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## PARTICIPANTS' PAPERS

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### CRIMINAL JUSTICE RESPONSE TO CRIME MOTIVATED BY INTOLERANCE AND DISCRIMINATION—BRAZILIAN LEGISLATION AND EXPERIENCE

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#### I. INTRODUCTION

In his iconic book published in 1936, *Roots of Brazil*<sup>1</sup>, after having lived a couple of years in Germany as a journalist correspondent and written some articles trying to describe the main characteristics of the Brazilian people to Europeans, the renowned Brazilian sociologist Sergio Buarque de Holanda coined the myth according to which Brazilians are mainly “cordial men” (not necessarily referring to a candid person but someone who acts mostly by heart than by reason, exactly the opposite of what he had seen in Germany, as he understood both societies at the time). From that time on, it is widely believed both locally and internationally that the mixed and interracial Brazilian society is a very generous, tolerant and pacific one, not prone to violence or war. Although it is true that Brazil has not waged a war of conquest for many decades since the Paraguayan War, current statistics of violence and crimes motivated by intolerance and discrimination tend to show otherwise of its own people.

The Brazilian Constitution of 1988 establishes that “*the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law*”<sup>2</sup>. Brazil signed and ratified most of the International Documents related to the subject of the protection of individual rights, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities, among others. Brazil has also enacted domestic law to enforce most of these international obligations.

Nevertheless, the steadily growing number of crimes motivated by intolerance and discrimination in Brazil is an undeniable reality, especially in recent times, proving what is widely known—that the very existence of the legislation to cope with the problem rarely seems to be the single solution to what is perceived as a complex and multifactorial problem. Many changes beyond the legislation and criminal justice itself must be achieved in order to reduce the number of such crimes, namely educational, economic and social structural approaches. It is important though to stress that this paper deals exclusively with viable and effective criminal justice responses to problems faced here.

After a hotly contested presidential election in October 2018, many minorities in Brazil justifiably fear an enhancement of such crimes and even more frequent intolerant and discriminatory acts and/or policies against them in the light of a new far-right regime which is due to rule for the next four years, starting on 1 January 2019. Although it is naturally too soon to draw to any conclusions on this matter, the fact remains that this theme is to be seriously studied, observed and addressed not only by the domestic criminal justice system but within the Brazilian society and international community as a whole.

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<sup>1</sup> Holanda, Sérgio Buarque. *Raízes do Brasil*. São Paulo: Editora José Olympio, 1936.

<sup>2</sup> Constitution of the Federative Republic of Brazil. Official translation access on <http://english.tse.jus.br/arquivos/federal-constitution>

## II. TARGETED GROUPS AND VIOLENCE MOTIVATED BY INTOLERANCE AND DISCRIMINATION IN BRAZIL

After more than twenty years of dictatorship in Brazil, the Brazilian Constitution was promulgated in 1988, whose article 5(XLII), as mentioned before, determined that the practice of racism was to be criminalized as a non-bailable crime, with no limitation, and punished with imprisonment under the terms of the law.

It did not take long (precisely three months to be more accurate, from 5 October 1988 when the Constitution was promulgated until 5 January 1989) for the Congress to enact a law establishing what is to be considered racism and its penalties: Act 7716/1989, whose first article determines that crimes resulting from “*prejudice of race or colour*” will be punished.

Although this newly enacted law, with its punishment of imprisonment up to five years, was far better than its previous Act 1390/1951, which considered racism as “*the practice of acts resulting from prejudice of race or colour*” only as a misdemeanour, the new legislation did not eliminate its original problem as being too narrow in describing which targeted and victim groups would be protected by the law.

It took more than eight years for the Congress to review the scope of it, until it adopted Act 9459/1997, providing a new definition to the aforementioned article 1, determining that crimes resulting from “*discrimination and prejudice against race, colour, ethnicity, religion or national origin*” will be punished.

There is no doubt that the new terms of the law are better than the original one, for two main reasons: first, it criminalized both prejudice and discrimination; second, the protected groups were broadened to include victims that might be targeted exclusively because of their ethnicity, religion or national origin.

According to Oxford Dictionary, prejudice means: “1. preconceived opinion that is not based on reason or actual experience. 2. *Law*. Harm or injury that results or may result from some action or judgement”. And discrimination means: “the unjust or prejudicial treatment of different categories of people, especially on the ground of race, age, or sex”.<sup>3</sup>

The broadening of the protected group is also welcomed, albeit still insufficient. In 2014, a well-known human rights activist Congresswoman in Brazil presented in Parliament a Draft Act 7582/2014 to “*define the crimes of hate and intolerance and to set mechanisms to prevent them*”, whose general but accurate article 2 determines that

*every person, regardless of class and social origin, migrant condition, refugee or internally displaced person, sexual orientation, identity and gender expression, age, religion, homeless situation and disabilities shall enjoy the fundamental rights inherent to every human, and it shall be guaranteed to them the opportunity to live without violence, and to preserve their physical and mental health as well as their moral, intellectual and social improvement.*

Articles 3 and 4 of the Draft Act clarify, respectively, hate and intolerance crimes against the protected groups mentioned in article 2. Article 3 determines that it is considered a hate crime if the offence is against “*life, physical integrity (assault) or someone’s health motivated by prejudice or discrimination*”, while article 4 sets a list of acts which shall be considered as intolerance crimes, such as, psychological violence, to deny a position in the public or private sector, to prevent access to public transportation and public or private schools, among many other unlawful acts described in quite similar terms of the current Act 7716/1989.

Nevertheless, this Draft Act has not been given the deserved consideration by Parliament during its current term (2014/2018), and some minorities in Brazil fear that the newly elected conservative Congress due to resume its duties on 1 January 2019 might be even less prone to discuss and enact such measures on their behalf.

Meanwhile, jurists and the criminal justice system in Brazil must work with the Act still in effect from 1989, whose most recent text sets a very specific targeted and protected group against crimes motivated by

<sup>3</sup> Oxford Dictionary of English. New York: Oxford University Press, 2010.

intolerance and discrimination.

### **A. Intolerance and Violence against Religious Minorities in Brazil**

The most recent and official report on Religious Intolerance and Violence in Brazil was presented in 2016 by the Federal Special Secretary on Human Rights, collecting data and information nationwide between 2011 and 2015.<sup>4</sup> It considered religious intolerance and violence to be all ideologies and offensive attitudes against different creeds and religions that might in some extreme circumstances become an actual persecution, hate crime, discrimination and even the harm against individuals, leading to assault or murder.

During this period between 2011 and 2015, at least 95 cases of assault directed against Afro-Brazilian people who professed religions with African origins and 99 cases of depredation, arson and destruction of cult sanctuaries of these religious groups were officially reported, though many more are believed to be underreported.

The number of cases brought to justice varied from a small number of 12 in 2011/2012 to 31 in 2014/2015, according to the Report, most of them waiting for a final decision.

### **B. Violence against Indigenous Peoples of Brazil**

Brazilian law also criminalizes acts which are motivated by prejudice or discrimination based on the ethnicity of the victim, and this is particularly worrying in relation to the native communities, especially the Indigenous Peoples, who suffer from aggravated discrimination and poverty in the national society, and who lack the adequate assistance and effective policies to ameliorate their precarious situation.

The Indigenist Missionary Council (Centro Indigenista Missionário, or CIMI), a well-known organization in defence of Indigenous Peoples' rights and linked to the Catholic Church, has been presenting its Report on Violence against Indigenous Peoples since 1996 (since 2003, CIMI has been publishing it annually with data and information from the previous year), with an alarming and steadily growing number of violent cases directed against these communities in Brazil.

According to its latest Report presented in September 2018, collecting data from 2017, the amount of systematic violence against Indigenous Peoples in Brazil has increased dramatically, including at least the following number of well-reported and documented cases: 110 murders, 27 attempted murders, 19 manslaughters, 14 death threats, 12 assaults, 16 sexual assaults and 36 cases of discrimination and other forms of threatening.<sup>5</sup>

The elevated number of crimes and violence specifically targeting these already impoverished communities is worrying, despite the fact that they represent less than 0.5% of Brazil's total population (approximately nine hundred thousand Indigenous Individuals).

### **C. Crimes Motivated by Race and Colour**

Brazil has experienced a spate of homicides unprecedented in modern western history in "peaceful times" (many international and local experts truly believe, though, that Brazil lives in a state of undeclared civil war), revealing a "devastating scenario" in which Brazil "broke its own record for homicides last year [2017]", counting 63,880 deaths by violent means.<sup>6</sup>

According to the Brazilian Institute of Applied Economic Research (or IPEA based on its acronym in Portuguese), in cooperation with the Brazilian Forum on Public Security, the Atlas from violence in 2017 showed that most victims of such violent crimes in Brazil in 2016 were men (92%), black (74.5%) and young

<sup>4</sup> Secretaria Especial de Direitos Humanos. Relatório sobre Intolerância e Violência Religiosa no Brasil (2011-2015): Resultados Preliminares. Access on: <http://www.mdh.gov.br/informacao-ao-cidadao/participacao-social/cnrdr/pdfs/relatorio-de-intolerancia-e-violencia-religiosa-rivir-2015/view>

<sup>5</sup> Conselho Indigenista Missionário (CIMI). Relatório Violência conta os Povos Indígenas no Brasil – Dados de 2017. Access on [https://cimi.org.br/wp-content/uploads/2018/09/Relatorio-violencia-contra-povos-indigenas\\_2017-Cimi.pdf](https://cimi.org.br/wp-content/uploads/2018/09/Relatorio-violencia-contra-povos-indigenas_2017-Cimi.pdf)

<sup>6</sup> 'A devastating scenario': Brazil sets new record for homicides at 63,880 deaths. The Guardian, published online on 9th August 2018: <https://www.theguardian.com/world/2018/aug/09/brazil-sets-new-record-for-homicides-63880-deaths>. Access on 03/11/2018.

between 15 and 29 years old (53%).<sup>7</sup>

Although it is not possible to affirm on legal terms at least that all these crimes against young black men were motivated by intolerance and discrimination (most are believed to be the result of drug trafficking wars in major cities), this same research published in its 2018 version concludes that “*racial inequality in Brazil expresses itself in a very clear manner in relation to lethal violence and policies of public security*”.<sup>8</sup> It is also observed that the risk of a young black boy to be a victim of homicide is 2.7 times higher than that of a young white boy in Brazil.

#### **D. Crimes Motivated by Gender and Sexual Orientation**

After a paradigmatic case in the Inter-American Commission on Human Rights in Washington/DC presented against Brazil in 1998, a law was finally enacted in 2006, known as “Maria da Penha Act” (in regard to the victim’s name of the case presented before the Commission), aggravating the penalty of domestic violence.

Recently, the Brazilian Congress enacted the “Femicide Act” (or “Femicide Act”; Act 13104/2015), declaring as Murder in the First Degree (“qualified and aggravated murder”) the homicide of a woman for the simple reason of her feminine condition, either in domestic and family violence cases, or due to scorn or discrimination against her nature as a woman.

LGBT (lesbian, gay, bisexual, and transgender) communities have been fighting for many years to have a similar specific criminalization of acts directly targeting them, although the Brazilian Congress has refused to adopt it, until now. Differently from other groups, these groups are not especially protected by the law and many of them feel marginalized in relation to other victims, particularly due to the restrictive categorization of the Brazilian legislation.

According to a recent report of an important activist Non-Governmental Group, at least 387 murders were committed in 2017 in Brazil motivated by sexual intolerance and discrimination.<sup>9</sup>

### **III. BRAZILIAN APPROACHES BY THE CRIMINAL JUSTICE SYSTEM TO CRIMES MOTIVATED BY INTOLERANCE AND DISCRIMINATION**

Although the number of crimes motivated by intolerance and discrimination in Brazil is considerably high, the main cause for it is not a lack of legislation, but its enforcement as well as an absence of a coherent and nationally uniform mechanism and effective responses to this type of criminal offence.

The aforementioned Draft Act 7582/2014 intends to cope with this absence of uniformity and reliable data by establishing in its article 6 the following obligations of Brazilian authorities: I – the operational integration of the Judiciary, the Prosecution Service and the Public Legal Defence in order to safeguard victims’ rights; II – the elaboration of studies, research, statistics and other relevant information that could map the causes, consequences and the frequency of the practice of such hate crimes motivated by intolerance; III – the adoption of a specialized police district to cope with crimes motivated by hate and intolerance; and IV – to stimulate the continuous learning of public servants in the attendance of potential victims of such crimes.

The lack of reliable data and statistics involving crimes motivated by intolerance and discrimination in Brazil is remarkable and undeniable, since most data and information are gathered by non-governmental organizations, as shown in this paper.

Nevertheless, one major advance in this area in Brazil might come from the already implemented (in

<sup>7</sup> Instituto de Pesquisa Econômica Aplicada (IPEA). Atlas da violência 2017. Access on <http://www.ipea.gov.br/atlasviolencia/download/2/atlas-2017>.

<sup>8</sup> Instituto de Pesquisa Econômica Aplicada (IPEA). Atlas da violência 2018. Access on [http://www.ipea.gov.br/portal/images/stories/PDFs/relatorio\\_institucional/180604\\_atlas\\_da\\_violencia\\_2018.pdf](http://www.ipea.gov.br/portal/images/stories/PDFs/relatorio_institucional/180604_atlas_da_violencia_2018.pdf)

<sup>9</sup> Grupo Gay da Bahia. Pessoas LGBT mortas no Brasil – Relatório 2017. Access on <https://homofobiamata.files.wordpress.com/2017/12/relatorio-2081.pdf>

some States) obligation number three, mentioned above, in the Draft Act 7582/2014, determining the adoption of a specialized police district to cope with crimes motivated by intolerance and discrimination, which is known in Brazil as DECRADI (in its original Portuguese acronym from “Delegacia de Crimes Raciais e Delitos de Intolerância”, or Police District on Racial Crimes and Intolerant Offences).

The first experience of its kind in Brazil was established in 2006 in Sao Paulo (Brazil’s largest and most populated city), specifically designed to combat racism and homophobia, prejudice and intolerance against religious minorities, as well as crimes against ethnic minorities, migrants and Romani (or Roma) people (popularly but improperly called “Gypsies”).

In the last few years several other States have created their own DECRADI. The actual results in most parts of Brazil are still to be seen. Just as an example, Rio de Janeiro, Brazil’s second most populated city, has only recently in August 2018 implemented its first DECRADI.

The experience in Sao Paulo, on the other hand, has shown that the establishment of a specialized police force against crimes motivated by intolerance and discrimination is welcome: from January 2010 until November 2015 the DECRADI of Sao Paulo investigated 962 cases.<sup>10</sup>

The expected future coordination among all sectors of the criminal justice system is to be thoroughly discussed and implemented as soon as possible, since the number of crimes motivated by intolerance and discrimination is rising significantly in Brazil.

#### IV. CONCLUSION

Brazil has a high record of crimes motivated by intolerance and discrimination, despite the fact it has immediately after the promulgation of its latest 1988 Constitution enacted a specific law coping with the problem of racism. Thirty years later, the world and Brazilian society have significantly evolved, and the newly elected Congress with the newly elected President should gather and discuss a new set of more comprehensive rules, in order to cope with this “*devastating scenario*” of more than sixty-three thousand violent deaths only last year. It is time for the Federal Government to show that it does not condone any sort of violence, especially that which is criminalized as hate crime or motivated by intolerance and discrimination. The criminal justice system would never be, for obvious reasons, the single solution to this holistic problem, since educational, economic and social approaches are indispensable. But its response to this type of crime is certainly a good start, and the criminal justice system definitely plays a key role in the solution

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10 Government of the State of Sao Paulo’s webpage, access on <http://www.ssp.sp.gov.br/LeNoticia.aspx?ID=36514>