

# **A study on the prohibition of incitement to hatred in the Americas**

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## Introduction and methodology

This research paper describes how the contents of article 20 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> have been implemented in domestic legislations of the States of the Americas. With this in view, and with a focus on article 20 of the ICCPR especially, this paper analyzes the current state of legislation, case law, and public policies relating to the prohibition of incitement to hatred in the countries of the region.

The Americas make up a geographic space currently composed of 35 States, all of them members of the United Nations (UN) and of the Organization of American States (OAS). Of these 35, 30 States are Parties to the ICCPR<sup>2</sup>, 30 are Parties to the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>3</sup>, and 24 are Parties to the American Convention on Human Rights (ACHR)<sup>4</sup>. There is no specific binding regional document that regulates the prohibition of discrimination on national, racial, or religious grounds.

For the purposes of the present study, an analysis was performed on information obtained from 28 of the ICCPR States Parties, as well as from Antigua and Barbuda<sup>5</sup>. Also, it is noteworthy that the United States of America is the only country of the Americas that is a State Party to the ICCPR and has entered a reservation with respect to the scope of article 20 of that Convention<sup>6</sup>.

The present study underwent three distinct phases. As a first step, a search was carried out in order to identify information available on the 35 States of the Americas in public-domain Internet databases. This process was concluded with the transfer of data by members of civil society and of university circles to the Centro de Estudios en Libertad de Expresión y Acceso a la Información

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<sup>1</sup> Article 20 of the ICCPR stipulates the following: “(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

<sup>2</sup> The 30 States of the Americas that are Parties to the ICCPR are: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

<sup>3</sup> The 30 States of the Americas that are Parties to the CERD are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

<sup>4</sup> The 24 States of the Americas that are Parties to the ACHR are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

<sup>5</sup> Of the 30 States Parties to the ICCPR, only the cases of Haiti and Suriname remained outside the analytical scope of the present study. The other three States not covered by this paper are Cuba, Dominica, and Paraguay.

<sup>6</sup> In this regard, in a communication dated 3 November 2010 addressed to the UNHCHR, the United States of America pointed out the following: “The United States has entered a reservation to Article 20, according to which the Article ‘does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States’. We took this reservation because our Constitution provides broader protections for freedom of expression than those provided in Article 20. While the United States does not, therefore, implement Article 20 prohibitions, in the spirit of open dialogue, we would like to take this opportunity to share our experiences and views on this matter”.

Furthermore, it should be pointed out that the United States of America also entered a reservation to article 4 of the CERD, which stipulates that States Parties to this Convention “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of assistance to any racist activities, including the financing thereof.”

(CELE) of the University of Palermo's Law School, in Argentina. During the second phase, which consisted in data systematization, the information was compared with a series of documents that the United Nations Office of the High Commissioner for Human Rights had sent to CELE. During the period of this consultation the Geneva headquarters also received specific contributions from Canada, Costa Rica, Guatemala, Guyana, Nicaragua, Peru, and the United States of America. All these data were incorporated into the analytic framework of the present study, and during the third phase they made up the basic documentation used for research and drafting purposes.<sup>7</sup>

During the preparation of this study, certain difficulties were encountered as a result of the dispersion of available information, and especially of information pertaining to court rulings. Consequently, it should be pointed out that in some cases the report is silent on certain countries not because there is a lack of information but rather because access to said information is difficult, if not impossible.

The above notwithstanding, during the systematization phase pertinent information was found to be available on 29 States of the Americas. The study is broken down into four regional blocks:

- (a) North America Block (3): Canada, Mexico, and the United States of America.
- (b) Central America Block (7): Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.
- (c) Caribbean Block (10): Antigua and Barbuda, Bahamas, Barbados, Dominican Republic, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.
- (d) South America Block (9): Argentina, Bolivia, Brazil, Chile, Colombia, Guyana, Peru, Uruguay, and Venezuela.

The third phase consisted in drafting the three chapters of this paper. The first of these covers the regulatory standards that are followed in the direct or indirect implementation of the stipulations of article 20 of the ICCPR in the domestic legislation of countries of the Americas. The conclusions of this section are that, although a fair share of the States of the American continent have promulgated criminal regulations in this regard, during recent decades there has been a tendency to draw up public policies outside criminal legislation in order to combat incitement to hatred and discrimination, especially on racial grounds.

The second chapter contains an analysis of those judicial rulings on the prohibition of incitement to hatred that were identified. The conclusion of this section is that, barring the cases of the United States of America and Argentina, case law in those few countries of the Americas that have adopted a punitive model for expressions of hatred does not establish the real or potential occurrence of subsequent damages as a prerequisite for the imposition of a punishment.

Finally, the third chapter deals with the efforts made within the framework of the OAS—which to date have borne no fruit—to achieve a binding instrument that would tackle the problem of discrimination in the Americas. This section also revisits the issues considered in the first two chapters, and places them in context in order to show that the contents of article 20 of the ICCPR are somehow being “reinterpreted” in the Western hemisphere so as to integrate them into a model that lies outside the scope of criminal law.

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<sup>7</sup> Both the information gathering and systematization and the elaboration of this report were carried out by Professor Eduardo Bertoni, Director of the CELE. During these phases he was supported by six students in Buenos Aires and Lima, under the coordination of Professor Carlos J. Zelada, research fellow at the CELE and tenured professor at the University of the Pacific, Pontifical Catholic University of Peru and at the San Martín de Porres University. The students in the Buenos Aires team were: Golda Rafsky (Georgetown University, on internship at the CELE), Julio Santiago Alonso (University of Palermo), and Mario Moreno (Duke University, on internship at the CELE). The following students made up the Lima team: Diego Mauricio Ocampo (Pontifical Catholic University of Peru), Renato Sotelo (San Martín de Porres University), and Luis Gabriel Paredes (Peruvian University of Applied Sciences).

## **Chapter 1**

### **Regulatory standards**

An analysis of legislations of the States of the Americas results in the identification of five sets of regulatory standards that govern the manner of incorporation of the prohibition of incitement to national, racial or religious hatred. In turn, these regulatory standards can be brought together under two more-general tendencies or models:

- (A) Punitive or sanctioning model. This model includes three regulatory standards:
  - (a) States whose criminal codes include clauses that prohibit incitement to hatred. This standard was further subdivided into three sub-standards, in order to take into account not only those criminal codes that include a straightforward prohibition of incitement to hatred (PIH), but also those that prohibit incitement to genocide (PIG) and to discrimination (PID). It should be pointed out that, as will become apparent in the tables below, one single State might include more than one prohibitive sub-standard in the same criminal code.
  - (b) States that include clauses that prohibit incitement to hatred, to genocide or to discrimination in their secondary criminal legislation (outside of their criminal codes).
  - (c) States that have included clauses prohibiting incitement to hatred in their administrative legislation governing the media.
  
- (B) Non-sanctioning model. This model includes two regulatory standards:
  - (d) States whose constitutions incorporate the prohibition of discrimination. In these cases, discrimination on the grounds of nationality, race or religion is prohibited, either explicitly or implicitly.
  - (e) States having other types of legislation and mechanisms that prohibit incitement to hatred.

The tables below reflect regulatory standards by regional block, pursuant to the criteria specified above. The number that appears in parentheses at the beginning of each table indicates the number of States evaluated per regional block.

**North America Block (3)**

<i>State</i>	<i>Punitive Model</i>				<i>Non-Punitive Model</i>		
	<i>Criminal Code</i>			<i>Secondary criminal legislation</i>	<i>Administrative legislation</i>	<i>Constitutional prohibition</i>	<i>Other types of legislation or mechanisms</i>
	<i>PI H</i>	<i>PI G</i>	<i>PI D</i>				
Canada	√	√			√	√	
Mexico				√	√	√	√
United States of America				√			
<b>TOTAL</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>2</b>	<b>2</b>	<b>2</b>	<b>1</b>

**Central America Block (7)**

<i>State</i>	<i>Punitive Model</i>				<i>Non-Punitive Model</i>		
	<i>Criminal Code</i>			<i>Secondary criminal legislation</i>	<i>Administrative legislation</i>	<i>Constitutional prohibition</i>	<i>Other types of legislation or mechanisms</i>
	<i>PI H</i>	<i>PI G</i>	<i>PI D</i>				
Belize						√	
Costa Rica			√			√	
El Salvador		√				√	
Guatemala		√			√	√	√
Honduras						√	
Nicaragua		√	√			√	
Panama				√		√	√
<b>TOTAL</b>	<b>0</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>7</b>	<b>2</b>

**Caribbean Block (10)**

<i>State</i>	<i>Punitive model</i>				<i>Non-Punitive Model</i>		
	<i>Criminal code</i>			<i>Secondary criminal legislation</i>	<i>Administrative legislation</i>	<i>Constitutional prohibition</i>	<i>Other types of legislation or mechanisms</i>
	<i>PI H</i>	<i>PI G</i>	<i>PI D</i>				
Antigua and Barbuda				√		√	
Bahamas					√	√	
Barbados				√		√	
Dominican Republic							
Grenada						√	
Jamaica				√	√	√	
Saint Kitts and Nevis						√	
Saint Lucia	√	√				√	
Saint Vincent and the Grenadines						√	
Trinidad and Tobago				√		√	√
<b>TOTAL</b>	<b>1</b>	<b>1</b>	<b>0</b>	<b>4</b>	<b>2</b>	<b>9</b>	<b>1</b>

**South America Block (9)**

<i>State</i>	<i>Punitive Model</i>				<i>Non-Punitive Model</i>		
	<i>Criminal Code</i>			<i>Secondary criminal legislation</i>	<i>Administrative legislation</i>	<i>Constitutional prohibition</i>	<i>Other type of legislation or mechanisms</i>
	<i>PI H</i>	<i>PI G</i>	<i>PI D</i>				
Argentina	√			√	√		√
Bolivia			√		√	√	√
Brazil				√		√	√
Chile						√	
Colombia						√	
Ecuador	√		√		√	√	
Guyana				√		√	
Peru			√			√	√

Uruguay	√			√			√
Venezuela					√	√	
<b>TOTAL</b>	<b>3</b>	<b>0</b>	<b>3</b>	<b>4</b>	<b>4</b>	<b>8</b>	<b>5</b>

Taken together, the information contained in the four tables above provides the overall result for the Americas, which is reflected in the table below. Although it would initially seem that both standards appear with the same frequency, it will be seen subsequently that the absence of judicial decisions within the framework of the punitive model would appear to indicate a preference for the second model, and specifically for the articulation of public policies within the framework of the fight against discrimination on racial grounds.

### ***The Americas (29)***

<b><i>State</i></b>	<b><i>Punitive Model</i></b>				<b><i>Non-Punitive Model</i></b>		
	<b><i>Criminal Code</i></b>			<b><i>Secondary criminal legislation</i></b>	<b><i>Administrative legislation</i></b>	<b><i>Constitutional prohibition</i></b>	<b><i>Other types of legislation or mechanisms</i></b>
	<b><i>PIH</i></b>	<b><i>PIG</i></b>	<b><i>PID</i></b>				
North America (3)	1	1	0	2	2	2	1
Central America (7)	0	3	2	1	1	7	2
The Caribbean (10)	1	1	0	4	2	9	1
South America (9)	3	0	3	4	4	8	5
<b>TOTAL</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>11</b>	<b>9</b>	<b>26</b>	<b>9</b>

## **1.1 The punitive model**

### **1.1.1 Criminal codes**

At least 11 of the 29 countries of the Americas considered in this study have incorporated the prohibition of hate speeches in their criminal codes, whether directly (PIH) or indirectly (PIG and/or PID). This applies to the following: Argentina, Bolivia, Canada, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Peru, Saint Lucia, and Uruguay. The presence of this regulatory standard is more intensive in the countries of Central America (4 out of 7) and of South America (5 out of 9), which are also the regions with a highest concentration of American States whose legal codes originate in the European continental legal tradition (or civil law system). The details of these standards can be found at documentary annex 1.

This initial description merits some comments. First of all, it can be stated that the criminal codes of the Americas categorize expressions tantamount to an attitude of contempt on the grounds, for example, of nationality, race, religion, gender and even sexual orientation. Likewise, the expressions of hatred sanctioned against in criminal codes usually have the purpose of demeaning, intimidating, or fostering prejudices or inciting to violence against individuals or groups by reason of their race, gender, age, ethnic group, nationality, religion, sexual orientation, gender identity, disability, language, political opinions, socioeconomic status, occupation, appearance, mental capacity or any other grounds, regardless of the means through which said expression is outwardly manifested. On the other hand, the legislations of the Americas define hate speeches on the basis both of their

intention and of their object. As far as intention is concerned, a hate speech is that which has been designed to intimidate, oppress, or incite to hatred or to violence. This speech must also be directed against a specific person or group and be based on characteristics such as race, religion, nationality, gender, sexual orientation, disability, or another group characteristic.

Secondly, it should be noted that the criminal standard of prohibition of hate speeches has not had a specific and autonomous reception in the criminal codes of the States of the Americas. In every case considered, with the exception of the criminal codes of Bolivia, Canada, Ecuador, Saint Lucia, and Uruguay, the prohibition of incitement to hatred is indirectly “incorporated” (PIG and/or PID) into other criminal typologies, such as incitement to genocide or the prohibition of discrimination, usually as an aggravating factor.

For example, article 281 quater of the *Código Penal* of Bolivia (“*Difusión e incitación al racismo o la discriminación*”), section 319 of Canada’s Criminal Code (“Public Incitement of Hatred”), the *Código Penal* of Ecuador in an article as yet unnumbered, article 359 of the Criminal Code of Saint Lucia (“Public incitement of hatred”), as well as article 149 bis of the *Código Penal* of Uruguay (“*Incitación al odio, desprecio o violencia hacia determinadas personas*”), are the only cases encountered where there is specific inclusion of the prohibition of hate speeches in explicit terms. Of these five criminal typologies, the most recent correspond to the *Código Penal* of Ecuador (reformed and published in Supplement 555 to the *Registro Oficial*, dated 24 March 2009) and to the *Código Penal* of Bolivia (resulting from the promulgation in October of 2010 of Law No. 45, *Ley contra el Racismo y Toda Forma de Discriminación*).

By contrast, other cases of regulatory inclusion are for the most part inscribed within criminal typologies related to genocide and discrimination. For example, the context for this prohibition in Argentina is the chapter dealing with the crime of “terrorism”<sup>8</sup>. In the criminal frameworks of Costa Rica and Ecuador, the prohibition is included in the criminal typology corresponding to “racial discrimination”. Likewise, the criminal typologies in El Salvador, Guatemala and Nicaragua are “discrimination” and/or “genocide”. In Panama, the issue is contextualized in the section corresponding to so-called “crimes against the international community”. In Peru, much as in the Nicaraguan model, the criminal typology is generic: “discrimination”. Curiously enough, all of these standards are to be found in Spanish-speaking countries. In several of these cases there is also a marked insistence on the racial variable. The religious variable, though present, is rather isolated (see the cases of Argentina, Nicaragua, and Peru).

Thirdly, and as will be seen in the section on judicial interpretation, the use of these criminal typologies in punitive processes seems to have been very exceptional. This tendency would seem to respond to the context pertaining to the countries of the Americas, where historical problems related to national, racial, and religious intolerance have not responded to the same historical and cultural

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<sup>8</sup> In the case of Argentina, a draft law was published in June 2010 and tabled before the *Cámara de Diputados de la Nación* with the purpose of incorporating into the *Código Penal* article 108 bis, among others, under the heading “*Discriminación*” and with the following text:

*Elévase en un tercio el mínimo y en un medio el máximo de la escala penal de todo delito reprimido por este Código o leyes complementarias, cuando sea cometido por persecución u odio motivado en razones de color, etnia, nacionalidad, lengua o idioma, religión, ideología, opinión política o gremial, género, identidad de género o su expresión, orientación sexual, edad, estado civil, responsabilidad familiar, trabajo u ocupación, caracteres físicos, capacidad psicofísica, condición de salud, perfil genético, posición económica o condición social. En ningún caso se podrá exceder el máximo legal de la especie de pena de que se trate.*

(In the criminal scale, raise the minimum sentence by one-third and the maximum by one-half for any crime punished by this Code or its supplementary regulations, whenever it should be committed in relation with prosecution or hatred on the grounds of color, ethnic group, nationality, language, religion, ideology, political or professional opinion, gender, gender identity or expression, sexual orientation, age, marital status, family responsibility, work or occupation, physical characteristics, psychophysical capacities, health status, genetic profile, economic status, or social standing. Under no circumstances may the legal maximum for the type of punishment in question be exceeded.)



patterns as in Europe, Asia, or Africa. This, however, might also be a result of the difficulty of access to the court decisions of some countries of the Americas.

In any case, the inclusion of these criminal typologies would seem to respond to a historical constant or tradition, rather than to the specific treatment of a concrete or generalized set of problems at the national or regional level.

### 1.1.2 Secondary criminal legislation (outside the criminal code)

At least 11 of the 29 countries of the Americas considered have opted for the inclusion of criminal typologies on hate speeches in their secondary criminal legislation. This applies to Antigua and Barbuda, Argentina, Barbados, Brazil, Chile, Guyana, Jamaica, Mexico, Trinidad and Tobago, United States of America, and Uruguay. This legal pattern manifests itself with the same intensity in the countries of North America (2 out of 3) and the Caribbean (4 out of 7) as well as in South America (5 out of 9). Likewise, there is an equitable distribution of this model between American States with a European continental legal tradition (or civil law system) and countries with an Anglo-Saxon tradition (or common law system). It should be pointed out that, among these 11 States, Argentina, Panama and Uruguay have also incorporated the prohibition into their criminal codes. Details on these regulations can be found at documentary annex 2.

The prohibition of hate speeches in special criminal regulations is usually included in legislation that regulates the fight against racial and religious discrimination (see the cases of Argentina, Brazil, Guyana, and Mexico) and the prohibition of genocide (see the cases of Antigua and Barbuda, Jamaica, United States of America, and Uruguay). That notwithstanding, the prohibition might also be included within a diverse typology of regulations (see the cases of Antigua and Barbuda, Barbados, Chile, Trinidad and Tobago, and the United States of America). Likewise, as we will see below and as is usually the case with criminal-code types, their use in punitive processes would also seem to be exceptional.

In this context, the case of Brazil merits special comment. There are in Brazil several special regulations dealing with hate speeches, especially for cases related with racial issues. The following may be mentioned: Law 1390, dated July 1951 (also known as "*Lei Afonso Arinos*") and Law 7716 (also known as "*Lei Caó*"), dated January 1989 (see documentary annex 2).

For nearly 40 years, the *Lei Afonso Arinos*, which regulated racial discrimination in Brazil, was the only piece of Brazilian regulation in that area. Its text pointed out that it is a "*contravenção penal, punida nos termos desta Lei, a recusa, por parte de estabelecimento comercial ou de ensino de qualquer natureza, de hospedar, servir, atender ou receber cliente, comprador ou aluno, por preconceito de raça ou de côr*". The sanctions it established ranged from prison terms of three months to one year to the imposition of fines. However, according to some authors this regulation was not intended to punish frequent covert discriminatory practices, but rather to prevent the future occurrence of acts of discrimination.<sup>9</sup> What is more, this regulation has not been applied in the courts of justice. It did, however, result in the constitutional prohibition of hate speeches which is enshrined in section 5, article XLII of Brazil's founding charter, and to which section 1.2.1 of this paper refers. With the *Lei Caó* (which was subsequently modified by Law 9459, dated May 1997) it was finally declared—thus developing the constitutional precept established in section 5, article XLII—that those crimes resulting from actions having as their motive the "incitement" to discrimination on the grounds of race, colour, ethnic group, religion, or national origin shall be liable to criminal punishment.

The approach followed in Brazil is noteworthy; there, the criminal prohibition appears initially as a

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<sup>9</sup> "The logic behind making discrimination merely a misdemeanor offense was that the law's purpose was not to uproot an already entrenched social problem, but to prevent the emergence of one that did not currently exist. [...] This focus on deterring the introduction of racial practices, typically of foreign origin, into society, is a persistent preoccupation in Brazilian anti-discriminatory law". Benjamin Hensler. Not Worth the Trouble? In: Hastings International and Comparative Law Review Vol. 30 No. 3 (2007), p. 288.

deterrent, and it subsequently contributes to the constitutional enshrinement of the prohibition of hate speeches. This framework has finally resulted in a program of public policies that will be referred to below (see documentary annex 5).

### **1.1.3 Administrative legislation on the mass media**

There are also cases where the incitement to national, racial or religious hatred has been dealt with in the administrative regulations that control the mass media. It was thus determined that at least nine countries of the Americas have a punitive model prohibiting hate speeches in the administrative area. This is the case for: Argentina, Bahamas, Bolivia, Canada, Ecuador, Guatemala, Jamaica, Mexico, and Venezuela. This regulatory standard is present in all four regional blocks: North America (2 out of 3), the Caribbean (2 out of 10), Central America (1 out of 7) and South America (4 out of 9). Of these nine States, Bahamas, Guatemala, and Venezuela do not include a similar prohibition either in their criminal codes or in their secondary criminal legislation. A detailed list of these regulations can be found at documentary annex 3.

The inclusion of this matter in legislation on the mass media would seem to respond to an administrative enshrinement of an already-existing criminal prohibition, although in this instance it would focus on regulating the contents broadcast by the media. In some of the cases considered, the regulations also establish specific administrative sanctions for the commission of these offenses, which amount to repealing the concessions and licenses of the media concerned (see the cases of Bolivia and Venezuela).

## **1.2 The non-punitive model**

### **1.2.1 Constitutional prohibition of discrimination**

In contrast to the previous model, the majority of countries of the Americas have also inserted in their constitutional texts prohibition clauses corresponding to different forms of discrimination. In general, those conducts which have been explicitly classified as “prohibited” have included nationality, race, and religion. Of the 29 States of the Americas for which information could be found, at least 26 have in place constitutional rules in that regard. This is the case for Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Granadines, Bolivia, Brazil, Canada, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Trinidad and Tobago, Uruguay, and Venezuela, all of which have rules on this matter. Details on these regulations can be found at documentary annex 4.

An analysis of this tendency by regional block points to the general nature of this phenomenon: the clause can be found in 2 of the 3 countries of North America, in the 7 constitutional texts considered for Central America, in 9 of the 10 cases in the Caribbean, and in 8 of the 10 countries of South America. Consideration from the viewpoint of the dominant legal tradition also points to its predominance, regardless of whether the State might have received its legal heritage from the legal systems of Spain, France or Portugal (European continental legal system, or civil law system) or whether the legal tradition of the State concerned is Anglophone (Anglo-Saxon legal system, or common law system).

It must be stressed, however, that with the exception of the constitutions of Brazil, Ecuador, and Venezuela (which goes as far as to prohibit religious intolerance), in the remaining 24 cases there are no articles that make direct or explicit supra-legal reference to the prohibition of hate speeches. Furthermore, it might be inferred that what is in question in these three cases are relatively recent constitutional models that opted for granting specific constitutional space to the prohibition of hate speeches (Brazil, 1988; Ecuador, 2008; Venezuela, 1999).

On the other hand, there are cases such as those of Argentina<sup>10</sup> and Peru<sup>11</sup> that have no specific clause such as those described in the preceding paragraph, where certain provisions of the constitutional text incorporate the provisions of the treaties ratified by the State. Consequently, the resolutions of article 20 of the ICCPR would somehow also be “incorporated” into these constitutions.

### 1.2.2 Other types of legislation and mechanisms: The prevalence of public policies that foster a non-criminal solution

Finally, in the fifth regulatory standard we encounter legislation that regulates the implementation of public anti-discriminatory policies, especially on the grounds of race. In nearly all these cases, the legislation also regulates the creation by the Administration of “commissions” intended to monitor the implementation of said policies. This mechanism can be encountered in the legislations of at least nine countries: Argentina, Bolivia, Brazil, Guatemala, Mexico, Panama, Peru, Uruguay, as well as Trinidad and Tobago. Details on these regulations can be found at documentary annex 5.

The above is not to say that in other States of the Americas there are no public policies intended to regulate discrimination. In several cases, we had access to press releases that made reference to the creation of national plans or commissions on human rights intended for that very purpose; however, access was not possible either to the text of the founding regulations or to the Website of those bodies and mechanisms.

Given the specific historical context of American States, however, it would seem that in the countries of the Americas there is a marked preference for the non-punitive model that has as its objective the implementation of public policies intended to combat racial discrimination.

Furthermore, while in eight of the nine States where the existence of this last variable has been verified the punitive regulatory standard is also present,<sup>12</sup> it should be pointed out that this model would seem to have been applied quite exceptionally, except in the cases of Brazil and Argentina. As was already suggested, however, this conclusion could result from the difficulties encountered when attempting to access the judicial rulings of the countries of this region.

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<sup>10</sup> Article 75. 22 of the Constitution of Argentina stipulates the following: “La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño: en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos” (*“The American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol, the Convention on the Prevention and Punishment of the Crime of Genocide, 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, as they might be in force, enjoy constitutional status; they do not repeal any articles of the first part of this Constitution and must be understood to be complementary to the rights and guarantees therein recognized”*).

<sup>11</sup> The Fourth Final and Transitory Resolution of the Constitution of Peru stipulates the following: “Las normas relativas a los derechos y a las libertades que la Constitución reconoce se interpretan de conformidad con la Declaración Universal de Derechos Humanos y con los tratados y acuerdos internacionales sobre las mismas materias ratificados por el Perú”. (*“The regulations corresponding to the rights and liberties recognized by the Constitution are interpreted pursuant to the Universal Declaration on Human Rights and to the international treaties and agreements on these matters that have been ratified by Peru.”*)

<sup>12</sup> Excluding the case of Guatemala.

Be that as it may, there would seem to be a regional belief to the effect that, when it comes to problems linked to racial discrimination, criminal prohibition by itself would be unable to achieve the expected results in the medium or the long term. Consequently, in the case of the punitive model, the presence of a prohibition in the criminal code and in special criminal regulations would seem to respond, rather, to the historical constant of a deterrent from a type of conduct that is understood not to derive any meaningful solutions from the application of the States' punitive power.

## **Chapter 2**

### **Judicial interpretation**

#### **2.1 Court rulings**

An interesting finding of the present study was the realization of the difficulties experienced when it came to gaining access to judicial rulings on speeches inciting to hatred in the countries of the Americas. Judgments were found only for Argentina, Brazil, Canada, Colombia, Peru and the United States of America. This fact is even more noteworthy considering the marked prevalence of the punitive model in two of the regional groups examined (Central and South America). No judicial rulings were found for Central America and the Caribbean.

It might be inferred, beyond the difficulties of access, that the courts of our countries have not often been seized of this matter. To what factor might this tendency respond? As was seen in the first chapter, the punitive model has been used in the Americas as the reflection of a historical tradition that condemned those practices which constituted particularly serious human rights violations, especially on the grounds of racial discrimination. A manner of general legislative framework that disapproves of said practices is thus revealed, although there is an absence of concrete sentences for specific cases.

It might therefore be stated that in this region it is consciously assumed that the criminal model is not an efficient tool when it comes to addressing the real causes of discrimination. The massive presence of criminal regulations which, especially in the case of Latin America, responds to the precise historical point during which legal codification occurred, would not seem to have made a meaningful contribution to reducing racism or the discriminatory conducts that have been present historically in our countries. Indeed, in the Americas the law is no longer seen as the principal or the only instrument available in the fight against acts of discrimination. One of the main criticisms addressed to those in favor of their presence is that these regulations would have served, rather, to "distract attention" away from the real causes of phenomena of discrimination and xenophobia in our countries.<sup>13</sup> Consequently, the current preference lies with a non punitive model, a fact better understood when one considers that in the Americas the specific "European" problem (the experience of Nazism) which is at the origin of the text of article 20 of the ICCPR has never been present to the same degree.

That said, those case-law tendencies that have been identified may be grouped on the basis of the requirement of a causal link between the prohibited speech act and the occurrence of subsequent acts of violence, or the lack of such requirement. This approach has been applied to the analysis of the decisions considered below.

#### **2.2 The causal link between speech acts and the act of violence**

Those few rulings that could be identified reveal that no uniform interpretative tendency has been followed in the Americas. All the States considered, with the exception of the United States of

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<sup>13</sup> Martha Minow. *Regulating Hatred*, p. 1271.

America and Argentina, would seem to favour the existence of a prohibition—and, consequently, the application of a penalty—regardless of the real occurrence of an act of discrimination or of violence, thus somehow quasi-literally following the stipulations contained in article 20 of the ICCPR. Consequently, under this model the States enjoy a considerable margin of discretion when it comes to restricting the promotion of an idea on the grounds of its mere *content*, a restriction justified merely by the fact that it is harmful, dangerous or offensive. It must not be forgotten that article 20 of the ICCPR stipulates the prohibition of “Any advocacy of national, racial or religious hatred that constitutes incitement to [...]”; in other words, it authorizes sanctions against public speeches that might be “liable to” cause or “capable of” causing violent results.

Therefore, under the framework of article 20 of the ICCPR the *a priori* prohibition of these expressions is considered to constitute a strictly proportional restriction of freedom of expression, a “repressive” model justified precisely by the fact that such speeches are not part of the collective values of a democratic society or, what is more, of the end to which freedom of expression must ontologically aspire.

### 2.2.1 Lack of requirement of a causal link: Canada, Colombia, Brazil, and Peru

In Canada, the Supreme Court has considered the matter of speeches that incite to hatred in the cases *R. v. Keegstra* (1990) and *Canada (Canadian Human Rights Commission) v. Taylor* (1990). It should be stressed that in both cases the constitutionality of two of the rules referred to in the first chapter was challenged (see documentary annexes 1 and 3). Thus, in *R. v. Keegstra* the Supreme Court of Canada asserted the constitutionality of article 319.2 of the Criminal Code in order to stress that hate speeches bear no relation with democratic values, given their opposition to the belief that all persons are equal in dignity. On the other hand, in *Canada (Canadian Human Rights Commission) v. Taylor*, section 13 of Canada’s Human Rights Act was deemed unconstitutional. The claim also was unsuccessful.

The Canadian approach considers that the dissemination of ideas that incite to hatred creates an environment that is conducive to discrimination and violence against society’s minority groups. Hence the justification of regulations that overtly condemn this type of speech acts, regardless of whether or not there is a subsequent act of violence. In other words, in Canada the imposition of criminal sanctions against expressions of hatred is not linked to the occurrence of acts of violence: it is understood that there are community values that justify the *a priori* imposition of restrictions by the State to these forms of expression. Ultimately, the State’s sanctioning intervention against hate speeches is justified when it comes to achieving what is understood to be the promotion of the essential values of democracy.

In Colombia, the Constitutional Court has heard in some cases dealing with the matter of hate speeches in the context of restrictions to freedom of expression. A constant factor in all these cases is the requirement that the exercise of freedom of expression take place *a priori* in the context of a “constitutionally” legitimate purpose. Whenever a speech act that fosters violence is encountered, the speech act turns illegitimate and thus becomes punishable. For example, in 2004 the Court ruled that “the principle of *purpose* as a prerequisite to freedom of expression becomes manifest in the fact that the diversity of opinions or thoughts to be disseminated should bear a relationship with the attainment of a constitutionally legitimate purpose, such as informing of an event or incident that is in the public interest, disseminating and making known cultural manifestations or creations of the human intellect, or participating through criticism in the exercise of public control. This means that freedom of expression cannot be turned into a tool that harms the rights of others or acts as an incentive to violence”.<sup>14</sup> Once again, stress is placed on the incitement, and not on the act itself of

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<sup>14</sup> “[...] el principio de finalidad como requisito del ejercicio de la libertad de expresión, se manifiesta en que la diversidad de opiniones o de pensamientos que se divulguen, se relacionen con el logro de una finalidad constitucionalmente legítima, tales como, informar sobre un acontecimiento o suceso de transcendencia pública, difundir y dar a conocer manifestaciones de cultura o creaciones del intelecto humano, o participar a través de la crítica en el ejercicio del control público. Esto significa que la libertad de expresión no puede convertirse en una

discrimination or of violence.

In Brazil the presence of the matter cannot be identified in case law at the higher levels, with the exception of a ruling of the Supreme Federal Court dated June 1954, in the case *Darío Nelli et al.*<sup>15</sup> In that ruling, the Court held that the exercise of freedom of expression should be intended for democratic purposes, thus the need to prohibit certain “propaganda intended to disrupt the existing social and political order”. As mentioned in the first chapter, the Brazilian approach has been to opt for innovative non-judicial mechanisms on the matter of public policies (see documentary annex 2). Indeed, since it is one of the States of the Americas with the largest proportion of Afro-descendants in its population, the State Administration’s approach has consisted not only in not using the tools of the punitive system in the courts but also in creating an outreach mechanism that has targeted different sectors of the population by means of educational governmental policies.

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*herramienta para vulnerar los derechos de los otros o para incentivar la violencia*”. Constitutional Court of Colombia. Fifth Constitutional Review Chamber. Alexander Morales Bailón. Ruling T-787/04 of 18 August 2004. See also the following:

- Constitutional Court of Colombia. Eighth Constitutional Review Chamber. Gilberto Hoyos Barreto and Nelson Puentes Lozano T-368/98 (The Constitutional Court rules that violent speeches must not be condoned during sports events by reporters).
- Constitutional Court of Colombia. Seventh Constitutional Review Chamber. Jaime Rodríguez T-1319/01 (The Constitutional Court rules on the protection of honor and the limitations on freedom of expression on the grounds of incitement to violence).
- Constitutional Court of Colombia. Plenary Chamber of the Constitutional Court. Presidency of the Republic of Colombia. C-578/02. (The Constitutional Court rules on the criminalization of apartheid in the Rome Statute of the International Criminal Court)
- Constitutional Court of Colombia. Seventh Constitutional Review Chamber. Alexander Morales Bailón C-1083/02. (The Constitutional Court rules on the scope of religious freedom and the limitations established as concerns speeches of religious hatred).
- Constitutional Court of Colombia. Fifth Constitutional Review Chamber. Alexander Morales Bailón T-787/04. (The Constitutional Court finds that, on the matter of freedom of expression, the principle of purpose prohibits speeches inciting to violence and hatred).
- Constitutional Court of Colombia. Ninth Constitutional Review Chamber. Johana Luz Acosta Romero T-1070/05. (The Constitutional Court rules on constitutional protection from private acts of racial discrimination).
- Constitutional Court of Colombia. Fifth Constitutional Review Chamber. Iván Cepeda Castro T-959/06. (The Constitutional Court rules on the implications of speeches against the political movement *Unión Patriótica* during the elections).
- Constitutional Court of Colombia. Second Constitutional Review Chamber. Radio broadcast “*El Mañanero de la Mega*”. T-391/07. (The Constitutional Court rules on the protection of obscene speeches and the limitations to freedom of expression concerning hate speeches, incitement to violence and incitement to genocide).
- Constitutional Court of Colombia. Third Constitutional Review Chamber. Claudia Julieta Duque. T-1037/08. (The Constitutional Court rules on the liability of civil servants for their own opinions and on the liability of the State for acts that affect the rights of third parties).
- Constitutional Court of Colombia. Plenary Chamber of the Constitutional Court. Daniel Bonilla Maldonado et al. C-417/09. (The Constitutional Court alludes to the fact that the protection of freedom of expression allows for no exceptions, other than those recognized in international-law, on speeches of hate, incitement to violence or to genocide, and child prostitution).
- Constitutional Court of Colombia. Plenary Chamber of the Constitutional Court. Carlos Humberto García Guzmán and Jorge Eliecer Peña Pinilla. C-575/09. (The Court alludes to the fact that sanctioning against outrages to national symbols is unconstitutional, insofar as these do not constitute a prohibited form of discourse).
- Constitutional Court of Colombia. Second Constitutional Review Chamber. Héctor Fernando Solórzano Duarte. T-839/09. (The Constitutional Court asserts that the right to religious freedom does not go as far as to allow the disqualification of other religions, as was interpreted by the Human Rights Committee).
- Constitutional Court of Colombia. Third Constitutional Review Chamber. Clímaco Pinilla Poveda and Fabio Hernández Cubillos. T-263/10. (The Constitutional Court reiterates its case law and rules that hate speeches are not protected by freedom of expression).
- Council of State. Chamber of Consultancy and the Civil Service. Minister of Communications. C.492.1992. (The Council of State rules that the only censorship that might be enforced by the Ministry of Communications relates to such prohibited forms of discourse as are specifically established in the American Convention).

In the case of Peru, on the other hand, in 2003 the Constitutional Court held, with regard to court proceedings on unconstitutionality initiated against a set of anti-terrorist rulings, that “*el Estado está legitimado a reprimir a aquellas conductas que, con su ejercicio, busquen destruir el propio sistema democrático, ámbito natural donde es posible el goce y el ejercicio de todos los derechos fundamentales del ser humano*” (“the State is legitimized when it comes to repressing conducts that seek to destroy the democratic system itself, a natural milieu where all fundamental human rights may be enjoyed and exercised”). Some paragraphs further down, however, the same Court warned that “behind such criminal typologies, there have been occasional attempts to silence the expression of minority groups or groups opposed to the system in force. Consequently, this Court considers that, in safeguarding these freedoms, the magistrates of the Judiciary must be especially sensitive when it comes to protecting them, and consequently must apply those criminal typologies pursuant to article 20 of the International Covenant of Civil and Political Rights [...] that is, in the sense that what is prohibited is the apology that constitutes an incitement to violence or to any other illegal action.”<sup>16</sup>. In the case of Peru, it is noteworthy that there is an express reference to article 20 of the ICCPR as a regulatory standard and also a link to the concept that there are certain ideas that should be prohibited in principle because they seek “to destroy the democratic system” (“*destruir el sistema democrático*”).

In short, the point of departure in these cases is an outlook of “trust in the State” when it comes to repressing those who are considered to be the “enemies” of individuals and of the community, that is to say, of democratic society’s collective values. Certain types of ideas are thus fostered, while others that might facilitate the return to power of certain totalitarian entities are sanctioned against. A distinct vision is derived from the experience of the United States of America.

### 2.2.2 Requirement of a causal link: the United States of America and Argentina

The key principle of case law in the United States of America is that the State cannot impose restrictions on an expression on the basis of its content. In principle, this premise implies that under the laws of the United States of America it is not possible to restrict the dissemination of a given idea arguing that it is noxious, dangerous or offensive. Consequently, the United States Supreme Court has afforded to hate speeches in public spaces a constitutional protection that is without parallel in any other court elsewhere in the Americas.

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<sup>15</sup> Supreme Federal Court of Brazil. Criminal appeal 1509, dated 4 June 1954. *Darío Nelli et al.* (The court recognizes the right to freedom of thought, but it rules that this right has limitations in the matter of incitement to violence. This notwithstanding, punishable criminal acts must be harmful and flagrant, a situation which did not apply in this case as the action involved was merely the distribution of pamphlets in a public thoroughfare). See also:

- Supreme Federal Court of Brazil. Writ of Habeas Corpus 34492, dated 3 October 1956. (The Court considers the manner in which freedom of opinion can be made compatible with offenses that criminalize participation in communist groups and the financing thereof).
- Supreme Federal Court. Writ of Habeas Corpus 82424-2, dated 17 September 2003. *Siegfried Ellwanger*. (The Court determines the obligations on the matter of human rights concerning racism and the limitations of freedom of expression also concerning racism).
- Supreme Federal Court of Brazil. Direct action for unconstitutionality 3166, Sao Paulo, dated 27 May 2010. (The Court rules that Law 10872 of the State of Sao Paulo, dated 10 September 2001, on the matter of discrimination, is unconstitutional on the grounds of the State having regulated on fundamental rights, on which the Federal State has exclusive jurisdiction).
- Supreme Federal Court of Brazil. Appeal 2137-1, *Remi Abreu Trinta*, dated 15 October 2010. (The Court considers the substantial differences between the crime of racism, on the one hand, and on the other the crime of slanderous allegation with the aggravating factor of the grounds of race).

<sup>16</sup> “[...] *depués de tipos penales de esta naturaleza, en ocasiones se ha pretendido silenciar la expresión de grupos minoritarios u opositores al régimen de turno. Por ello, el Tribunal considera que, en el resguardo de estas libertades, los jueces del Poder Judicial deben ser especialmente sensibles en su protección, y por lo tanto, deberán aplicar estos tipos penales de conformidad con el artículo 20 del Pacto Internacional de Derechos Civiles y Políticos [...] esto es, en el sentido de que lo prohibido es la apologia que constituya incitación a la violencia o a cualquier otra acción ilegal*”. Case file No. 010-2002-AI/TC.

In the cases *Brandenburg v. Ohio* (1969), *Hess v. Indiana* (1973) and *NAACP v. Clairbone Hardware* (1982), the United States Supreme Court held that speech acts of this nature are to be protected under the First Amendment to the United States Constitution, unless said “public” speech acts should have as their purpose the incitement to, or result in what has been described as, an “imminent” unlawful act. In other words, for the United States courts those speech acts of an inciter that are devoid of a “real” likelihood of generating a reaction in their audience cannot be sanctioned against; the danger attached to this type of speech acts is not deemed to be such as to justify the restriction of the speech act. On the contrary, democratic values themselves require that it be tolerated.<sup>17</sup>

This is precisely the argument put forward by the United States of America when it entered a reservation to article 20 of the ICCPRE. Under that same regulatory framework, however, there is a rather wide virtual margin for the States when it comes to imposing criminal and civil sanctions against expressions inciting to hatred.

The methodology applied by the United States of America has as its starting point an attitude of “mistrust” against the State as well as of concern about potential abuses by government power against anyone who might be qualified as a “dissident”. These speeches, however questionable they may be, are part and parcel of freedom of expression<sup>18</sup> and are perceived as being necessary for the strengthening of democracy. A further aspect of the issue becomes apparent in the text of article 13.5 of the ACHR, which, although it contains text similar to that of article 20 of the ICCPR, differs radically in its approach on causality. Article 13.5 of the ACHR provides that: “5) Any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group or persons on any grounds including those of race, colour, religion, language, or national origin shall be considered offenses punishable by law”. And, although the United States of America is not a party to the ACHR, the text of this regulation is closer to the United States case-law archetype, with its requisite specific causal link rather than the mere possibility that an act of discrimination or of violence might ensue.

In the case of Argentina, case law has drawn up the constitutional parameters for hate speeches within the framework of article 3 of Law 23592 (see documentary annex 2) in order to explain that “the typical act consists in encouraging or inciting to prosecution or hatred, encouraging [...] means inspiring or strengthening or bolstering courage, arousing, in this case, to prosecution or hatred whereas inciting involves, rather, moving or stimulating someone to execute something, in the dispute, those acts referred to in the regulations, prosecuting or hating”.<sup>19</sup> Argentine courts have defined guidelines for the interpretation of this criminal typology, explaining that anti-discriminatory law punishes propaganda that necessarily implies “[...] the initiation or development of a progressive

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<sup>17</sup> In a communication to the Office of the United Nations High Commissioner for Human rights, dated 3 November 2010, the United States stated the following: “We do not agree with these expressions of hate. Yet we protect freedom of expression because our democracy depends on the free exchange of ideas and the ability to dissent. And we protect freedom of expression because the cost of stripping away individual rights is far greater than the cost of tolerating hateful words. We also have great concerns about empowering governments to ban offensive speech and how such power could easily be misused to undermine democratic principles. That is not to say that freedom of speech is absolute in the United States; it is not. For example, we do not permit speech that incites **imminent** violence. But this is a limited exception to freedom of expression and is only unlawful where it ‘is directed to inciting or producing imminent lawless action and is likely to incite and produce such action’. Mere advocacy or teaching of violence is not unlawful. We also do not permit speech that falls within the narrow class of true threats of violence. These and other exceptions to freedom of speech have been drawn narrowly in order to preserve the public space for democratic discourse”.

<sup>18</sup> In this regard, the following should be reviewed: Greenawalt, Kent. *Fighting Words*. New Jersey: Princeton University Press, 1995.

<sup>19</sup> “[...] la acción típica, consiste en alentar o incitar a la persecución o al odio, alentar, [...] significa animar o infundir aliento o esfuerzo, dar vigor, en este caso, a la persecución o al odio mientras que incitar entraña antes bien mover o estimular a uno para que ejecute una cosa, en el sub lite, los actos que alude la normativa -perseguir u odiar”.

National Criminal Appeals Court. Chamber II. “*Russo, Ricardo et al, re judicial review*” dated 12/4/1999.



course of marginalization and discrimination that causes grave and serious harm to the peaceful and harmonious coexistence of the citizens of a given sector of the population, liable to giving rise to violent conducts.”<sup>20</sup>.

On this matter, in the *Partido Nuevo Triunfo* case (2009), the Supreme Court of Justice of Argentina stated the following:

“An end that the State must achieve, therefore, is discouraging and counteracting the development of practices that incite to racial or religious hatred, and to the subjugation and elimination of persons by reason of their belonging to a group defined by any one of the aforementioned characteristics.

For this reason, it is not only convenient but also imperative that the authorities of the Argentine Republic take this matter into account when it comes to drawing up policies intended to prevent proselytism in favor of such a political offering. Not doing so would be tantamount not only to allowing praise for a type of conduct that constituted one of the worst crimes in human memory, but also to consenting to the realization of a programme intended to reproducing it to a certain degree.

[...] the decision that denies political recognition to a group founded on a premise that ignores the most basic rights of certain groups of persons or of minorities, that propounds the superiority of one race, and that fosters differences by reason of color, origin, religion, sexual orientation, etc., basing itself on the understanding that all these attitudes, globally considered, are tantamount to a prohibited discriminatory practice, does so in strict respect of the mandate of national and international law.”<sup>21</sup>

However, there is no doubt that the most frequently quoted Argentine ruling on the matter is *Cherashny* (2004)<sup>22</sup>. In its decision, the National Chamber of Appeals in Penal and Correctional Matters in and for the Federal Capital held that article 3 of law No. 23592 punishes “*las expresiones susceptibles de generar un clima hostil en el marco del cual los destinatarios del discurso puedan verse incitados a realizar actos de discriminación o de violencia*” (“expressions liable to generate a hostile atmosphere within which those to whom the speech is addressed might be incited to the performance of acts of discrimination or of violence”) against a group. In 2006, the same court held that the anti-discriminatory law punished the dissemination of information and ideas that might involve “the initiation or development of a progressive course of marginalization and discrimination

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<sup>20</sup> “[...]el inicio o desarrollo de un curso progresivo de marginación y discriminación que produzca un menoscabo serio y directo de la convivencia pacífica y en armonía de los ciudadanos de un sector de la población, apto para culminar en la materialización de conductas violentas”. National Chamber of Appeals in Penal and Correctional Matters in and for the Federal Capital, Chamber I, “*FIKZ INMEDIATA, Nicolás*”, 4/4/2006.

<sup>21</sup> “Un fin que necesariamente debe alcanzar el Estado es, entonces, desalentar y contrarrestar el desarrollo de prácticas que promuevan el odio racial o religioso, y la sujeción o eliminación de personas por el hecho de pertenecer a un grupo definido por alguna de las características mencionadas.

Es por tal razón que no sólo resulta conveniente, sino imperativo, que las autoridades de la República Argentina tomen en cuenta este dato a efectos de trazar políticas orientadas a impedir el proselitismo a favor de semejante oferta política. Lo contrario implicaría permitir no sólo el elogio de conductas que constituyeron uno de los peores crímenes de que tenga recuerdo la humanidad, sino incluso consentir la realización de un programa orientado a reproducirlo en alguna medida.

[...] la decisión de negar reconocimiento político a una agrupación que se basa en el desconocimiento de los derechos más esenciales de ciertos grupos de personas o de minorías y en la superioridad de una raza, que promueven diferencias en razón del color, origen, religión, orientación sexual, etc., por entender que todas estas actitudes consideradas en forma conjunta revelan una práctica discriminatoria prohibida, no hace otra cosa que respetar estrictamente el mandato de la ley nacional e internacional”.

National Supreme Court of Justice. *Nuevo Triunfo Party*, re recognition. Ruling of 17 March 2009, p. 1469.

<sup>22</sup> National Chamber of Appeals in Penal and Correctional Matters in and for the Federal Capital, Chamber I, 8/7/1994, *Ortiz, Sergio*, *The Law* 1995-D-524.

that causes grave and serious harm to the peaceful and harmonious coexistence of the citizens of a given sector of the population, liable to give rise to violent conducts”.<sup>23</sup>.

In Argentina, therefore, the condition for application of the punitive model is the existence of a type of “causal link” between incitement to hatred and the creation of an “atmosphere” which inclines to discrimination and to violence, much as in the United States model. In principle, there would be no need for the occurrence of the act of discrimination or of violence. In any case, the dearth of rulings on the matter does not help to shed more light as to the “real” tendency in related Argentine case law. Consequently, a sector of Argentine doctrine understands that “in each specific case, criminal courts evaluate whether the expression of discrimination, depending on the circumstances of manner and place of dissemination, has given rise to the danger of materialization of those consequences that the law tries to prevent”.<sup>24</sup> In this instance, we have opted for placing the Argentine model under the present heading, given its proximity to the United States model. A nuance that might help to distinguish between the United States’s approach and that of Argentina is that the latter also inscribes its discussion within the context of racial discrimination, as in the case of the model that does not require a causal link. Under the United States’s approach, the context of discrimination would not pave the way for the problem, given the near-total prohibition of censorship of speeches on the basis of their content.

In any case, and under either one of these models, an approach based on a court sentence has been a rather marginal occurrence in the Americas. This would seem to substantiate the hypothesis posited at the beginning of this study: In this part of the planet, preference is given to a non-punitive model that is defined in the design and implementation of public anti-discriminatory policies fostered by diverse sectors of the State administration. But what have these States been doing in the regional plane? The following chapter provides a narrative description of initiatives adopted in the region, and goes on to expound on the current evolution of article 20 for the Americas.

### **Chapter 3. Regional initiatives**

#### **3.1 Initiatives undertaken by member States of the OAS towards an Inter-American Convention against all forms of discrimination**

In parallel with the efforts made to design and implement public policies at the local level, for several years the States of the Americas have been negotiating within the OAS on a text that might serve as a basis for a future “Inter-American Convention against all forms of discrimination”. In 2000, the General Assembly of the OAS entrusted its Permanent Council with the consideration of the need to elaborate a draft inter-American convention to prevent, penalize and eradicate racism and all forms of discrimination and intolerance. As part of that initiative, the year 2005 saw the creation of a “Working Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance”, to which it provides legal advice and technical support.<sup>25</sup> Within this framework, the Department of International Law of the OAS and the Inter-American Commission

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<sup>23</sup> “[...] *el inicio o desarrollo de un curso progresivo de marginación y discriminación que produzca un menoscabo serio y directo de la convivencia pacífica y en armonía de los ciudadanos de un sector de la población, apto para culminar en la materialización de conductas violentas*”. National Chamber of Appeals in Penal and Correctional Matters in and for the Federal Capital, Chamber I, 27/4/2006, Bonafini, Hebe, *re* dismissal.

<sup>24</sup> “[...] *los tribunales penales evalúan, en cada caso concreto, si la expresión discriminatoria, de acuerdo a las circunstancias de modo y lugar en que fue difundida, ha creado el peligro de que se produzcan las consecuencias que la ley trata de prevenir*”. Rivera, Julio César. *La libertad de expresión y las expresiones de odio*. Buenos Aires: Abeledo Perrot, 2009, p. 210.

<sup>25</sup> Information available at: <http://www.oas.org/dil/esp/discriminacion.htm>.

on Human Rights (through its Rapporteurship on the Rights of Afro-Descendants and Against Racial Discrimination) has been providing American States with technical advice on its area of expertise.

At the time of drafting this paper, the adoption of a final text for that convention was still outstanding. In June 2010, the General Assembly of the OAS approved Resolution AG/RES. 2606 (XL-0/10), whereby the Working Group was asked to continue its efforts to conclude negotiations within the framework of the most-recent version of the draft articles.<sup>26</sup> These negotiations, however, seem to have been stalled by the consideration of a possible restriction of the scope of the convention exclusively to racial discrimination. Indeed, the above-mentioned June 2010 resolution of the General Assembly of the OAS included a reference to the fact that a group of States (Antigua and Barbuda, with the support of Belize, Canada, and Saint Kitts and Nevis) had been supporting this position.<sup>27</sup>

Be that as it may, and leaving aside the problems concerning the scope and reach of the draft articles for a future convention, the most-recent text presents an interesting approach to State obligations on the matter of discrimination. Thus, in articles 8, 9 and 14 of the draft, the States have expressed their consensus concerning the suitability of the non-punitive approach as the most efficient mechanism:

#### Article 8

The States Parties undertake to formulate and implement policies the purpose of which is to provide equitable treatment and generate equal opportunity for all persons, including educational and promotional policies and the dissemination of legislation on the subject by all possible means, including the mass media and the Internet.

#### Article 9

The States Parties undertake to adopt legislation that clearly defines and prohibits racist discrimination and intolerance, applicable to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, particularly in the areas of employment, participation in professional organizations; education; training; housing; health; social protection; exercise of economic activity; access to public services and other areas; and to repeal or amend any legislation that constitutes or produces discrimination or intolerance.

#### Article 14

The States Parties undertake, in accordance with their internal legislation, to establish or designate a national institution that shall be responsible for monitoring compliance with this Convention, and shall inform the OAS Technical Secretariat of this institution. The representative of that national institution shall be the State's representative on the Inter-American Committee for the Prevention, Elimination, and Punishment of Racism and All Forms of Discrimination and Intolerance.

It would appear that the States of the Americas continue to opt—on a parallel with punitive systems—for mechanisms originating in the State administrations and intended to promote initiatives in the area of what might be considered as actions leading to prevention and assurances of “non-repetition” of acts of discrimination.

Finally, it should be pointed out that the project has also incorporated “incitement to hatred” as part of the obligations that would correspond to States under this potential legal framework. Although there is no clear consensus on the matter as yet, the States have proposed that article 5 stipulate the following, *inter alia*;

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<sup>26</sup> “Documento Consolidado: Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia” (*Consolidated document: Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance*) (CAJP/GT/RDI-57/07 rev. 13). 23 April 2010. Available at: [http://www.oas.org/dil/esp/CAJP\\_GT\\_RDI-57-07\\_rev13.pdf](http://www.oas.org/dil/esp/CAJP_GT_RDI-57-07_rev13.pdf).

<sup>27</sup> Information available at: <http://www.oas.org/dil/esp/discriminacion.htm>.

## Article 5

[For purposes of this Convention and based on the definitions in the preceding articles and the criteria set forth in Article 1.1, the following are among the measures or practices that must be classified as discriminatory and prohibited by the State:]

- i. Public or private support provided to discriminatory and racist activities or that promote intolerance, including the financing thereof;
- ii. Publication, circulation, or dissemination, by any means of communication, including the Internet, of any [racist or discriminatory] materials, understood as being any image or depiction of ideas or theories that advocate, promote, or incite hatred or violence against individuals or groups by reason of any of the criteria set forth in [Article 1.1];
- iii. Publication, circulation, or dissemination, by any means of communication, including the Internet, of materials that condone or justify acts that constitute, or have constituted, genocide or crimes against humanity, as defined in international law;
- iv. Violence motivated by any of the criteria set forth in [Article 1.1];
- v. [Criminal activity instigated by hate, in which the victim or the victim's property is chosen intentionally on the basis of any of the criteria set forth in [Article 1.1];]<sup>28</sup>

### **3.2 As a manner of conclusion: Seeking solutions outside the criminal framework; a new outlook on article 20 of the ICCPR?**

There is in the Americas a movement to incorporate, under different legal forms, punitive mechanisms that echo the contents of article 20 of the ICCPR. However, this study allows for the conclusion that this would seem to respond to traditional historical variables that have found no use in the courts of justice. In other words, we are witnessing binding declarations that condemn certain conducts deemed to infringe upon the democratic order, but that go no further. In the Americas, therefore, these criminal typologies are seldom applied, which would explain the very few rulings that have been identified, all of them rather marginal (with the exception of those from the United States of America and Argentina). This is because the historical code that must be applied when reading article 20 of the ICCPR (the experience of Nazism) does not necessarily find an echo in the sociocultural realities of the countries of the American region.

Furthermore, those few related court rulings that have been identified in the Americas seem to respond to the application of a model that does not require a causal link between an idea that "incites" and the act of violence that might subsequently occur. Consequently, with the exception of Argentina and the United States of America (which has also raised a reservation to article 20 of the

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<sup>28</sup> As for Article 1.1 of the draft, it reads as follows:

Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, whose purpose or effect is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties.

Discrimination may be based on race, color, heritage, national or ethnic origin, nationality, age, sex, sexual orientation, gender identity and expression, language, religion, political opinions or opinions of any kind, social origin, socioeconomic status, educational level, migrant, refugee, repatriate, stateless or internally displaced status, disability, genetic trait, mental or physical health condition including infectious-contagious condition and debilitating psychological condition, or any other condition.

ICCPR), judges in the Americas have shown a preference for an interpretation that is much closer to the archetype proposed by the ICCPR. What is punished, therefore, is the “suitability” of the speech when it comes to causing the act of discrimination or of violence, independently of the imminence or actual occurrence of this act.

On the other hand, since the 1990’s the Americas have witnessed a marked preference for non-punitive mechanisms, and more especially for the generation of public policies and the creation within the State administrations of commissions or committees intended to monitor these public policies. An important point that should be underscored is that the majority of these bodies have been created within the ambit of the grounds of racial discrimination. That is to say, at least on the surface the other two grounds, nationality and religion, do not appear to be a problem to which the States of the Americas pay great attention. This preference for what lies outside the scope of criminal law seems to originate in the case of Brazil, which has progressively distanced itself from a punitive model in favor of mechanisms intended to raise awareness and to empower rather than to impose prison sentences.

Finally, both the constitutional texts and the regulations that establish the bodies charged with monitoring public anti-discriminatory policies are including a new motive that had been ignored hitherto, to wit, discrimination on the grounds of sexual orientation and of sexual or gender identity, as new “suspect conducts” that might result in a speech being classified as an incitement to violence against one of the collectives concerned. This is, arguably, one of the most revealing findings, not only because of their constant presence in the different versions of the draft articles for a convention against discrimination within the framework of the OAS, but also on account of their inclusion in the legislative framework of several States of the continent.

In other words, the original idea of the triple causes of hate speeches is expanded to include a fourth, whose presence no longer seems to meet the resistance of previous decades. This fact might serve to call our attention to how, nearly 50 years after the text of the ICCPR was approved, the States have been attaching to it with a meaning that goes well beyond the intentions of its original drafters, respecting all the while the basic idea that there are certain speeches that cannot be condoned on account of the dangers that they pose to a truly democratic order.