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ABORIGINAL RIGHTS IN BRAZIL

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The Indian Population in Brazil

Some 185,000 Indians live today in Brazil (CIMI 1982), members of 180 ethnic groups, speaking different languages or dialects, and living under different conditions, ranging from a total absence of direct contact with the neo-Brazilian to a coexistence which is centuries old. These are the remnants of a native population numbering in the millions at the time of Brazil's discovery in 1500, which was largely destroyed by epidemics, war, slavery and, in general, by the advancing economic frontier. In relative terms, within Brazil's population of 130 million, the Indian population is negligible. In absolute terms, however, it has been growing in the last few years. The first contact frequently entails a sharp decline in population, which is followed by recovery if the group's physical and cultural reproduction has not been irremediably jeopardized.

Unlike the Andean groups, the Indians living in the South American lowlands typically consist of small highly diverse acephalous societies. Their cultural reproduction does not depend on large numbers of people, but it requires larger territories than those occupied by agricultural societies, given their emphasis on hunting, collecting and fishing. If throughout the first three and a half centuries the use of Indian labor was the gist of the Indian issue, today conflicts revolve around Indian lands. As we will see later, the soil and subsoil of Indian lands are coveted by landowners (cattle breeders, cocoa growers, farmers generally), by licensed miners and domestic and transnational mining companies, as well as rural workers pushed into Indian lands by large ranches. In addition to these private sector encroachments government initiatives, such as opening roads, setting up hydroelectric projects that flood Indian lands, and mining projects are also significant.

Preliminary Aspects

Brazil is about to convene a Constitutional Convention. To date, no Indian representative has ever participated in the elaboration of the Constitution. The Union of Indian Nations (UNI) has claimed that party-independent representatives directly appointed by the Indian communities should be present to work on the Indian issues. The chances are slim, however, that such representation will be approved.

Pursuant to the Constitution in force (art 8, XVII, o), it is the Union's responsibility to legislate on the Indian issue. This exclusive jurisdiction is healthy, because it reduces the interference of local anti-Indian interests, most vigorous at state level. Nevertheless, as we will see, there are no independent Indian poli-

cies per se. Policies are subject to broader national political processes, issues and interests.

Since the XVI century, Indian legislation has been typically hypocritical (Mendes Jr. 1912:29). In laws defining the Indians' unlimited freedom, loopholes were included justifying all kinds of abuse. It was in fact the law of the wolf over the sheep. In 1910, having set up the Indian Protection Service, inspired by a positivist doctrine, Brazil became the leader in Indian legislation. Nevertheless, the sizable gap between the law and its practice remained.

Brazil's Indian laws are included in the Constitution (art 4, IV, art 8, XVII, art 198), in the Civil Code (art 6), in the so-called Indian Statute (Law 6001 of 12/19/1973), in several ordinary laws voted in Parliament, in Executive decrees and in the several International Conventions subscribed to by Brazil; the ILO's Convention 107 (1957) promulgated in Brazil by decree 58,824 (7/14/1966), the Convention for Prevention and Punishment of the Crime of Genocide (1948), and the International Convention on the Elimination of All Forms of Racial Discrimination (1966), except for art 14.

Two essential aspects of that legislation should be understood:

1. Indian lands are the inalienable possession and for the exclusive usufruct of Indians, being the property of the Union (Constitution, art 4, 198).
2. Brazilian Indians are deemed 'relatively incapable' with respect to some acts of civil life, which makes them wards of the state (Civil Code, art 5 (IV)). Some provisions in the Indian Statute allow for the emancipation of groups and individuals, through their own initiative.

Both legal provisions were enacted more effectively to protect Indian lands and assets, and to provide them with special assistance. However, their language borrows juridical concepts - possession and guardianship - from other fields of law, which allows their interpretation to be distorted. It should be pointed out that land rights and civil capacity are mutually independent. However, both may be joined: one may claim, as we will see, that Indians are no longer treated legally as such when they are emancipated. The holders of land rights therefore disappear (Dallari 1978:1-11; 1979:79).

Who is an Indian?

This interpretation stems from the ambiguous legal definitions of Indian and Indian community, definitions which are crucial. They appear in the Indian Statute (Law 6001 of 12/19/1973), in arts 3 and 4:

3. For all legal effects, the following definitions are hereby established:
 - a) Indian or Forest-dweller - Any individual of pre-Columbian origin and ascent who identifies himself and is identified as belonging to an ethnic group, the cultural characteristics of which distinguish it from the national society.
 - b) Indian Community or Tribal Group - A cluster of Indian families or communities, living either in a state of complete isolation from other sectors of the national community, or in intermittent or permanent contact therewith, but not integrated therein.

4. The Indians are considered:

- a) Isolated - When living in unknown groups of which only limited vague information is forthcoming from fortuitous contacts with elements of the national community.
- b) Integrating - When in intermittent or permanent contact with alien groups, living to a greater or lesser extent in the conditions of their native existence, but accepting certain practices and ways of life common to the other sectors of the national community, of which they stand progressively more in need for their very subsistence.
- c) Integrated - When incorporated in the national community and recognized in full enjoyment of their civil rights, even while retaining practices, customs and traditions that are characteristic of their own culture.

Such definitions are flawed both from the logical and anthropological standpoints (for detailed discussion, see Carneiro da Cunha 1985); they mingle heterogeneous concepts and lend themselves to misinterpretation.

Pre-Columbian origin and descent should not be understood as a 'racial', biological criterion. The very existence of human races in biological terms is presently being challenged. According to Nobel Prize winner, François Jacob

The biological distance between two people from the same group, the same village - is so great, that it renders insignificant the distance between the average of two groups, and that makes the concept of race devoid of any content. (Jacob 1981:66-9)

If it is not a 'racial' criterion, pre-Columbian origin and descent should then refer to genealogy. The latter cannot be proved for any human group beyond a few generations. Nevertheless, the awareness of historical ties with pre-Columbian communities is transmitted within the group and this is how the legal criterion of origin should be understood.

The cultural criterion identifies the Indian 'as belonging to an ethnic group, the cultural characteristics of which distinguish it from the national society'. Although such a concept is relatively satisfactory, insofar as it corresponds to many empirical situations, it still remains to be used properly. That means that two underlying assumptions should be avoided:

- (a) one should not consider the existence of such a culture as a primary characteristic, since it is on the contrary a result of the organization of an ethnic group;
- (b) one should not regard such a shared culture as being necessarily the ancestral culture.

In order to demonstrate how such concepts are unsuitable, we have only to remember the following points: if, when identifying an ethnic group, we depend on the cultural traits it exhibits - language, religion, techniques, etc. - we cannot claim that any group anywhere is the same group as that formed by its biological ancestors. We do not necessarily utilize the techniques or values of our ancestors. The language we speak today differs significantly from the one spoken by them. A second objection arises from the fact that the same ethnic group will show different cultural features according to the environmental and social situation facing it. Adapting to natural conditions and social opportunities which result from interaction with other groups occurs without a necessary loss of identity.

Such objections are raised when one adopts the concepts common in anthropology today, whereby ethnic groups are defined as forms of social organizations in populations whose members identify themselves and are identified as such by others, thus constituting a category different from other categories in the same order (Barth 1969:11).

This definition privileges the group's identification as against the culture it displays. Therefore, the issue of a group's continuity in time and its identity in different environments is solved, which would otherwise be a problem should we adopt cultural features as criteria for the definition of group. In short, cultural traits may vary in time and space, as they do in fact, but this does not affect the group's identity. Such a perspective is in line with one which perceives culture as being essentially dynamic and evolving. Thus, instead of being the condition which defines an ethnic group, culture is to some extent the product of its prior existence (Carneiro da Cunha, 1983:97-98).

That means that out of the three criteria encompassed in the legal definition of the Indian, only that of identification as such by himself and by the others is strictly correct from the anthropological standpoint; it encompasses the other two insofar as they are its consequence and mechanisms, and not independent criteria.

The adoption of the anthropological criterion also implies that only the Indian community can decide who are and who are not its members. That is the reason why the Indian Statute's definition of 'Indian' before identifying 'Indian community' does not make sense. The order should be reversed. The following definitions would prove more satisfactory:

- Indian communities are those regarding themselves as segments distinct from the national society in view of the awareness of their historical continuity with pre-Columbian societies.
- An Indian is the person who sees himself as belonging to one such community and who is recognized as a member by it (Carneiro da Cunha 1984:34-5)

One of the most obvious problems in the definition of Indian community as seen in the Indian Statute (art 3) is that of excluding the so-called 'integrated' communities. Art 4, III, defines as 'integrated' those Indians 'incorporated into the national community and recognized in full endowment of their civil rights even while retaining practices, customs and traditions that are characteristic of their own culture.' That means that the integration criterion is simply legal emancipation. Therefore, an emancipated Indian community is not legally an Indian community: as a result one could argue that nothing would justify its special land rights guaranteed under the Constitution.

Underlying such an argument is an abusive and dangerous confusion between the concepts of integration and assimilation. Integration refers to an articulation of Indian societies with the dominant society, an articulation expressed in several levels of social life (Agostinho 1980: 174ff; 1982:67). For instance: the production of cassava for the regional market, or the extraction of rubber for the international market are forms of economic articulation of Indian groups. That does not pre-suppose their assimilation and dilution in to the surrounding society. Indian groups maintain their distinct ethnic identity and nevertheless have an articulation with the national society. Thus, the harmonious integration proposed by the Indian Statute (art 1) does not mean that the community should cease to be an Indian community, both from the practical and legal points of view. If a community continues to be Indian, what justifies the elimination of its

land rights? These do not emanate from the Indians' relative incapacity, and therefore cannot be abolished with their emancipation. Those rights derive from the acknowledgement of the inborn right they have over the land, the Indigenate (Mendes Jr. 1912:57).

At the local level, the issue of the communities' Indian identity has been at the core of several land conflicts. In the State of Bahia (Brazil is a Federation made up of States), powerful cocoa growers have occupied the 36,000 hectares of the Pataxó Hã-hã-hãe territory delimited in 1936, and tried to deny the Indian identity of their opponents in court, claiming miscegenation, absence of a distinctive language, and loss of traditional cultural features. So far, Indians have won the cases.

Other examples are the numerous communities in the oldest settlement zones whose Indian identity has been challenged, and who have had difficulty in being recognized as such by the government. This has been the case of the Tingui-Botó and the Uassu in Alagoas State, confined to very small areas. The Tingui-Botó possess 3 hectares where they keep a one-ha wood for their rituals.

The government has made several attempts to limit the definition of Indian. One such attempt which elicited an outcry dates back to 1980, and was intended to apply 'Indianness criteria' to decide who was and who was not an Indian in Brazil. The objective was threefold: to suppress land rights, to free the government from some wards, and to get rid of annoying Indian leaders (Carneiro da Cunha 1981; Viveiros de Castro 1981).

The Indians' Legal Status

Pursuant to the Civil Code of 1916 (Law 3071 of 1/1/1916, art 6, IV), the Indians are considered relatively incapable of performing certain acts in civil life. This category also includes minors over 16 and under 21 years of age, and spendthrifts. The Indians' civil incapacity is therefore relative and not absolute. Absolutely incapable are minors under 16, the insane, and the deaf and dumb who can not express their will.

Being relatively capable, Brazilian Indians are wards. Their legal guardian is the Union, and guardianship is exercised by FUNAI (Federal Agency for Assistance to the Indian) set up in 1967 (Law 5371 of 12/5/1967) to replace the Service of Protection to the Indian - SPI - set up in 1910 and dissolved in 1967 primarily because of corruption charges.

The Indian Statute (art 9, 10) provides for emancipation from guardianship only upon the initiative of the interested party. Individual Indians and Indian communities as groups (upon the initiative of the majority) may request their emancipation. For this purpose, the following requirements have to be met:

knowledge of the Portuguese language, possession of the necessary skill to perform a useful activity in the national community, reasonable comprehension of the usages and customs of the national community. (Indian Statute, art 9)

Wardship means that civil acts (such as the sale of agricultural outputs, labor contracts, sale of timber, etc.) are not enforceable against Indians unless they are to their advantage (Civil Code art 146; Indian Statute, art 8). The guardian's legal assistance is required in such instances. It should be noted that the guardian cannot impose its will on the ward, but should only assist it so it can exercise its own will. Guardianship should be regarded neither as a sanction nor as

a form of discrimination but rather as an additional protection to the Indian who, living according to specific rules, different from those of the remainder of the population, and having insufficient knowledge of the surrounding society, is particularly liable to be wronged: in fact, wardship is always conceived of as a special zeal to the benefit of wards, in instances where it is applied.

In practice, however, guardianship has been widely used as coercion, and this practice is not fortuitous but derives from a basic structural contradiction. Between the general public interest - which is that of the ruling classes - and Indians' rights, the Union allows the first to prevail to the detriment of its wards (Souza Filho 1982:95-7). The inclusion of FUNAI in the Ministry of the Interior, the ministry in charge of development projects, highlights the guardian's powerlessness. Even if it had the administrative will and competence (not to mention the often-questioned honesty) required, FUNAI would barely have the political power to enforce Indians' rights. It should be added that unlike guardianships governed by common law, there are no provisions for any curatorship over the wardship exercised by the Union. FUNAI is not obliged to render accounts of its acts (Dallari 1979:78; 1984a:6).

Thus, there are numerous instances of abuse of power both over the Indian communities and individual Indians. In 1980, the government denied a passport to Xavante chief Mário Juruna, who had been invited to participate in the Russell Tribunal in the Netherlands. Mário Juruna won the ensuing lawsuit in the Federal Court of Appeals. In 1981, with the excuse of the Indians' status as wards, the government tried to challenge the possibility of an Indian organization. In 1983, FUNAI negotiated directly - and to the detriment of its wards - an agreement with the Elf Aquitaine Oil Company, allowing oil prospecting in the area of the Sataré-Maué and Munduruku in the Amazon. Mobilized, the Indians obtained an indemnification from Elf Aquitaine.

The image of wardship is also flawed inasmuch as it can suggest to public opinion (as it has suggested even to criminal law experts) a certain 'childishness' of the Indians, or their insufficient or defective mental development. In fact, the guardianship is based on the acknowledgement of the different cultural standards that disarm Indian populations before a capitalist society (Dallari 1983:4; Agostinho 1980; 1982).

Despite all these problems, the link between Indian guardianship and land rights (referred to above) continues to make wardship an important tool to defend Indian lands, in the absence of a more suitable arrangement. Aware of that, no Indian or Indian community has ever requested emancipation. On the other hand, since the early 1970s, Brazil's government and anti-Indian deputies have made attempts to enforce compulsory emancipations, against the interested parties' will. So far, mobilized Indians and public opinion have prevented such actions (see L. Vidal et al 1979).

Guardianship - when properly understood - does not prevent the exercise of citizenship rights. The Indians are native Brazilians, they have political rights, may vote and be elected (Resolution 7,019/66 of the Superior Board of Elections), have the right to property (Indian Statute, art 32), the right to manage their own businesses, and to participate in the administration of the Indian Estate run by FUNAI (Indian Statute, art 42). They are entitled to organize in associations, to hire lawyers to represent them (Indian Statute, art 37; Dallari 1983:5-6; Souza Filho 1983:8). The mobilization of the Indians and that of the civil society (stimulated by the Indians and by entities supporting them), as well as some recent jurisprudence, have been a major factor in the gradual recognition

of such rights, even though limited by FUNAI's authoritarian practices. The election of Xavante leader Mário Juruna to the national Congress by Rio de Janeiro in 1982, the Indians' presence in court filing suits regardless of FUNAI (C.A. Barbosa & M.A. Barbosa 1983: 10-11), are landmarks in this struggle.

A new draft Civil Code is under discussion by the Parliament. In the draft submitted to the Chamber of Deputies in 1984 the Indians were included amongst the absolutely incapable, and not among the relatively incapable (Draft, art 3). If approved, instead of assisting the Indians in their civil life, the Government would represent them. The Indians could then be neglected, for they would have to submit entirely to the guardian agency. The clamor brought about by the proposal gives grounds for hope it will be rejected (Carneiro da Cunha 1984:3).

Land Rights and Use of Natural Resources

The fight over Indian lands and their riches is the gist of the Indian issue in Brazil today. The latest official data (FUNAI 1984) mention 67 million hectares of already identified Indian lands, and provide an estimate that Indian lands might total between 7.8 % and 8.5 % of Brazil's area, approximately 850 million hectares (Grupo de Terras Indigenas 1985: Annex C).

The Indians' land rights are ensured by the present Constitution of 1969, according to a constitutional tradition dating as far back as 1934 (Constitution 1934 art 129; Constitution 1937 art 154; Constitution 1946 art 216; Constitution 1967 art 186). These rights are reiterated in the Indian Statute and Land Statute (art 2 (4)). In its present version, the Constitution grants the Union title over Indian lands, and the Indians permanent possession and exclusive usufruct of their riches. Article 198 (as inserted by Constitution Amendment No 1, 10/17/1969) provides:

Lands inhabited by Indians are inalienable as provided for by federal law, and the Indians are entitled to their permanent possession, and to the exclusive usufruct of natural riches and all utilities existing on that land.

(1) Juridical effects of any nature aiming at the dominium, possession or occupation of land inhabited by Indians are hereby declared null and void.

(2) The nullification and voidness referred to in the previous paragraph shall grant the occupants no right to indemnification or suit against the Union and the Federal Agency for Assistance to the Indian.

As mentioned above, Indian land rights derive from the acknowledgement of indigenate as the primary and congenital source of land possession (Mendes Jr. 1912:57; Affonso da Silva 1984:4), expressly recognized in several colonial laws, and particularly in the Ordinance of 1 April 1680, which declares the Indians 'primary and natural owners (of lands)', and provides that their rights should be preserved upon the granting of lands to private parties. This right emanates from primordial occupation (Dallari 1980:9); it is a historical right (Carneiro da Cunha 1981). Despite the strength of the Constitutional provisions, or perhaps precisely because of it, there have been attempts to 'decharacterize' the subjects of such land rights, to reduce the extension of guaranteed territories, and to restrict Constitutional provisions by ordinary laws and decrees. There are frequent claims that small Indian groups own unnecessarily

large land tracts, without pointing out that when their land is taken, those Indians are not usually replaced by other people, but by heads of cattle. It would be necessary to know what portions of such lands are occupied by non-Indians or are leased by FUNAI (Oliveira Filho 1983:25). At any rate, lands in the Indians' permanent possession as provided for in the Constitution are not negligible.

From the Indian peoples' standpoint, land is not merchandise but rather their territory, a condition for both their physical and social reproduction (See-ger & Viveiros de Castro 1979). This perception is the basis for the inalienability of Indian lands and their internal regulation by Indian customs (Indian Statute art 6). The Union's frequent attempts to fragment several Indian territories (Yanomami, Nhambiquara) not only ignores the way of life of hunting-collecting peoples but also neglects the importance both of social ties between different villages and of territorial continuity.

Some jurists question the constitutional guarantee of Indian lands: a justice of the Supreme Court of Brazil declared that art 198 of the Constitution was equivalent to the first Bolshevik decree: 'Private property is abolished'. Nevertheless, prominent jurists understand Indian lands the way they should be understood: as a people's habitat, and not in the unjustifiably limited sense that reduces them to the village and its gardens (Nunes Leal 1964; 1967; Affonso da Silva 1984; Franchetto 1985).

In accordance with the Indian Statute (art 17, 26-30, 32), Indian lands may be of three types: there are lands inhabited or occupied by the Indians, those defined under the Constitution and which are their permanent possession. There are lands that are the full property of Indian communities or Indians: examples are lands granted to communities, such as the ones donated to the Gaviões in Pará State. Lastly, there are reserved lands, where Indian parks and reserves are created and to which Indians can be transferred. Theoretically, the latter should not be confused with those referred to in art 198 of the Constitution, but in reality they frequently overlap.

Except for lands which are the Indians' full property, the remainder are the Union's property and the Indians' permanent possession. It should be pointed out that the collective possession of lands by Indians, as well as typical Indian customs regarding land, are explicitly recognized in the Indian Statute (art 28 (3), 33; see Oliveira Filho 1983:5).

The Indians' rights to the permanent possession of their territories are not dependent upon the delimitation of such lands (Indian Statute art 25; Affonso da Silva 1984:5). Nevertheless, the physical delimitation of the lands and their homologation by the President of the Republic (Indian Statute art 19) are important to guarantee them, and the Indian Statute (art 65) provided for a five-year term to complete all delimitation of Indian lands. This term expired on 12/19/1978, but delimitations were far from being completed. The latest official data, of October 1984, nearly six years after the legal term had expired, indicate that thus far 67 million hectares of Indian lands have been identified for delimitation, of which 3 % have been delimited and homologated, 19 % delimited and not as yet homologated, while 78 % have only been identified (Grupo de Terras Indígenas:13). The delay in land delimitation underscores the strength of anti-Indian interests.

In early 1983, an Executive decree (88,118 of 2/23/1983 regulated by Ordinance No. 002 of 3/13/1983) transferred the final ruling regarding the definition of Indian areas - previously in charge of FUNAI - to a work group which includes the Ministry of Land Affairs and other federal and state agencies deem-

ed convenient', and recommended that the presence of official projects and of non-Indians be taken into account in such areas. In brief, it recognized invasions, including official ones, and tried to legalize them.

Indian lands enjoy a number of legal guarantees: for example, they are not subject to expropriation, 'usucapiao' (adverse possession) or attachment (Indian Statute art 38, 61). Their leasing is also forbidden (Indian Statute art 18). Nevertheless, the Indian Statute itself set forth an exception in art 62 (3), allowing the continuation 'for a reasonable timespan' of leases effective in 1973, the date of its approval, so as to avoid 'serious social consequences'. This is a restriction on the Indians' direct possession of their lands (Laranjeira 1984:192; 1985:126). Given the leasing policy practiced by the Indian Protection Service, the assistance agency prior to FUNAI, this exception actually meant the continued leasing of large tracts of Indian lands: a good example is the Caduveo in South Mato Grosso, where half of their reserve is leased to farmers. Such leases have frequently resulted in the actual ousting of the Indians from their territories. A clear example is that of the Pataxó Hã-hã-hãe in Southern Bahia.

The permanent possession of land inhabited by Indians, as guaranteed in the Constitution, has been unconstitutionally restricted (Laranjeira 1984:192; Afonso da Silva 1984:6) in the Indian Statute (art 20), and in the ILO's Convention 107 adopted in Geneva in 1957 and promulgated in Brazil as Decree No. 58,824 on 7/14/1966 (art 12). Both articles envisage compulsory displacement of Indian populations. The Indian Statute art 20, provides for intervention in Indian areas and eventual removal of Indian groups in several cases including the following categories based on 'national security':

- (c) for the sake of national security;
- (d) to carry out public works of interest to national development;
- (e) to repress widespread disorder or deforcement;
- (f) to work valuable subsoil deposits of outstanding interest for national security and development.

Despite this, art 20 specifies that the Union should only intervene if there is no alternative solution, and such action requires a Presidential decree.

What has actually taken place is that the Government treats Indian lands as no man's land. They become the first - rather than the last - alternative for government projects. Examples are provided by the numerous dams flooding Indian areas with no demonstration whatsoever of the absence of existing alternatives and without the sanction of Presidential decrees (Aspelin & Santos 1981). Entire Indian populations such as the Parakanã in Pará State have thus been displaced by the flooding of their lands by the Tucuruí Dam. Twenty-one hydroelectric plants should be built by 1995, affecting some 20,000 Indians. Art 20 of the Indian Statute clearly reveals the true Indian policy, one which is totally subjected to development policies. The settlement of the Amazon, launched as government policy in the late 1960s, with the building of roads, hydroelectric plants, mining and agricultural projects, has in fact entirely dominated Indian policies (Davis 1977).

Another serious restriction on the constitutional provision is expressed in the Indian Statute: art 45 allows third-parties to exploit the subsoil of Indian lands. Surface mineral wealth, unlike that in the subsoil, is recognized as being for exclusive exploitation of the Indians (art 44). This restriction is based on the argument that Brazilian law makes the distinction between the possession and property of the soil from that of the subsoil, and that subsoil riches belong to the

Government (Federal Constitution art 168). Nonetheless, art 198 of the Constitution provides that the Indians have exclusive rights to all the natural wealth of their lands, which would include the subsoil. Art 45 of the Indian Statute would therefore be unconstitutional (see Gomes 1984; Dallari 198b; Gaiger 1985). In November 1983, an Executive decree (86,985/83) sought to regulate subsoil exploitation of Indian areas, opening possibilities for mining and prospecting by private companies. Domestic and international clamor against the decree was vehement, but pressure from interested mining companies was sufficient to make President Figueiredo, the last president of Brazil's military rule, sign the decree in secrecy on 1/6/1985, six days before his successor's election. Again the outcry was so intense that the President backed down and suspended its publication in the Official Journal of the Union (Lopes da Silva et al 1985).

Whether they have been delimited or not, a sizable portion of Brazilian Indian lands have been invaded. In 1983 alone, 50 land conflicts were registered involving 45 ethnic groups. Of these conflicts, 23 opposed Indians to farmers, 11 to homesteaders, 9 to licensed miners and mining companies, and 11 to official hydroelectric projects (Oliveira Filho 1984:10). Conflicts between Indians and miners encroaching upon their lands, generally hired by powerful landowners, have been on the increase: in Alto Rio Negro and Roraima the situation is particularly serious.

To defend the Indians against invasion of their lands, FUNAI may request the intervention of the Federal Police and Armed Forces (Indian Statute art 34). This measure benefits the Indians, so long as the Military Police - who depend on state governments and thus are more related to local interests - are excluded. In 1983, however, the administration tried to legitimate (Exposition of Motives 055/83) the initiative of 'concerned private parties' to resort to the Military Police in conflicts against Indians. Shortly afterwards, the Military Police were called upon against the Pataxó-Hã-hã-hãe in Bahia.

Judicial issues regarding the property of Indian lands are under the jurisdiction of federal courts. This is a consequence of the fact that Indian lands are property of the Union, and one of its clearest advantages. The very reason for Indian lands to be the property of the Union, with the Indians retaining possession of them, is the greater protection the Government may grant to such lands. Nevertheless, Government itself tends to treat Indian lands as available land. There is one additional problem in transferring the full property of their lands to Indians: Brazil's law does not provide for collective property in land. Despite these difficulties, the next Constitution should try to find a better juridical formula, more in accordance with Indian customs, giving Indians the collective, unavailable, untransferable, imprescriptible property over their lands, with all their surface and subsoil riches, in addition to ensuring them special measures of defense.

Self-Government

Art 6 of the Indian Statute recognizes customs and traditions of Indian peoples in their internal affairs. That means that leadership systems in those societies are respected, along with their specific transmission patterns. However, the presence of the guardian agency amongst those societies who originally lack State organization is strongly felt both in the strengthening of leadership and in new competences ascribed to traditional chiefs. In addition, both FUNAI and

some missionary groups interfere directly in the internal politics of particular peoples, favoring certain leaders and trying to invalidate the authority of others. Both the nature of traditional leadership and the multiplicity of leaders are barely understood by officials foreign to the groups.

Indian Communities have no representatives in FUNAI's administration (Decree 89,420 of 3/8/1984), even though there are individual Indians working in the guardian agency (Law No 5371 of 12/ 5/1967, which set up FUNAI). A Bill proposed by federal deputy Mário Juruna, a Xavante Indian, in 1983 provides for the restructuring of FUNAI, which would be run by a council of management elected by Indian communities and supervised by an Indian council. Regional Indian Councils would monitor the actions of FUNAI's regional officials (Bill No 661/1983). The Bill has passed the Chamber of Deputies and is currently in the Senate.

FUNAI's administration of the Indian estate does not forbid the use of income to the benefit of communities other than the ones who generated it (Indian Statute art 43). This results in a de facto restriction on the self-government of Indian communities (Laranjeira 1985:127; Cardoso de Oliveira 1972:136).

There are no legal provisions for a national Indian organization, but it exists in fact and is widely recognized. It is the Union of Indian Nations, whose legality was challenged during Brazil's military government (Carneiro da Cunha 1981).

The State acknowledges no autonomous channel for Indian political representation. FUNAI, as has been seen, is neither authorized nor entitled to act as such a channel. A reorganization of political relations between the State and the Indians, providing for an adequate system of representation, would be a basic prerequisite for the recognition of Indian self-determination (Viveiros de Castro 1983; UNI 1985a; 1985b).

Acknowledgement of Family Structures

Arts 6, 12, and 13 of the Indian Statute acknowledge customs, particularly governing kinship and order of succession. Marriages may be made according to the community's customary law.

Criminal Law

The Indian Statute (art 56 and 56) provides for attenuated penalties for Indians, and recommends that confinement penalties be served in semi-freedom in premises close to the convict's dwelling.

In fact, many Indians have been arrested. In the second half of 1985 alone, 18 Wapixanas and Macuxis living in Roraima, Brazil's northernmost territory, were put in common jail in the territory's capital. They were charged with theft and with being a criminal gang when caught trying to delimit their land or to till already delimited areas. Many land conflicts leading to violence have been characterized as common offenses.

Even though the Indian Statute (art 56) recommends that the judge take into account the Indian's degree of integration when applying the penalty, the Criminal Code does not provide for this. Judges frequently use the unsuitable criterion of 'incomplete mental development or mental disease' to assess the cri-

minal responsibility of an Indian defendant (Paiva & Junqueira 1985:10; Agostinho 1978; Halpap and Fontana 1979; Conn 1983).

Customs are tolerated in the criminal area, with the exception of Indian use of death penalties (art 57). The death penalty in Brazilian Indian societies is generally applicable to successful shamans who start claiming a domineering position strange to these totally egalitarian societies.

The Indian Statute (art 58, 57) also sets forth penalties for crimes against Indians and Indian culture, such as the sale of liquor or disturbance of Indian ceremonies.

With land conflicts, violence against Indian leaders has increased sharply. Such crimes are often not properly investigated. Fourteen murders of Indians committed in the last 10 years remain unsolved. In November 1983 Margap de Souta, a Guarani leader from Mato Grosso who had represented Brazilian Indians upon the visit of Pope John Paul II to Brazil, was murdered. So far the facts of the case have not been revealed (Almeida 1984).

Special Institutions

The federal guardian agency - FUNAI - is required to provide the Indian population with health and educational services. The Indian Statute (art 49) provides for the teaching of both Portuguese and the group's language, and orients the whole educational process towards 'integration in the national communion' (art 50). On various occasions and notwithstanding vigorous protests (UNI 1985c), educational services were delegated to Protestant missions.

The absence of Indian representatives both at FUNAI and in Congress has already been mentioned, although there are individual Indians at FUNAI and one Indian in the Chamber of Deputies. The Union of Indian Nations (UNI) - not provided for by law - nowadays plays an important representative role. Councils of each Indian community appoint an 85-member National Council, which in turn appoints the national coordinating body consisting of six members.

Human Rights and Equality before the Law

Many Indian peoples have protested with increasing efficiency against violence inflicted on them. At the national level, UNI has become the most dynamic body to denounce violations of human rights, supported by:

- (a) Brazilian associations for the defense of Indians (such as the Comissão Pró-Índio, Centro de Trabalho Indigenista, and Associação Nacional de Apoio ao Índio), in addition to Conselho Indigenista Missionário (CIMI) and Operação Anchieta (OPAN)) which existed before UNI and have been actively supporting it. Some of those associations provide juridical services for Indian affairs. Others, like the Centro Ecumênico de Documentação e Informação (CEDI), have played a vital role in the area of documentation (CEDI 1984; 1985).
- (b) Professional associations (Associação Brasileira de Antropologia, Ordem dos Advogados do Brasil, Associação Nacional dos Geólogos and Conferência Nacional dos Bispos do Brasil (CNBB)).

Pressure from both international and domestic organizations, capable of mobilizing public opinion, resulted in a very important development: as of 1981, the World Bank started requiring the Brazilian government, as a condition in agreements to fund large projects in the Amazon involving mining, dams, agriculture and cattle raising, highways and railways (Northwest Pole and Carajás), to take measures safeguarding Indian populations affected by such projects. For the first time, the Bank required that the implementation of such programs (and, for Carajás, the assessment of the program itself) be assessed by teams of anthropologists foreign to the guardian agency, FUNAI. Priority was given to the delimitation of Indian areas and to health care to Indian groups, some of which had been just recently contacted. Results, however, are still far from satisfactory (Mindlin 1984; Vidal et al. 1985).

A Parliamentary Commission for the Indian, set up by a resolution proposed by Indian deputy Mário Juruna, has been working in the Chamber of Deputies since 1983. All bills affecting Indian populations must be submitted to that Commission. Many anti-Indian deputies quickly joined it, proposing bills that provided for the opening of the Yanomami area for mining, or the compulsory emancipation of Indians. Nevertheless, after tough struggles, so far the Commission has been generally favorable to the Indians.

The Juridical Branch, even though very slow, has sometimes ruled favorably for the Indians. However, major lawsuits still drag on in court, such as the Mangueirinha affair in Paraná State. Half of the area belonging to the Kaingang and Guaraní was illegally sold in 1949. A 1979 ruling was unfavorable to the Indians and since 1980 the case has been with the Federal Court of Appeals. Meanwhile, conflicts become more vicious. In 1980, the main Kaingang leader, Angelo Kreta, was killed in an ambush (Helm 1982).

Still in the domain of human rights is the right to one's own image which, although provided for in the Indian Statute (art 58, item II), has been violated by private parties and FUNAI (Pontes Neto 1982: 156; Pimentel & Viveiros de Castro 1981). Recently, some singers using Indian music as well as authors of ethnography books have been paying royalties to the Indians.

Brazil has never admitted its multi-ethnic character. Because it tries to conceal this reality, and given the principle of universal equality before the law, the unsatisfactory formula of guardianship of Indians ends up by warranting the special protection they are entitled to. Without that guardianship, one could argue that there is no reason for a different treatment for Indian lands, as provided for in the Constitution. This treatment - which is, as we have seen, a historical right - would then be seen as a privilege.

The next Constitution should therefore acknowledge Brazil's multi-ethnic character, the collective and inalienable property of Indian lands and the special protection which Indians and their territories are entitled to from the Brazilian State.

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