidate to the vacancy in the reserved mode. These committees are not intended to suppress, reduce, or avoid the self-identification of the subject but to validate the self-declaration issued exclusively for access to the reserved vacancy in Higher Education.

In this context, the self-declaration signed by a person socially recognized as white, who does not suffer racial prejudice of mark, if not verified, will imply the exclusion of the holders of the racial affirmative action policy: black people. The non-conformity of racial self-declaration damages the rights of black people, which is excluded from distributive public policies.

Thus, the racial heteroidentification committees aim to ensure the integrity of the affirmative action policy, realizing the antidiscrimination principle. They do not remove the possibility of a person self-identifying (self-identify) as black, not affecting their identity or racial belonging, their family history and ascendants, their social groupings because of the self-identified race, and their eventual affiliation to the customs, traditions, costumes, and religions of African matrices. All these aspects are exclusively subjective. It also follows unchanged his identity informed in the demographic census conducted by IBGE, in which the person declares, with total and uncontested autonomy, their race in one of the five categories provided (white, brown, black, yellow, and indigenous).

Two distinct situations need to be considered in this discussion. The first concerns the person who makes self-declaration with the explicit intent to defraud racial affirmative action policy. The second concerns people who declare themselves brown because they believe that they are neither black nor white; that is, they do not realize that the brown person is part of the political-legal-social category of a black person.[27] While there is bad faith in the first situation, we understand that racial literacy is absent in the second.

In both cases, the administrative performance of heteroidentification committees does not invalidate self-identification based on the autonomy and social experience of the subjects but concerns only the securitization of subjects before the public policy of affirmative racial action, which is an essential mechanism of social control and fraud avoidance, either by intentional act or by lack of understanding of the plaintiff.

From 2012, when law 12.771 was published, until 2016, when Normative Guidance n. 03 was posted, Higher Education relied on self-declaration as a necessary and sufficient statement for securing candidates for vacancies in Federal Universities (SANTOS, et al, 2022). However, as of 2017, there was an explosion of allegations of fraud through the presentation of self-declarations in non-compliance with the main criterion of public policy: the phenotype, which we will deal with in the following topic (SANTOS, 2020).

According to Camilloto and Oliveira (2020) and Santos (2021b), Brazil needs a standardized administrative procedure for all Federal Universities. Despite this, as part of the Brazilian Public Administration, Federal Universities have experimented with various frameworks of racial heteroidentification committees because they have the 'power duty'[28] to proceed to factual-normative investigation before any complaints. Although there is no specific normative document to regulate the functioning of racial heteroidentification committees between the years 2012 and 2016, it is possible to affirm that there are legal norms in Brazilian law capable of controlling the activity of heteroidentification as, for example, the constitutional principles of Administrative Law provided for in Art. 37

[26] The process of the racialization of society does not only concern black people. White people are also racialized. Especially in a continental country like Brazil, it is also important to highlight that the social context is constituted by the population and cultural diversity that complicates the analysis of the racialization process. In this sense, there are intellectual and practical efforts in building a dialogue of national amplitude, for example, the I and II National Seminars Affirmative Action Policies in Brazilian universities, conducted by the Federal University of Mato Grosso do Sul (UFMS) and the Federal University of Ouro Preto (UFOP), respectively.

[27] The accumulated experience with the stalls of racial heteroidentification allows us to make this distinction with some security. When there is no intentionality, the self-declaration of a brown person signed by a white person stems from the lack of an adequate understanding of ethnic-racial relations and the purpose of the legislation.

[28] The concept of 'power-duty' is the power given to the Brazilian Public Administration to reach the public interest. In the case of complaints, this 'power-duty' means that the Public Administration must investigate the facts reported by federal general legislation.

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of the Brazilian Constitution (BRAZIL, 1988).[29] Thus, we can assert that there is enough legal-social technology to control the public policy of affirmative action drawn from the racial marker.

Recently, there has been in the Brazilian legal system the Normative Instruction n. 23 of the Ministry of Management and Innovation in Public Services (BRAZIL, 2023), which "Regulates the application of the reserve of vacancies for black people in public tenders, in the form of Law no. 12.990, of June 9, 2014, and reserves vacancies for black people in the selection processes for hiring for a certain time that Law Nº 8.745 deals with, of December 9, 1993, in the scope of the organs and entities of the direct federal, municipal and foundational public administration." (BRAZIL, 2023).[30]

Along with the constitutional principles of Brazilian Administrative Law, Normative Instruction n. 23[31] brings the procedural guidelines for the functioning of heteroidentification committees, especially in Article 14, which provides:

> Heteroidentification procedure
>
> Art. 14. The heteroidentification procedure provided for in this Normative Instruction is subject to the following principles and guidelines:
>
> I - respect for the dignity of the human person;
>
> II - compliance with the contradictory, broad defense and due process of law;
>
> III - a guarantee of standardization and equal treatment among persons submitted to the heteroidentification procedure promoted in the same event;
>
> IV - a guarantee of publicity and social control of the heteroidentification procedure, safeguarding the chances of secrecy provided for in this Normative Instruction;
>
> V - compliance with the duty of Auto-protection of legality by the public administration; and
>
> VI - guarantee the effectiveness of affirmative action to reserve vacancies to black people in public tenders for admission to the federal public service and simplified selection processes.

Although the noteworthy defense of heteroidentification committees by jurists, academics, intellectuals, and especially by people of the Black Social Movement (BSM), that procedure has been disputed in Brazilian society. Arguing that racial heteroidentification committees are a kind of 'racial inquisition', its critics pejoratively have named it 'racial courts', according to the melanin content in the skin of each candidate. They also argue that this procedure has no objective criterion capable of offering security to the heteronomous judgment of self-declaration. However, in the context of constitutional control, Law n. 12.711/2012 and the legality of heteroidentification committees have already been decided by the Supreme Court (STF)[32] in the judgment of the Defendant of Noncompliance with Fundamental Precept (ADPF)[33] n. 186 in 2012, reaffirmed in the decision of the Declaratory Action of Constitutionality (ADC)[34] n. 41, which dealt with the constitutionality of Law n. 12.990/2014 in 2017. In both trials, the Supreme Court ruled that heteroidentification committees are constitutional if they secure constitutional procedural principles[35] and human dignity. Therefore, it is possible to affirm that Brazilian law has sufficient standardization to allow the operation of this procedure (CAMILLOTO; OLIVEIRA, 2020).

[29] These principles are legal norms that have application in all areas of Administrative Law. As provided in Art. 37 of the Brazilian Constitution, the principles are legality, impersonality, morality, publicity, and efficiency.

[30] Law 12.990/2014 is also a law of affirmative action policy, racial cut, which "Reserves to blacks 20% (twenty percent) of the vacancies offered in public tenders for effective positions and public jobs in the federal public administration, municipalities, public foundations, of public companies and mixed economy companies controlled by the Union." (BRAZIL, 2014)

[31] Before it, from 2018 until 2023, we had the Normative Ordinance n. 4 (BRAZIL, 2018), which provides "Art. 1º This Normative Ordinance disciplines the procedure of heteroidentification complementary to the self-declaration of black candidates, to be provided for in the calls for tender for public office of the direct federal public administration, municipal and foundational, to fill the reserved vacancies, provided for in Law 12,990, of June 9, 2014.
Sole paragraph. The heteroidentification procedure provided for in this Normative Ordinance is subject to the following principles and guidelines:
I - respect for the dignity of the human person;
II - compliance with the contradictory, broad defense and due process of law;
III - a guarantee of standardization and equal treatment among candidates submitted to the heteroidentification procedure promoted in the same public tender;
IV - a guarantee of publicity and social control of the heteroidentification procedure, safeguarding the chances of secrecy provided for in this Normative Ordinance;
V - compliance with the duty of protection of legality by the public administration; and
VI - guarantee the effectiveness of affirmative action to reserve vacancies for black candidates in public tenders to enter the federal public service."

[32] Brazil has a complex constitutional control system consisting of diffuse/concrete control mechanisms (inspired by the North American control system) and concentrated/abstract (inspired by the Austrian control system). In the abstract control, the Constitution of the Republic (BRAZIL, 1988) provides a list of actions that can be proposed directly before the Supreme Court; they are Direct Action of Unconstitutionality (ADI), Declaratory Action of Constitutionality (ADC), Direct Action of Unconstitutionality for Omission (ADO) and Defense of Noncompliance with Fundamental Precept (ADPF).

[33] Action for Noncompliance with Fundamental Precept (ADPF) is the one that aims to prevent or repair injury to fundamental precept resulting from the act of the government.

[34] Direct Action of Constitutionality aims to confirm the constitutionality of an already edited normative act that inspires controversies about constitutionality.

[35] According to the Brazilian Constitution (1988), Art. 5º, LV, "litigants, in judicial or administrative processes, as well as defendants in general are ensured of the adversary system and of full defense, with the means and resources inherent to it; of Brazil provides the adversary system and complete defense." This is called the principle of due process of law, which prescribes the guarantees of procedural equality, broad protection, and contradictory. Henceforth, we will use the term due process of law to refer to that constitutional content.

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In summary, when reserving vacancies to Federal Universities for black people, self-declaration is a necessary statement, but it is not enough. One important reason to defend the heteroidentification committee is the necessity to secure access to the distribution of public goods (opportunity to study) to black people. In such cases, racial self-declaration does not only concern the subjects and their perception but the integrity of a specific policy in which the heteroidentification committees function as a secondary measure to the self-declaration made by the candidate.

III. Socio-Legal Context of Affirmative Action Policies in Brazil

In the Brazilian social context, the Unified Black Movement (MNU) has contributed to developing racial heteroidentification committees, putting their knowledge in service of Higher Education institutions in coping with fraud. Actively participating in the debates on the implementation of racial affirmative action policy, the BSM has qualified the discussion in the Brazilian public sphere, especially about the criterion of a judgment of the validity of the self-declaration signed by the candidate to the reserved vacancy and their condition of black person from the phenotype. As we said, phenotype is the criterion in Normative Instruction n. 23/2023, which regulates heteroidentification, stands within the scope of Law n. 12.990/2014: "Art. 9º The heteroidentification committee shall use exclusively the phenotypic criterion to measure the condition declared by the candidate in the public tender.".

In addition to being normative, this criterion is formulated from the Brazilian social reality, in which phenotype is one of the determining characteristics of racial inequality. This formulation is crystallized in the idea of 'mark prejudice' experienced in Brazil since colonization. The experience of racism in Brazil points to the situation that the more retinal or pigmented the skin of the person and the more traces of Africanity are accentuated in its phenotype, the more oppression they experienced in the Brazilian social context (NOGUEIRA, 2007). It means that a black person with dark skin (black) is more likely to be rejected socially, exposed to prejudice and discrimination, and have more incredible difficulty entering the labor market than a black person with light brown skin. Similarly, brown people find more significant challenges than white people in their social and professional transits.

The complex process of miscegenation of the Brazilian population contributed to the form of the Brazilian social imaginary, the myth of racial democracy.[36] Popularized from the 1930s, especially by reading the book 'The Masters and the Slaves: Study in the Development of Brazilian Civilization' by polymath Gilberto Freyre, this imagination still reverberates contemporaneously in Brazilian society. It is easy to come across social situations in which someone puts forward the arguments that we live in a racially fair society or that now only black people are recipients of rights in Brazil, or that there is no racism in Brazil because we do not segregate black people as in the legal regimes like the USA and the apartheid of South Africa. According to this imagination, we are a miscegenate country where black people do not suffer any discrimination or prejudice by other citizens, as already denounced by Oracy Nogueira (2007, p. 297) about the ideological aspect of assimilationist and miscegenation.[37]

The difficulties of working with the social fractures produced by racism did not prevent the Brazilian Federal Universities from advancing in implementing racial affirmative action policies to reserve vacancies for black people. From the experience of implementing the racial affirmative action policy in Higher Education (SANTOS, et al, 2022), it was found that the racial self-declaration established based only on the declarants will need to be revised. Suppose someone makes a public statement about their racial identity for purposes of a dispute about Higher Education vacancies reserved for black people. In that case, the veracity of its content should not be limited only to the terms consigned by the subject who subscribes to it since, if the self-declaration statement is admitted with absolute veracity,[38] then the logical

[36] The difficulties raised are related to the term "colorism", which, according to Alessandra Devulski (2021), is another form of expression of structural racism, which reaffirms the maintenance of a system of privileges of whiteness. According to the author, colorism is a sophisticated ideology of racial hierarchization "employed by whites over blacks and blacks over blacks" (DEVULSKI, 2021). Colorism is a complex and multifaceted theme, especially in societies marked by the violence of the enslavement process. Aware of the need to deepen the concept, we made a brief presentation to avoid the cover-up of the theme.

[37] It is necessary to remember that in 1949, UNESCO applied an extensive research project in Brazil to study race relations. We should highlight that the central premise of that project is that Brazil was considered a "laboratory" on the quest due to its mixed composition and the supposed absence of segregation. The importance of this action is related to the project's purpose: According to the universalist and pacifist UNESCO's perspective, Brazil was chosen because it had a kind of image of an international scenario that it was a country without racism. At that time, Brazil was considered an exemplary case of the absence of racial hatred. The results of that Project showed that Brazil was not an example of perfect harmony between black and white people, but rather, Brazil had intense racism.

[38] In Law, the statute of presumptions is used to establish the veracity of a situation. There is an absolute presumption (juris et de jure), established by law and does not admit proof to the contrary, and relative (juris tantum), valid conditionally to future refutation by evidence to the contrary. The adoption of self-declaration with a force of absolute presumption would mean that the self-declaration document would not admit evidence to the contrary. The adoption of this conception implies the recognition that if people are socially recognized as white firms, the self-declaration of black person (whether with the intent to defraud the law or in good faith, by feeling belonging to the black population because of their origins, culture or

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consequence would be that the self-declared content meets the conditions of necessity and sufficiency to guarantee to any person who declares themselves as black person (black or brown) access to reserved vacancies in public Higher Education, even if this person is obviously white and therefore does not hold this policy.

In the Brazilian legal context, the absolute veracity of self-declaration has also been ruled out in three important legal documents. First, in the judgment of the ADPF 186 by the Brazilian Supreme Court (BSC). Second, in Recommendation n. 41 of the Federal Prosecutor's Office[39], which explained:

> However*, self-declaration is not an absolute criterion for defining the ethnic-racial belonging of an individual,* and whereas, notably in the case of quota policy, it should be complemented by heterogeneous mechanisms for verifying the authenticity of the information declared, having the BSC, in the judgment of the ADPF 186, pronounced precisely on the legitimacy of the mixed system of racial identification (BRAZIL, 2016a, our emphasis).

And third, in the Normative Instruction n. 23 (2023), which provided:

> Art. 5º The self-declaration of the candidate person enjoys a relative presumption of truthfulness.
>
> § 1º Without prejudice to the provisions in the caput, self-declaration will be confirmed by heteroidentification procedure.
>
> § 2º The relative presumption of veracity that the caput deals with will prevail in case of reasonable doubt about its phenotype, motivated by the opinion of the heteroidentification commission.

One of the issues that cross this discussion concerns the ownership of people who would be legally beneficiaries of this affirmative action policy, that is, who is entitled to reserve vacancies of the quota policy? The question is raised here: "After all, who is black in Brazil?". According to the Racial Equality Statute, the black population is considered "the set of people who self-declared as black and brown, according to the color or race used by the Brazilian Institute of Geography and Statistics (IBGE), or who adopted analogous self-definition" (BRAZIL, 2010). The legal definition establishes the normative concept. However, it is necessary to go further because answering 'who is' or 'who is not' black has political and social dimensions forged in the struggle to recognize the Brazilian black population.

If, from a normative perspective, the answer to the question "Who is black in Brazil?" is relatively simple, the response from a social perspective is complex, mainly because whiteness uses the brown category to have an advantage. This usage might occur due to a lack of racial literacy or bad faith, and in both cases, there is obstruction of the policy of racial affirmative action (SANTOS, 2020). Lia Schucman defines whiteness as "an ideological construct of power, in which whites take their racial identity as norm and standard" (2020, p. 50) so that other non-white groups appear marginalized, deviant, or inferior. Considering the theoretical and practical difficulties in implementing this policy regarding the category of brown people and the administrative experiences of Higher Education institutions, the problem of heteroidentification committees is dramatic: who are the brown people in Brazil that compose the black conceptual category?

In practice, the theory about racial categories could be more evident and easier to apply. Despite the legality and constitutionality of heteroidentification committees in the legal context, they still cause discomfort in the Brazilian public sphere.[40] Among them, we highlight one: the argument that the analysis performed by the racial heteroidentification committee is subjective. We return here to the old (and current) matter of the dichotomy objectivity/subjectivity of epistemology, especially in Law.

The subjective perspective implicitly brings an epistemological bet that human knowledge of racial issues is based exclusively on the individual's experience when enunciating who may or may not be considered a black person. From this perspective, racial issues are so subjective that it would not be possible to conceive them as something capable of discursive dispute because they would be conditioned, resolutely, to the conditions of the subject of enunciation itself. Thus, there would be no way to legitimize the work of heteronomous racial committees to deal with something whose conditions of possibility are deposited only in the subject holder of the right to say about themselves.

The subjectivity in the analysis of the committees is inherent to one concept of law itself: judgment. The annoyance with the subjectivity of racial heteroidentification committees neglects that all judgment is performed by humans who are inevitably marked by a subjective dimension. However, this does not necessarily imply that the human knowledge produced ends only in the subjectivity of individuals. It is so in the *doing* of heteroidentification committees as much as in the daily *doing* of the Judiciary. Concerning the latter, the issue of the subjectivity of judges is not a

religiosity), this document will be valid despite the phenotypic characteristics of the declarants.

[39] The recommendations are documents issued by members of the Brazilian Federal Prosecutor's Office to other organs of the Public Administration to comply with specific constitutional or legal provisions. These are modalities of administrative warnings aimed at guiding the need for compliance with standards and the adoption of practical measures to address issues by the competent body.

[40] It is noticed that, when it comes to ethnic-racial relations and anti-racist guidelines, there are always bothers, either with the existence of the quota policy itself or with the adoption of racial heteroidentification committees.

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reason to question the existence of the Judiciary itself as an institutional judge of social conflicts. Without adhering to a perfectionist requirement, in which judgments will always be correct from a substantial point of view, the question is: "Why would subjectivity be a nuisance for the performance of racial heteroidentification committees when it is not for the daily performance of judges in the Judiciary?".

This annoyance also disregards that all human judgment (both in heteroidentification committees and in the Judiciary) occurs within a game of giving and asking reasons, whose central element is intersubjectivity (BRANDOM, 1994). Human beings use concepts in social practices and build possibilities for understanding reality from their own social-cognitive experience. The formation of the meaning of what "is right", what "is due", what "is fair", and, finally, what "is a phenotypically black person" is given through an exchange of reasons for subjects who are involved in the argumentative commitment to offering each other reasons that support some normative sense (CAMILLOTO, 2016). Moreover, as in the Judiciary, the decision of the heteroidentification committee is also subjected to appeals by/the candidate/ dissatisfied/with its result. In compliance with the principles of due process of law, it may be reviewed by higher administrative bodies for the judgment of appeals.

We believe that the answer to the question goes through revisiting the canons of legal hermeneutics, as proposed by Adilson José Moreira (2019). It is necessary to build a black legal hermeneutic that can take seriously the institutional and structural dimensions of Brazilian racism. As part of anti-racist education, training lawyers who can mobilize the antidiscrimination principle to effect social justice is necessary. In addition, a question must always be asked: "Why did the need for racial heteroidentification committees arise?". A possible answer is found in

> (…) the fact of not filling the vacancies reserved initially for black people became problematized by society, especially by movements interested in the proper implementation of legislation, raising a hypothesis: *the self-declarations did not correspond to the phenotypic characteristics of black people who, in this case, would be the holders of public policy.* Given this hypothesis, UFOP, as well as other public educational institutions, began to receive complaints in which it was stated that some students benefiting from racial quotas, therefore occupying the reserved places, phenotypic characteristics of black people (SANTOS, et al., 2022, p. 41-42, we have highlighted).

According to that diagnosis, there was a non-conformity in the phenotype of students enrolled from the application of the legal quota reserve. Because of that, the Unified Black Movement (MNU),

> [...], represented by black student collectives, began to charge if such candidates would do justice to the vacancy occupied. This scenario led to the resurgence of an old question: *who would be the black person holder of affirmative action policy with a racial cut?* This is an old issue already known for a long time by MSN, and that always comes coupled with the old argument that the country is mixed; that is, we would not have strict ethnic-racial boundaries between people. This old argument would be supported by the experimentation of a "racial democracy" in Brazilian society. (SANTOS, et al., 2022, p. 42, we have highlighted).

We must not forget that, in Brazil, brown people are also black and have the right to dispute vacancies through racial quotas. It is unfair that brown people take the place of the "hiatus" reserved for those who are not black and suffer more intensely the ills of racism, nor whites, who enjoy the privileges conferred by whiteness. How, then, to guarantee their rights as members of the Brazilian black people?

First, understanding the limits of the performance of racial heteroidentification committees, which, from the phenotypic criterion, should not reach the subjective dimension of self-identification of someone as a black person, but only their self-declaration. Secondly, understanding that those racial committees are administrative committees that find normative provisions in Brazilian law. Finally, assuming the validation of racial self-declaration signed for admission to the Federal University through vacancies reserved for black people controls affirmative action public policies in Higher Education.

In addition, we believe that an anti-racist education, committed to racial literacy and racial consciousness, with the constant denunciation of structural racism, with the removal of the myth of 'racial democracy' and with a black hermeneutic guided by the principles of antidiscrimination law, maybe a possible way out to reduce inequalities in Higher Education in the contexts of race.

IV. Final Considerations

The racial heteroidentification committees are administrative committees regulated by Brazilian law that aim to analyze the self-declaration that confers the access of black people to Higher Education through the reservation of vacancies. Their decisions do not invalidate the candidate's self-identification, which is of the dimension of '*to be*'. The procedure can invalidate the self-declaration as preventing white people from unduly occupying places reserved by racial affirmative action policy in Higher Education for black people. Created only to safeguard the policy's purpose, the racial heteroidentification committees protect the holders of affirmative action policy: black people.

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