

Multiculturalism and Collective Rights

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INTRODUCTION

The survival of multiculturalism in a world in which the state recognizes, protects, and seeks to transform all rights into individual rights is practically impossible. In fact, the construction of the contemporary state and its law was characterized either by legal individualism or by the transformation of each person with rights into an individual. This was done with businesses, societies and with the state itself. The fiction was created that each entity was a person, a legal or moral individual. Similarly, indigenous peoples came to be seen as individuals with protected rights. This transformed the essentially collective rights of peoples into individual rights.

Contemporary law, apart from being individualistic, is also dichotomous. People—individuals with rights—are made to correspond to one thing: a protected legal title. The legitimacy of this relation is established by a contract, an agreement between two people. It is obvious that this legal model would not serve the interests of the indigenous peoples of Latin America because, even if each people was considered a legal individual, the protected property (i.e., the property that the peoples need to protect) and its legitimacy bear no relation to either individual availability or contractual origin.¹ It is because of this that Latin American countries always seek to separate the individual native from his/her people, assimilating the individual into the “national society” in such a profound way that his/her native identity is lost. The system has always believed that such an assimilation would be possible via labor yet has never understood that labor that produces property is not a part of the indigenous cultures of America.

So much did these peoples struggle, and so slight was the possibility of assimilation that the developing societies exerted on them, that the system ended up recognizing collective rights, which opened a new horizon of

recognition of the peoples, enabling countries to consider themselves multi-cultural and multi-ethnic. These collective rights moved the indigenous peoples to other social segments, in such a way that they ended up being liberating.

The trajectory of this transformation, its potential and difficulties are the theme of this chapter. The following stories, though extremely representative, must be understood as examples of a much vaster and more complex reality that points always in the same direction, towards a type of renaissance of native peoples or a renaissance of hopes (Souza Filho, 1988).

THE FORMATION OF STATES IN LATIN AMERICA

The mercantile colonialism that began with the discovery of the Americas and the sea route to India led to a profound exploitation of the indigenous peoples of those lands, easily culminating in contempt and genocide. The wars that Portugal and Spain engaged in against the resistance of the peoples of America were marked by the inequality of conditions and cruelty. The Europeans had gunpowder, and did not hesitate to abuse it. The so-called Indians were hunted down in the jungles, mountains, and plains, forced into the interior and sold or trained in captivity to serve as slaves, made Christians and transformed into a workforce for the mercantile capitalists, who ironically in Europe constructed the theory of the independent worker as a basis of private property. No Native American people was immune to the arrival of the Europeans. The war waged on the coastal peoples rapidly spread to the interior. The native people either surrendered or fled. Those who fled did not find unoccupied territories, but groups of other natives with whom they had to fight for control of the land. Trapped between two enemies, every native group was constantly forced to choose between fighting and surrendering. If we could picture the routes taken by each native people on a map of America, we would undoubtedly see paths covered in blood throughout the vast forests, enclosures, fields, and mountains.

As if this was not enough, the Europeans brought slaves with them, who intended to free themselves of their chains, become reunited with members of their people, and find a place in which to live, hidden from the Indians fighting the fierce persecution of "the captains of the forest."² Clearly, they sought a refuge, a place of difficult access, a hiding place in which to settle. Such places, which in Brazil came to be known as "quilombos," existed and indeed still do in many countries of America. The blacks who escaped did not know the local terrain as well as the Indians, and thus were generally at a disadvantage when it came to fighting. The fact that America was organized into nation-states at a very early date (the same time as Europe) did not help to change the lot of the native inhabitants. The wars of independence at the

beginning of the nineteenth century did not have a liberating effect, despite the efforts of men like Tiradentes, Bolívar, and Artigas. The struggles, supported militarily and logistically by the indigenous peoples, did not manage to build free and truly independent states led by the will of the various peoples of which they were constituted. Quite simply, Iberian colonialism was replaced by an English version.³ The new colonialism had to be adapted to the new contexts of Africa and Asia, where the establishment of nation-states was abandoned, probably due to the fact that local leaders there did not exercise the same level of control over the people as did the far more Europeanized American leaders.

The exception is Paraguay. Francia, along with the indigenous people, promoted a real independence, evicting the landowners and the representatives of Spanish and English interests. Benefiting from freely accepted labor and a policy of inhibiting primitive and predatory capitalist accumulation, he industrialized the country, securing an excellent standard of living for the literate, well nourished and profoundly nationalist people. This experiment in freedom lasted four decades. Not resigned to the Paraguayan example, England encouraged and subsidized Argentina, Brazil, and Uruguay to wage a war of destruction to kill every Paraguayan man.⁴ Nowadays, Paraguayans, decimated in the last century, speak Guarani in informal situations in order to keep alive the experience of freedom.

Once the nation-states had been established, the indigenous peoples forgotten, and foreign interests always served, the governments took to expanding the agricultural borders and seeking new and interesting riches in the interior, treating the local peoples as a hindrance and obstruction to progress. Under these policies, their lands, lives, and societies were once again violated. The immigration of the nineteenth and twentieth centuries, on the other hand, also brought various other peoples, exiled from their homelands and deceived by false propaganda. The immigrants, who were independent workers, were treated in an equally inhuman fashion. Having no right to land in the nineteenth century, arriving as workers in an agricultural enterprise, they found themselves already in debt. There are innumerable examples of bad treatment, slavery, and misery. In the search for land and freedom, they ended up either accepting their fate or having to struggle for land in the already densely populated indigenous territories.

The nation-state and its individualist law denied all these groups any collective rights, and merely recognized their individual rights, crystallized in property. Thus, whoever benefited from economizing to establish a property was integrated into the system, while all the others would never become integrated—Indians, fugitive slaves, fishermen, riverside dwellers, rubber extractors, and small leaseholders living by gathering, hunting, fishing, and subsistence farming, maintaining strong relations with the community

in order to live, and, not infrequently, while far from contact with civilization, living lives of abundance and happiness. However, they were always threatened, because if they found themselves living on land rich in plants or minerals, they were envied, cheated, and split up.

THE FALLACIOUS INTEGRATIONIST POLICY

The colonialist policy in America was characterized by the subjugation and integration of the peoples encountered. The cultural and economic subjugation consisted in forced religious and economic integration. There were two choices: either accept such a policy or be wiped out. The policy varied according to the violence and ambition of its maker. In the Prata basin, the Jesuits were sincere and concerned about the salvation of the souls of the Guarani people, while among the Incas and Aztecs, Pizarro and Cortés were violent and arrogant. There were cases of alarming ambition and aggression. Great peoples with access to technology and gold, such as the Chibchas (Muiscas) were utterly wiped out in a careful and efficient act of genocide during the conquest of Colombia.

Those who survived were able to serve the kingdom as workers, semi-slaves, or participants in the missions of "pacification" of other native peoples. It is probably for this reason that so many native peoples participated in the wars of independence in Latin America, always led by the Spanish or their descendants. In Brazil, which was a special case, independence was achieved without bloodshed by the heir to the throne of Portugal. It was a choice of the organization and division of the state and not an attempt to gain freedom.

The creation of Latin American nation-states, following the European model, led to the establishment of a constitution that set out a list of individual rights and guarantees. This meant forgetting their Indians and omitting all rights apart from the possibility of individual patrimonial acquisition. However, the Indians maintained the possibility of integration as individuals, as citizens, or, in legal terms, as individual subjects with legal rights. Gaining individual rights meant losing their rights as a people. Despite this, the peoples are still peoples. This attempt to integrate individual Indians was established in the Carta Régia of 1808 that declared war on the Botucudo Indians of Paraná, and stipulated that the prisoners would be obliged to serve the militia or residents who captured them for fifteen years. To those who put down their weapons, became subjects of the realm, and populated villages would be given the opportunity to enjoy the permanent benefits of a peaceful and lenient society living under just and humane laws (Souza Filho, 1988: 56).

Nevertheless, the public policies and laws for many years proposed to satisfy this will of the nation-states to integrate the peoples as citizens, legal

subjects, able to negotiate legally, without recognizing their collective rights. From this perspective, the genocide continued, and each attempt at integrating these people meant the continuation of the state of war imposed when the Europeans arrived. Not only were the native people made invisible, but they also lost their very lives.

When the nation-states wrote their constitutions guaranteeing rights, they inaugurated a new system of justice with a number of dichotomies, such as the public and the private, the subject and the object of rights, based on private property, the legal security of freely established contracts, and the judicial solution of legal conflicts. This benefited property owners and those who held contracts, especially contracting parties, while the various native peoples, those living in communities, did not benefit from this system. In Latin America, the policies in relation to the indigenous peoples were those of integration. In other words, being indigenous was provisional. Many decades after the national constitutions were written, judicial protection of some indigenous rights began to appear, but this was always of a provisional character. In Brazil, in the twentieth century, indigenous laws stated that their goal was the integration of the Indians into the national community, and while this has not come about, some rights would have been granted. The first article of the present Indigenous Law in Brazil states that "it regulates the legal situation of the Indians or aborigines and of the indigenous communities, with the purpose of preserving their culture and integrating them progressively and harmoniously into the national community."⁵

It was not so in other parts of the world. Colonialism in Asia and Africa did not treat the local peoples in the same way, but maintained the colonies under policies of apartheid, the level of violence of which was in proportion to the resistance of the indigenous people. This meant that individual integration would only occur in exceptional cases. The consequence of this difference is that native peoples in America found it more difficult to continue living their lives according to their habits, customs, and traditions. The solution of their internal conflicts depended on the laws of the respective nation-states. Integration, in the case of Latin America, was proposed on the level of the individual. This meant the extinction of the native people.

In Brazil, each native people suffered differently from this policy; however, two fundamental methods can be easily observed. On the one hand, there was a policy of total omission, as if the native peoples did not exist and were merely a group of people who would be integrated sooner or later, while, on the other hand, there was a policy of consistent protection by creating remote refuges for the native peoples. Their traditional territories were not respected. This policy was especially applied in the Amazon. These two methods will be analyzed next, with historical examples to demonstrate the wide diversity of official policy.

THE INVISIBLE PEOPLES

The first method is the application of a classical assimilationist culture, in which there is no place for collectives that are situated between the citizen and the state. The invisibility with which the native peoples of the coast and the south of Brazil were treated is comparable to the lack of consideration given to the Peruvian indigenous people, as immortalized by the hero Garabombo the invisible (Scorza, n.d.).

To exemplify this situation of invisibility and the return to existence or rebirth (Souza Filho, 1998) I have chosen three cases: the Xetá people to the west of Paraná; the Guarani people, who occupy practically the whole southern region, and the people of the northeast, represented by the Pataxó Hãhãhãe. I have chosen these three cases because the state totally ignored them in their public policies, and insisted on denying their existence for a considerable length of time. Those who survived resisted with such force that today their struggles have become the main land conflicts in Brazil, supported now in the collective laws recognized in the Constitution of 1988.

The Xetá people: chronology of a genocide

The Xetá people have not survived. Today there are about ten individuals living separately, some in villages loaned to them by the Kaigangues, others in cities of the region. But before they were wiped out by the merciless advance of the agricultural border, the Xetá controlled the jungle of the Serra de Douradas. With the arrival of the colonization company Suemitsu Miyamura & Co., the forests were burnt down, as the wood was of no interest. The plots of land were sold off to new occupiers. The history of the Xetá Indians is very recent, yet it is so similar to the accounts of Bartolomé de Las Casas in the sixteenth century that it makes one doubt the passage of time. In 1952 the new large landholders captured an 8-year-old boy by the name of Tikuein. The confirmation that the territory was occupied by a "primitive" people came in the following year with the capture of another boy who became a servant for the whites.

In December of 1954, six naked and unarmed men came across some landholders. They spoke and gesticulated in such a calm and peaceful way that the whites did not react, and let them leave. What these Xetá said has never been translated. It was never known whether it was an appeal for clemency or a threat, but it is certain that if it was a threat, nothing came of it, and if it was a plea for clemency, it was unheeded.

In 1955, the Federal University of Paraná and the national indigenous organ organized an expedition that found villages and objects that today can be seen in the Museum of Paraná. However, no Indians were located.

Perhaps what they wanted to say in the previous year was that they intended to leave. In the following year the expedition went further and located two peaceful groups who allowed photographs to be taken and film to be shot. They joked around and laughed, but did not accompany the expedition, who had wanted to accommodate them temporarily at the nearest ranch; they stayed in the forest. A few months later, one of the groups was massacred. The crime was never completely explained nor were the perpetrators brought to trial. Members of Parliament pressed for the creation of the national Park of Sete Quedas (the Seven Waterfalls),⁶ inside of which was to be an area for the Xetá. The Xetá "reserve" was never created and a few years later this people was deemed extinct, removing any obstruction to the legitimization of private property in the region. The new colonialization firm, the Companhia Brasileira de Colonização e Imigração (Cobrinco), continued the devastating work, leaving not a single tree standing, and with the last cove of the forest died the hope of finding a member of the Xetá alive. The massacre had ended. Still, today a few Xetá survive outside their culture and the forest, which had sheltered them. Indeed, the forest itself has been transformed into vast plantations of cotton and soy and is riddled with textile factories. Not even the beauty of the Sete Quedas remains, flooded by the Itaipu reservoir, as if nature remains silent in homage to the death of the people who were always so close to it.

In 2000, FUNAI, the Brazilian indigenous organization, organized a study group to create a Xetá area, with the idea of accommodating the last dozen individuals who still survive, and maintaining the memory and the history of a people destined to die.⁷

The Guarani's long road in search of a land of freedom

If the history of contact with the Xetá was fulminant, the relationship of the Guarani with "civilization" has been very different. The Guarani appear in the texts written by the first Spanish chroniclers who went up the Paraná and Paraguay rivers. They were used as domestic slaves and were present in the cities of Buenos Aires and Asunción from the sixteenth century on. Throughout these five hundred years, they became so visible that a conflict broke out between Portugal and Spain, based on the Society of Jesus. They were once deemed practically extinct, and then once again became, in more recent times, the most populous indigenous people in Brazil. The Guarani gave Paraguay a national language, the toponymy of almost all of its geographical features, especially the rivers and mountains, and the names of innumerable cities in the south of Brazil. Nowadays it is common to see Guarani in the streets of coastal cities in discreet conversations conducted in their native tongue.

The trajectory of contact with the Guarani is curious. In 1607, the Jesuits chose the region in which today stands the city of Asunción, the capital of Paraguay, as their headquarters in the south. The idea of converting the Indians was linked to that of building, based on the Guarani's social organization and the Jesuit concept of state and law, an independent model of organization that was known as "Jesuit missionary returns." Persecuted by "bandeirante" violence⁸ in Portuguese territory and by representatives of the king in Spanish lands, the Guarani finally embraced not only Christianity but also life in the new villages, a life that was a blend of Guarani tradition and Jesuit social organization, with significant alterations in the division of labor. Apart from this, they maintained their beliefs, traditions, and customs, including their language. With the defeat of the Jesuits and their expulsion from South America, the Guarani also were dispersed throughout the territory. They accepted the encroachment of the agricultural boundary, and were not particularly concerned about the non-Indians who arrived in the region.

Traditionally, the Guarani shared their territory with other native peoples, and managed to live in relative harmony. They were great travelers and sought the land of freedom they knew lay to the east. The official policy of the Brazilian government in relation to them was one of total omission. They are for that reason an invisible people. In the states of Rio Grande do Sul, Santa Catarina, Paraná and São Paulo, they were deemed extinct and had practically no designated or reserved land for their exclusive use. In Mato Grosso do Sul, at the beginning of the century, their lands were occupied and given over in development programs to white immigrants. The Indians, who were seen as a labor force for the businesses, apparently accepted employment on the ranches given access to their sacred lands.

They always accepted sharing their territory with other peoples. In their cosmology, the gods created the earth for them. Thus, its use by other peoples was of secondary concern. They knew, however, that somewhere there existed a land of freedom, which they sought incessantly. They did not imagine that the new inhabitants had such different habits from the Kaingangues, Charruas, and Xoclings with whom they had shared their territory from time immemorial. They neither knew nor believed that the use of the land by the new inhabitants was devastating and implied the death of local flora and fauna in order to facilitate the introduction of new plants and tame animals, all of which were raised by men. In order to survive, and while not integrated individually as independent workers in the local society, the Guarani collectively were given small plots of land to which they were dramatically confined. Nevertheless, they were never integrated.

In this way, the Guarani, lords of a vast territory and culture, came to live in the three southern states, on land lent to them in the territories of other

peoples and in Mato Grosso, where they were confined. Despite this situation, they continued to search for the land of freedom. On this journey, keeping themselves half hidden, they left the destroyed forests in search of other forests they might inhabit. They established themselves in more and more remote places, untouched by private property. Nowadays, important Guarani areas are located in places considered "untouchable" by civilization, parks, and other conservation groups. Perplexed, then, they ask themselves where they should go. They are aware that the whole of the immense territory that they have forever thought of as only theirs is not and never was. However, those with whom they share it treat it strangely. They kill the rivers, destroy the forests, kill the animals, and make criminals of the Guarani for living in the last areas of virgin forest. Thus, a conflict of rights clearly occurs. On the one hand, one has the Guarani living, or trying to live, in the last areas of rainforest held sacred by them and, on the other hand, environmentalists who, with the best intentions, are concerned about saving the last forests, or "sanctuaries," which implies that they should be completely uninhabited.

The recognition of collective, native rights and the rights of everyone to an ecologically balanced environment, as laid down in the Brazilian Constitution of 1988, provoked an apparent conflict between the Guarani and the collective rights of all the parks and other conservation groups. As we shall see, this contradiction is only apparent, because there is a solution; however, it goes against the old system of the individual rights of landowners. The Guarani are not only extremely knowledgeable about the earth, its plant and animal life, but also about the sky and the stars. This great people, shy and reserved, are an example of invisibility. Their cause is not just about land, about a territory, but essentially about collective rights to its development, which includes the land, but goes beyond that. The acceptance of collective rights by the system has helped this people to become visible.

The renaissance of the Pataxó Hãhãhãe

The most striking example, however, of the renaissance of indigenous collective will is located in the northeast of Brazil. It was there that under five hundred years of European occupation the majority of the native peoples were wiped out or forced into exile. The native peoples contacted in the 1950s in Matogrosso, almost 2,000 kilometers in the interior, proved to be from the northeast coast.⁹ The history of the Pataxó Hãhãhãe stands out. In the 1930s, their territorial rights having been recognized, the Pataxó Hãhãhãe were granted an area of approximately 50,000 hectares in the southern part of the state of Bahia. Twenty years later, the region was transformed into a great cocoa producing area, which brought the region to

the attention of other interested parties. The Brazilian state took measures to ensure the integration of the Pataxó Hãhãhãe Indians, that is, it provided them with education and work in far-off places, relocating the few remaining families to other indigenous areas, including one that served as a prison, called, ironically, the Guarani Ranch. The Pataxó Hãhãhãe were deemed extinct and their lands went to ranchers.

Less than thirty years later, in the 1980s, the individual members of the Pataxó Hãhãhãe, believed to be integrated and content in their lives as Brazilian citizens and as independent workers, gradually began to regroup. In a daring symbolic act, they reclaimed and occupied one of the ranches that had been set up on their lands. This sparked a conflict, which has lasted twenty years and claimed many lives. The first group was joined by other groups, new families who recognized themselves and were recognized as Pataxó Hãhãhãe, who, rejoicing, remembered their common ancestors and reaffirmed their status as Indians, as a people, as a collective. The state and the local elite denied them this status, and do so to this day. This has forced them to appeal to the law in order to have their rights recognized.

There are a number of legal cases that have to do with indigenous rights in the region currently being judged. The most important one, which defines the indigenous character of the whole area, is so well constructed and proven that technically it is impossible to rule against the Pataxó Hãhãhãe. At present, a decision by the Supreme Court is expected. In the meantime, taking action as spectacular as it is efficient, this native people are reconquering their former land. After the first ranch was retaken in 1982, many others went the same way. The Indians have regained something in the region of 5000 hectares of that which was attributed to them in the 1930s (Ricardo, 1996; 2000).

In 1988, when the constitution was passed, further progress was made in their rights, but the process was still very slow. In 1997, the murder of Hãhãhãe Galdino dos Santos in Brasília, mistaken for a beggar and burned alive as a macabre joke by children of the local elite, unexpectedly made visible the question of their rights that for almost ten years had been recognized by the constitution but had not yet been implemented.¹⁰ In 1999, the Pataxó Hãhãhãe were subjected to further violence when they were subdued by the military police of the state of Bahia. Two police officers died in an unexplained operation and the Indians were accused of causing the deaths. Throughout the trial nothing was proven, but the impression was given that the police had died at the hands of their own colleagues.

The Pataxó Hãhãhãe have mobilized on two fronts: 1) legally, in the Federal Supreme Court for the recognition of all of their land; and 2) by direct action, by reoccupying ranches and further regrouping as a people. They have become visible and today are recognized and present. However, they still have a long way to go before all their rights are recognized.¹¹

The history of the Hãhãhãe resembles that of other native peoples who managed to survive in the northeast. Ignored by the state, they continued to exist. Their language was mutilated, their dignity slighted, and frequently were they split up, recruited as integrated individuals into the developing society. Like the Hãhãhãe, many other native peoples of the northeast began to regroup and reconquer small areas of land. With the advent of the Constitution of 1988, their claims were anchored in the collective rights therein guaranteed.

THE EQUIVOCATIONS OF THE CONTACT POLICIES IN THE AMAZON

In none of the above examples did the state organize expeditions to make contact with the native peoples before the arrival of the agricultural border. On the contrary, expeditions of a scientific nature or later official studies could do nothing to limit the violent, disorganized, and crushing shock caused by the colonizing companies.

Sometimes, however, especially in the Amazon, the Brazilian state sought to protect native peoples in certain circumstances, favoring the widening of the agricultural borders and the concentration of native peoples in certain places, like the Indigenous National Park of Xingú, even if it was not their original land. At other times, the state felt itself obliged to keep the native people on their traditional land; still, though in the guise of protector, it seriously interfered with their culture. This brought about new situations, which it was and still is not prepared to resolve. It can be said then that while the Brazilian state in its public policies ignored the indigenous peoples beyond the Amazon, being not in the slightest bit concerned about the resulting ethnic destruction, in the Amazon itself there was an effort to make contact. This contact preceded the expansion of the agricultural boundary, after which came roads, much construction work, adventurers looking for gold and precious stones, and merchants and migrants from other areas in search of their fortune or simply the place of their dreams. On the contact fronts, as they were called, there was no agreement on what should be done once contact had been made, apart from the general idea, stemming from colonial times, of offering the Indians the gentle laws of the empire, that is, integration into the national community.

As there was, and still is, no agreement on how to deal with contacted natives, some initiatives became particularly relevant, such as the Indigenous Park of Xingú, where the contacted natives could maintain their traditions. For that reason, the policy of transferring Indians from their traditional lands to other areas came to be the accepted norm, albeit an illegal norm according to current legislation, dated from 1973, which prohibits the transference of

native peoples. After the Constitution of 1988, this policy changed. There are no longer concerted efforts to make contact with new native peoples, despite the fact that many are still unknown in the Amazon.

The Constitution of 1988 made it possible for the native peoples who had been victims of this abandoned policy to reclaim their rights. Such is the case of the Panará, which will be presented next. Other native peoples of the Amazon, who were not transferred, had their lands recognized, but the lack of public policy and disorganized action led to profound social changes, as exemplified by the indigenous cities of the Amazon.

Capitulation and the return of the "giant Indians"

The Panará were renowned as great warriors and were feared in the whole region. They lived on the left bank of the river that has the Western name of Peixoto de Azevedo. Just before 1970, the civilized world knew that there was gold at the mouth of the river and precious stones further upstream. But they also knew that exploration would mean having to put down Panará resistance. As not even their name was known, strange names were given to them, borrowed from other languages of the region and from the reports of their traditional enemies, the Krenacarore, Kranhacãrore and Keen Akarore. Alternatively, they were simply referred to as the giant Indians, as one of the first to be captured was 2.06m tall (Panará, 1988).

The Brazilian government, which did not expound the merits of development, decided to build a road linking Cuiabá to Santarém, crossing the full length of the eastern Amazon and passing right through Panará land. The machines, and behind them the adventurers, pioneers, representatives, and businessmen, came right up to the territory on the banks of the river Peixoto de Azevedo. Facing them were the dreaded giant Indians.

To convince the Indians not to be hostile towards the construction of the road and, naturally, those who would follow, an expedition was organized, led by the Villas-Bôas brothers.¹² After five years of intense work, a few deaths and many stories, the giant Indians were "appeased" and allowed the road through, which brought those in search of wood, gold and precious stones, and also influenza, measles, diarrhea and hunger. The survivors tell of not being strong enough even to bury the dead strewn along the path, let alone hunt or open a clearing. They have ended up living on the charity of those passing through.

Very soon, the giant Indians were no more than a pale caricature of the noble people who appeared in photographs in the national press for the first time on 10 February 1973. The statistics are daunting: of a population estimated to have been between 300 and 600 before contact was made by the Villas-Bôas brothers' expedition, as of 1975, when they were transferred from their lands, there were merely 79.

Moribund, their dignity as a people wounded, humiliated, begging for a crust of bread, they were taken from their fertile lands to a village in the middle of the Indigenous Park of Xingú.¹³ Either by irony or the cruel turns of history, the village lent to them as their new home belonged to a traditional enemy, the Caiapó, to whom in the past they had shown only minimal respect, a situation brought about by wars and mutual aggression. The Panará lived humiliated in the house of their enemies for twenty years, hoping to return one day to their territory, reconquer their land, their home and once again live among the animals, plants, and rivers so close to them.

Twenty years later, in 1995, the Panará began to struggle in earnest to return home. Encouraged by the victories of other native peoples who had been brought to live in the Xingú, and of others, such as those in the northeast, who hoped to recover the lands that had once been theirs, the Panará undertook a journey to what was their region and found that a fifth of the original territory had been preserved. Organized with the help of non-governmental organizations such as the Socioenvironmental Institute (O Instituto Socioambiental, or ISA), they brought two cases against the Brazilian state and FUNAI (The National Foundation for Indians [Fundação Nacional do Índio]).¹⁴ The first asserted a legal claim over the land, and the second compensation for damages. In the first case an agreement was reached in which the state recognized native rights over a part of the original territory that was yet preserved (the remainder was already occupied, and even had cities). The second case, also supported by the ISA, claimed damages from the Brazilian state and those responsible for indigenous affairs for ill treatment at the moment of contact. The court recognized the illegal character of the contact and of the relocation of the Indians to the Indigenous Park of Xingú, and awarded damages to the surviving Indians. As of this writing, the ruling had not yet been issued, due to formal questions, but the case has been tried and will be settled shortly.

This ruling indicates a change in the behavior of the judicial system because the case was based on collective rights established in the Constitution of 1988, even though the events took place before it came into being.

Villages surrounding cities: a new threat to native rights

When the arrival of the agricultural frontier did not mean extermination or relocation, the native peoples basically continued living normally on their lands, which had been demarcated after legal disputes or direct appeals to the constitution. This is true of many native peoples in the Amazon, among them the Ticuna. Despite having appealed to the law for recognition of their territories, the Ticuna had no problem in seeing them demarcated by the Brazilian government. Their lands were demarcated in the 1990s, that is,

with the constitution in full force, the indigenous policy already changed, and with collective rights respected.

The Ticuna are one of the most numerous of the indigenous peoples of the Amazon and inhabited a vast territory that included the three borders of Brazil, Colombia, and Peru. The agricultural frontier had not advanced much into this region, despite the fact that navigation was open, due to the proximity of the port of Rio Solimões. Nevertheless, the Ticuna were obliged to appeal to the law in order to have their main lands recognized.

The territories are extensive, but the agency responsible for indigenous affairs and religious missions concentrated their efforts on small villages on the banks of the great river. In the course of the last few years the small village ports have grown in an unprecedented way. The concentration, however, did not lead to the arrival of farmers or outsiders, but to the strengthening of the will of the people to join together where it was easier to receive the benefits of contact. These villages grew at such an alarming rate that some had as many as one, two, or even four thousand inhabitants.¹⁵ In fact, the so-called Belém do Solimões is a real city, with four thousand people living on badly planned roads and with no urban infrastructure whatsoever: no sanitation, paving, water, or other services.

The cities of the Ticuna are clearly visible because they are located on the banks of a large navigable river, but it is not this that determines the phenomenon. Indigenous urbanization in the Amazon began to spread and reached far distant and almost inaccessible regions. In the region of the upper river Negro, near the border between Brazil and Colombia, Iauareté is a city of two thousand multi-ethnic inhabitants living with no infrastructure.¹⁶ The city grew so much that a number of small businesses were set up. Immediately after the demarcation of the area (in 1998), the Indians expelled the whites and took over control of the city.

In the region of Raposa Serra do Sol, on the border with Venezuela and Guyana, at least two other indigenous cities are growing and facing very serious problems. In these cities there is a non-indigenous local population, even if small, and the government of the state of Roraima has turned one of them into the seat of the municipality. The indigenous territory where these cities are found has not been demarcated and the anti-indigenous, local politicians are struggling to prevent demarcation by using, of course, the existence of the cities as an argument.

All of these peoples still live in their traditional ways, with barely any consumer goods, and yet with unthought-of urban problems. Brazilian legislation offers no solution. There is no political organization, no representation, not even tax collection. These are new situations from which the indigenous populations are looking for an exit. It is interesting to note that in the argument in Raposa Serra do Sol, where the territory has not yet been

demarcated, there are those who defend the present organization of the state with the exclusion of non-indigenous use.

All of the examples cited here and in the previous section serve only to give some indication of the cultural diversity of Brazil, with its more than two hundred different peoples and more than 170 spoken languages, but it is enough to begin a socio-legal reflection on the successes and failures of the state, on sovereignty, citizenship, and international relations, including the consequences of globalization in these areas of the world that insist on the local.

THE NEW LAWS IN LATIN AMERICA

The nation-states of Latin America, with their history of extreme shifts, of dictatorships alternating with formal democracies, are very similar to one another. Portuguese and Spanish colonialism were linked in time and by violence. The historic moment of the outbreak of the wars of independence was more or less synchronized, those involved were similar and the same hopes were frustrated. Founded at the beginning of the nineteenth century, the relation of these states with the native peoples in their territories is also similar. They inherited a common colonial past, used the native peoples in the wars of independence, and believed they would be able to integrate them as citizens, guaranteeing them individual rights, including land ownership, while commonly ignoring their customs, traditions, languages, beliefs, and territory. When in conflict, these states dragged the native peoples into sordid wars or subjected them to direct repression. The rights of the indigenous people, because collective, were omitted from written legislation.

During the Cold War, the majority of the states in Latin America became military dictatorships in order to put down popular movements. Thus, the 1960s and 1970s are characterized by military states, and the indigenous question also became a military one. In the 1980s, a long period of tension began. Many arguments occurred and the countries were led to rewrite their constitutions. Indigenous organizations and civil society took part in discussions on the new constitutions, defending collective rights, founded in a recognized manner on the cultural diversity of each country. The threat of environmental devastation led to the native peoples returning to their lands, and groups organized by environmentalists joined with indigenous organizations and indigenous supporters in collective claims. The new constitutions began to emerge. They were clearly concerned about multiculturalism and multi-ethnicity and the preservation of the environment. Alongside the homogenizing individualism was a pluralism of great social, cultural, and natural diversity, in a perspective that could be called socio-environmental.

Thus, each constitution established collective rights alongside absolute and exclusive individual rights. The local populations discussed the range of this new phenomenon that came to contradict the growing hegemonic perception of post-Berlin Wall capitalism, which put forward the end of local cultures.¹⁷

Once again, the Latin American nation-states reaffirmed their similarities. The constitutional legal systems, having refused in the past to recognize multiculturalism and multi-ethnicity, now one by one began to accept that the countries of the continent were made up of a variety of ethnicities and cultures and that each group was organized according to its culture and was living according to its traditions, in harmony with nature, of which each is a part, and that each has the right to choose their own development.

The main characteristic of these new rights is the fact that they were not individual. They did not stem from a legal relation, but merely from a fundamental guarantee that had to be honored and that, in doing so, would end up determining the exercise of individual rights. This means that collective rights do not spring from a specific legal relation but from a reality—how to belong to a people or form a group that needs or wants clean air, water, forests, and the traces of their culture preserved, or even a guarantee of life in society, a job, a house, and the guarantee of the quality of goods bought.

This characteristic distances them from the concept of individual rights conceived in its entirety in the contractualist or constitutionalist culture of the nineteenth century, because it is a law without a subject. Or, put in terms that might seem even more confusing to individualist thought, it is a law to which everyone is subjected. If everyone is subjected to the same law, everyone can appeal to it, but at the same time nobody can benefit from it, since a benefit to one party would be an infringement of the rights of others.

If we were to analyze each of the constitutions rewritten in the 1980s we would see that they are very similar, although they might use different terminologies. Paraguay's, for example, apart from recognizing the existence of the indigenous peoples, declared that the country was multicultural and bilingual, and considered the remaining languages to be the cultural heritage of the nation (Paraguay, 1992, Art. 140). The Colombian constitution established that "The Colombian state recognizes and protects the ethnic and cultural diversity of the Colombian nation" (Colombia, 1991, Art. 7). As a sign of the times, the new American constitutions recognized social diversity more and more. Mexico (in 1992) assumed that it has a "multi-cultural makeup"; Peru in its constitution approved in 1993 did not go so far and merely accepted Quechua, Aimara, and other "aboriginal" languages as official alongside Castilian. Finally, in 1995, Bolivia, with its prominent indigenous majority, broke the silent integrationist tradition and defined

itself as multi-ethnic and multicultural, while Argentina ordered its Congress to recognize the pre-existence of the indigenous peoples. Other constitutions, such as that of Brazil (1988) and Nicaragua (1987), although steering clear of the words "diversity" or "pluralism," define the rights of indigenous peoples and protect them.

This same recognition is apparent in international agreements, such as Convention 169 of the International Labor Organization (A Organização Internacional do Trabalho, or OIT), dated 26 June 1989. Both the United Nations and the Organization of American States (A Organização dos Estados Americanos, or OEA) have debated declarations along the same lines. This agreement does not mean that Latin American countries have accepted international norms, which proves the insincerity of the local elites who always imagine that their constitutions can be invalidated for legal reasons (by failing to pass regulatory laws demanded by the Constitution). For this reason, they allow the inclusion of progressive changes in their constitutions only because they control the regulatory process that will restrict the ambit of application of such changes. If accepted in real terms, the international norms, especially Convention 169, would provoke a revolutionary transformation of both the constitutions and the regulatory legislation. These rights, however, are not exclusively indigenous. The constitutions of Colombia and Brazil go out of their way to recognize the rights of traditional black communities, and all those who recognize collective rights fundamentally admit that other communities can claim them. The collapse of the individualist paradigm is set in the constitution and its coming into effect is the question put to local communities, movements, and groups.¹⁸

APPLYING THE LAW, AND ITS DIFFICULTIES

Apart from the fact that a decade has gone by since the recognition of these collective rights, it cannot be said that there has been significant progress in their application. There is no doubt that indigenous territorial rights in the region beyond the agricultural boundary, especially in the Amazon, came to be more readily recognized than in the previous period. The example of the Panará is evidence of this. Apart from being forced to appeal to the law, the Panará gained rights over the territory from which they had previously been removed. There are other examples, like that of the Indigenous Area's Yanomami and the territory of the native peoples of the Upper Negro river, among many others.¹⁹

In the regions where there is political pressure and stronger economic interests, progress has not been so significant. An important factor in the application of judicial protectionist norms has been the international visibility

of the indigenous peoples. That is, those native people who succeed in drawing international attention to their local problems have had more success in bringing protectionist rules into effect.

The judiciary has had a prevalent role in the application of these new rights, but has maintained a conservative position most of the time. The judicial tools are reasonably well constructed in Latin America and are an addition to instruments that serve other collective rights fundamentally recognized by the population, such as the right to an ecologically balanced environment and to one's cultural heritage. Despite this, indigenous populations have gained little directly from the public administration. Generally, to obtain rights it has been necessary to appeal to the law, as in the case of the Panará. This limits the scope of action of the indigenous peoples, who need to create organizations along Western parameters rather than traditional ones in order to achieve recognition of their rights, even in the Amazon.

Outside the Amazon, the situation is even more difficult. Some native peoples of the northeast have had their existence recognized, that is, they have come to be treated as indigenous peoples, a status that they had lost to the national state due to their apparent integration into the regional population. Upon recognizing their existence, the state allocated to them a small and insufficient territory, which was not sufficient to allow their culture to flourish. It was not even enough on which to survive. The expansion of their rights, however, brought new possibilities. The judicial action that is holding back the Pataxó Hãhãhãe, which as described earlier is being decided in the Federal Supreme Court, has gained new impetus, but is taking an exaggeratedly slow path. From a technical point of view, it is impossible for the Pataxó Hãhãhãe to lose the case. The question is when it will be resolved. They live in a region of strong political opposition and have powerful enemies among the local elite.

In light of the 1988 Constitution, the Federal Supreme Court has already passed judgment on a number of other cases with the same characteristics as that of the Pataxó Hãhãhãe. One of them was the Krenak case, in Vale do Rio Doce, in Minas. This became prominent historically when indigenous lands (which were similar to those of the Pataxó Hãhãhãe) that had been distributed to farmers in the 1950s were returned to the Krenak. All that is lacking is political will in the highest authority of the country to make the decision and confront the regional political situation. It is true that in the Vale do Rio Doce those whose interests were at stake were small ranch owners, who at most had influence in local municipal governments, while in the case of the Pataxó Hãhãhãe in Bahia, a cocoa-producing region, political influence is on a national level.

Apart from the political circumstances, the judicial disputes over land in Brazil are still strongly influenced by individual rights established in the

nineteenth century, with their preferential option for individual ownership of the land. The individualist and absolute character of ownership of land has been a distinctive feature of Western law and the basis of Latin American civil law. The peoples of this continent tried, in the twentieth century, to make laws which would promote a change in this absolute character: from the remarkable Mexican Constitution of 1917, on through various laws of agrarian reform, including the powerful Bolivian Law of 1952, to the Chilean experiment of Salvador Allende in the 1970s, whose tragic and violent end appalled America.

With the exception of Cuba, no other country can seriously put land ownership in question. Laws originating in the Bolivian revolution of 1952, and subsequent Colombian and Venezuelan laws could offer theoretical interpretations that led to the structuring of a new concept of land ownership, characterized by the idea of its social function. However, even this concept came to be absorbed by the elites to the point of identifying social function with capitalist productivity. In other words, the social function of all land was to provide revenue for production. Social function, as such, is beyond this idea. There is no sense of its role as an integrator of cultures and a protector of the ecologically balanced environment, guaranteeing the life of the planet.

With the advent of collective rights, it became more and more clear that the land would have to fulfill this social role, or socio-environmental role, as the protector of the environment and the cultures associated with it. But a territory controlled by a single group is a characteristic of the judicial culture of Latin America, whether from the point of view of public or private law, disputing absolute and meticulously demarcated sovereignties, including unknown regions, or transforming all the land into private lots. For this reason, apart from the legal changes introduced by the constitutions, it is still very difficult for judges to interpret the law against the interests of private property.

This position of the judges explains the greater tendency towards decisions in favor of the Indians in areas not of predominantly private property, such as the Amazon. Inside the agricultural boundaries, private enterprise culture has already been established, creating greater difficulty. The indigenous organizations and peoples face restrictive interpretations of their rights. The question is put in such a way that in the Amazon, most of the time, conflict occurs between traditional populations, with guaranteed collective rights, and trespassers, adventurers, drug dealers, prospectors, and others with no rights whatsoever. Inside the agricultural boundary, however, confrontations spring up between traditional populations who were stripped of their rights by the government and the people who received these same tracts as returned land.²⁰ Thus, confrontation breaks out between traditional populations and individual landowners considered legitimate by the system.

Moreover, this conflict is at the very heart of the new decree that controls the administrative procedure for the demarcation of indigenous lands, because the Federal government decided that, once a particular land was deemed indigenous, all those with claims would have to be called by edict to determine whether there was anybody with individual rights over it.²¹ The reinterpretation given by the federal government made the process of demarcation difficult and also made all the previous demarcations dubious. The publication of the decree was a victory for anti-indigenous property interests, but the mobilization of the Indians, their organizations and the organizations that support them saw to it that, in practical terms, the rulings against the Indians did not have the feared impact. Perhaps the clearest example of the difficulty in regulating the collective rights established in the constitution is that of the general law concerning the indigenous peoples of Brazil. The old Indian Act (*Estatuto do Índio*) of 1973, still in place, has an individualist, integrationist, and legally civil profile, and for that very reason attributed to the legal institutions of protection a provisional character; that is, it was relevant only until the Indians individually became integrated in the national community as citizens without qualification and without ethnic distinction, in other words, until they stopped being Indians.

Since the publication of the new constitution, the indigenous organizations and their allies have begun to mobilize by rewriting the general law, which today should be called the Indigenous Peoples' Act, and with its contents including collective rights. Many versions were written and much discussion took place. A version was approved by a Commission of the National Congress, but by direct order of the President of the Republic, Fernando Henrique Cardoso, just elected for a first term, it was removed from the list before he took office in December 1994. Since then, due to a strange and unacknowledged government interest, the Act has remained in a kind of legislative "freeze."

There have been a number of polemic issues, such as the use of the natural resources of the forest, the mineral wealth, and the protection of traditional knowledge having to do with biodiversity. However, it does not seem to be these issues that are complicating the approval of the project. It was only in 1999 that legislative discussion of the statute was reopened, and it became clear then that the main obstacle to its approval, on the part of the government, was the old and already resolved integrationist question. Prior to the Constitution of 1988, the government wanted to maintain a conservative position and keep the indigenous cultures provisional. The immediate advisors to the President of the Republic defended an individualist concept dealing with personal integration and the loss of indigenous identity. This concept clearly was formed prior to the Statute of 1973.²²

The President of the Republic had to intervene directly, and convened a

meeting with the main indigenous leaders of the country in April 2000 so that the advisory committee might renounce its position and allow the legislative process for the writing of a statute that put constitutional rules into practice to begin again.²³

This fact demonstrates the extreme difficulty in applying current principles upon which a new relation between the indigenous peoples and the Brazilian state is to be based. Conservative sectors hold on to the fixed idea that the Indians are a nuisance to the process of development, and use all of their power to diminish, restrain, and limit, not only the possibility of demarcating the land, but its use according to the customs and traditions of each people. Alongside the conservative sectors stand the military and those with interests in the local economy, who are often protected by judges, courts of law, and important civil servants, such as the President's group of advisors.

On the other hand, the right to be recognized as a people has been steadily gaining momentum among indigenous groups. During these years under the new constitution, there have been large-scale mobilizations of indigenous peoples and of groups of indigenous people seeking the application of collective rights. To the examples already cited, among them the case of the Panará, can be added many others, such as the indigenous organizations of the peoples of the Amazon, of the northwest, the Guarani, etc.

The current organizations and indigenous movements with claims are significantly different from those before 1988. The present movements claim rights that can be understood by the system, given that they always defend collective rights. Before the constitution, these were utopian demands, dreams that now have achieved the status of claims. These dreams became law and are an element in what lawyers refer to as the catalogue of fundamental rights recognized by the constitution. Thus, these claims can be put forward not merely as a political hope but as a judicial fact; without ever leaving the streets they can reach the chambers of the courts; they must be recognized by the public administration, and yet when they are not, they can be guaranteed in judicial rulings. This has led to the indigenous and also the popular movement gaining another important dimension—the legal dimension.

SHARED TERRITORIALITY

The names that Brazilian law has given throughout time to indigenous territories reveal the content attributed to sanctioned rights. "Reserve" was the word used in the Land Law of 1850, Law no. 601. It maintained the idea both of reserving a territorial space for the indigenous peoples who were found during colonization and of distributing the land, referred to as "the organization of the land," to those with capital to invest. Indians had to stay

on the reserved lands until they had learned to perform a "civilized" job and could be integrated into national life. Although reserved, the rights were provisional, though always linked to a territorial space.

The word "area" was also used, before finally arriving at "indigenous land." The word "territory" was never used; on the contrary, it was deliberately avoided. "Land" is the legal term to describe individual property, public or private; "territory" is the legal term used to describe a jurisdictional space. Thus, "territory" is a collective space that belongs to an indigenous people. The same ideology, which denies the existence of the indigenous people, as we shall later see, denies the use of the term "territory." Apart from this, indigenous rights in Latin America are always linked to a territorial space, however it is referred to.

The idea of a provisional reserve to be used while individuals learn a job that will allow them to be integrated into the Brazilian national community (which in most instances transforms indigenous peoples into peasants) is now outdated. The new constitution is characterized by the recognition of collective rights, which include the right to determine individual courses of development and the right to a territory. This collective right does not go so far, however, as to allow self-determination to become a state. The fear of the conservative sectors, especially the military, is that struggles for indigenous rights may become struggles for freedom or independence. From this stems the real fear of referring to them as "indigenous peoples," of using the word "territory" and the category of "self-determination."

The Bolivian Constitution recognizes all the rights of the indigenous groups as rights given to peoples, but does not refer to them as such. It guarantees that the natural authorities of the indigenous communities are responsible for the administration and application of their own rules, including alternative solutions to conflicts, but refers to their territories as "original common land" (Bolivia, 1995, Art. 171). Moreover, in 1994, the Law of Popular Participation was passed,²⁴ the intent of which was to "recognize, promote, and consolidate the process of popular participation, articulating the indigenous communities, both rural and urban, in the legal, political, and economic life of the country." To this end, citizens were tied to a specific, territorial space on the basis of popular participation. As a result, they became politically organized. The entity of popular participation thus came to be called OTB—Organizaciones Territoriales de Base.

The struggle for participation, for the recognition of collective rights, is common to practically every Latin American state, which have reinvented the legal system in order to recognize these collective guarantees and make possible new perspectives of local life. However, in Latin American law, the local is always linked to a territorial space. Native peoples and the rights inferred by a particular territorial space are beyond the system. The recogni-

tion of the collective rights of indigenous peoples is, thus, defined by a territory, and it is necessary to situate it in a territory in order to comply with the system.

Precisely this relation of collective rights with territory is at the root of the limited rights attributed to the populations of African origin, which as much in Brazil as in Colombia have rights recognized in demarcated spaces, as remnants of the old communities that lived hidden from the slave system. This right does not extend to other descendants.

Territoriality is just as important in the protection of environmental collective rights, another recently created category. The judicial system came to protect territorial spaces that can be referred to as "conservation units." Such territorial spaces are defined by the function they fulfill, or can fulfill, such as border forests, or because they contain preserved biotas. Generally, the preserved areas, for whatever reason, are either inaccessible or still beyond the agricultural boundary. Among the causes of this inaccessibility is the presence of indigenous people who are struggling for their legal title to the land, as is the case with large stretches of the Amazon.²⁵ Thus, when the native people and their rights are determined by a territory, apart from the difficulties already referred to, it has been possible to recognize them and guarantee them. A major problem arises when there are no territorial limits laid down, as in the case of the Gypsies, or when the limitation is not clear, as in the case of the Guarani.

In fact, there are native peoples who have always accepted the possibility of sharing their territory with others, of different cultures living together with great respect. Many demarcated indigenous lands are homes to more than one people, such as the Indigenous Land of the Upper Negro river with its twenty different ethnic groups. The problem of sharing the territory is exclusively that of the native peoples who live there, as long as it is demarcated and recognized by the respective national state (Ricardo, 2000: 243).

In the Guarani territory, as has already been noted, this does not apply. Other peoples, such as the Kaingang and the Xoc Leng, lived in the space that the Guarani thought of as their own. For this reason, it was not so serious when whites also arrived and occupied a part of these lands. The difference is that the whites did not only occupy, but profoundly changed the biota, altering the nature of the lands. Plants and animals were substituted, accidents of geography were altered, forests were destroyed, hills were flattened, lakes were built, and marshes were dried out.

The Guarani, who, because of their rights, shared the territories, began to feel more and more evicted from their own land since they could no longer recognize the places where the spirits of their ancestors appeared and where they received advice and punishment from the gods. The land was not what

it used to be, and with its disappearance there was no longer any sense in sharing the territory. The Guarani, travelers in time and space, sought the right to continue living in areas of their territory where they were familiar with the animals and plants and the accidents of geography, a place they could understand and in which they could be understood. These places, though, are those that civilization or current law considers as property subject to collective rights, the property of all. An ecologically balanced environment is here under protection. And so, as the interpreters of the law have it, human beings are not accepted. The areas of conservation, or the spaces that have survived devastation, must remain untouched.

Two collective rights, here, are in conflict. But it is a false conflict because both sides seek to protect and preserve a territory against the devastation of private property and the individual right to accumulate property, including forests. It is a false conflict because the Indians are not only protecting the forest but also protecting the knowledge that springs from it, including the secrets of its rebirth. The Guarani know every plant and how it relates to animals and soils and, by reinforcing this or that collective right and confronting individual rights and their strange privileges, it is possible to dream of another law being passed. From the dryness of the old individual right, a rose might grow.

By accepting the collective rights of native peoples, the possibility of claiming rights that are not territorial appears on the horizon, even though sometimes they appear linked to an area of land, such as the Guarani's. A typical example is that of the area of the Pankararu people, originally from the northeast of Brazil, but who immigrated to the southeast, living finally in the shantytowns of São Paulo. This group's claim is not to return to their traditional territory, where the majority of their relations live, but to obtain a rural, cultural space in São Paulo, where sacred plants can be grown and rituals practiced far from the prying eyes of fearful and often violent neighbors.²⁶ Another people who have never claimed exclusive territory but who have begun to claim rights, given that a less secret, because less dangerous, life is clearly possible, is the gypsies.

On the other hand, the problem does not end once the land has been demarcated, even if it is an area large enough for its inhabitants, as was shown by the disorganized urbanization and the unforeseen creation of indigenous cities in the Amazon.

ECONOMIC, SOCIAL, CULTURAL, AND ENVIRONMENTAL RIGHTS

Clearly, collective rights, especially those of indigenous peoples, are not limited to the question of territory. They go beyond, indeed, to the very

heart of the right to development, to human, economic, social, cultural, and environmental rights. The difference between these rights and those established in international agreements on human rights is in the collective character that they acquire. For that reason, they represent something new to the judicial system and makes its emancipatory role possible.

As much in the International Agreement on Economic, Social and Cultural Rights as in the International Agreement on Civil and Political Rights, both dated 16 December 1966, the idea is to guarantee individual rights. The first article of the two agreements is the same and deals with the rights of native peoples. They state that native peoples have the right to settle their own affairs and to determine their political status, freely promoting their economic, social, and cultural development. In this sense, both agreements recognize the native people's power to employ freely their natural riches and resources—never again would they be deprived of their means of subsistence.

The concept of "a people," according to the UN and international law that is employed in the Agreements and other official documents, is limited to the human base of a nation-state, with no internal differentiation. "A people," then, means the simple sum of all the citizens seen individually who live in a specific, national territory, under the law of a state. The national constitution must recognize the rights of every individual citizen as equal. From this perspective, minorities, those who are excluded, organically structured local populations, the overlooked, previous occupiers, and those living far away and do not have a role in the running of the state have their civil, political, economic, social, cultural, and environmental rights established by the state, or by the ruling class of the state, and not by their own organization.

In this concept of a "people" the trap of self-determination is clear. Native peoples are free to determine whether they are a state, as long as they are not under the jurisdiction of an already constituted state. The organization of a state, the self-determination, and the free arrangement of themselves as a people means following the established, legal, rules of the state itself. The recognition of the right to self-determination of native peoples according to international law is, then, the right to self-determination of the state that guarantees individual rights, among which are rights to property.

However, the concept of a "people" used in the agreements is not that which is used in this paper, nor is it appropriate to native peoples. Moreover, this is clear in international law. The International Organization of Labor produced two conventions on indigenous peoples: Convention 107, dated 5 July 1957 and, more recently, Convention 169, dated 27 June 1989. The former dealt with "the protection and integration of tribal and semi-tribal populations of independent countries" and anticipated what was presented in the Agreement on Civil and Political Rights almost ten years later. There,

article 27 prohibited states from denying people who belonged to ethnic, religious or linguistic minorities their right to social organization and their right of access to their culture, religion, and language.

These rights were characteristically individual because the catalogue of rights, as it was referred to, recognized only individual rights. Any collective idea was understood as meta-judicial; in other words, it was a political or social claim, often prohibited, that attained the category of the anti-judicial.

In contrast, Convention 169 in its introduction recognizes the desire of the "indigenous peoples and tribes to control their own institutions, ways of life, and economic development compatible with their cultural, linguistic, and religious identity," within the legal limits of the state in which they live. Thus, it was established that the convention applied to "tribal peoples in independent countries" (Gomez, 1991).

The convention changed the character of the right, recognizing it as collective right. The nation-states did not allow the term "people," even with the adjective "tribal," to refer to indigenous populations. To progress beyond the impasse, the convention established that its use of the word "people" did not have the same meaning as it did in international law.²⁷ In light of this, the states thought that an interpretation that gave indigenous people the right to self-determination, that is, to the constitution of the states themselves, would be out of the question.

The indigenous peoples of Latin America, despite their participation in the wars of independence, never sought to establish their own states. They always fought for their own rights in shared territory, respecting the way of life of each person. This is very clear today in the eastern indigenous areas of Chiapas, Mexico, and in the struggles of the Mapuche in Chile, both of whom are undergoing difficult confrontations with their respective nation-states. In the case of the former, the confrontation is armed. Apart from this, the local elites are concerned that native peoples, or at least some of them, will fight for local independence, which would weaken national sovereignty.

Ironically, the weakening of national sovereignty is occurring because of globalization, while the local peoples need—precisely in the struggle against globalization that yet again is trying to integrate them, no longer as citizens, but as consumers or providers of knowledge—are strong national sovereignties that will manage to guarantee their collective rights of survival.

For this reason, the minorities, those excluded, organically structured local populations, the forgotten, the previous inhabitants, those far from the centers, those with no capital, need a strong state to protect them from individual rights, from property owners, from global capital and power. They need to reinvent the state, substituting the logic of capital with the logic of the indigenous peoples.

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Notes

- 1 No judicial system in Latin America has resolved this question. Some laws did recognize in the end the legal character of native peoples, but only after the recognition of collective rights, that is to say, in the 1990s.
- 2 During slavery, "Capitão do mato" was the name given to those who hunted down runaway slaves. Normally, they were not employed by a single slave owner; whenever they caught a runaway slave, they would hand him over for a reward. However, when they did not manage to find the "legitimate" owner, they acquired the property and could sell the slave for their own profit.
- 3 Tiradentes, Bolívar, and Artigas are examples of leaders who brought freedom to their countries. However, no sooner had they constituted their respective states than they were ostracized and denied any practical influence in the organization of the nation. Tiradentes was hanged as a traitor; Bolívar, away from political life, died in exile in Colombia, after seeing the country he liberated divided up by local elites; Artigas lived out the last 30 years of his life in exile in Paraguay, where he died without ever returning to his homeland, Uruguay, which he had freed from Spanish oppression.
- 4 Before the war, the population of Paraguay was approximately 800,000. Afterwards it fell to 194,000, of which a mere 14,000 were men, half of them under 20 years of age (Chiavento, 1981).

- 5 Law No. 6001, 19 December 1973.
- 6 Sete Quedas was a remarkable group of waterfalls on the Paraná River. Its incomparable beauty was destroyed to build the electricity-producing Itaipu dam.
- 7 Most of the information on the Xetá is based on the CD-Rom "Quem são os Xetá" ["Who are the Xetá?"] produced by the Paranaense Museum in 2000.
- 8 Those involved in armed expeditions that left from São Paulo for the interior in search of Indians and precious minerals were referred to as "bandeirantes." These expeditions, which were generally very aggressive, sought to reduce the number of runaway slaves, known as "quilombos."
- 9 The well-known Xavante people, contacted at the end of the 1950s, covered upwards of 2000 kilometers, crossed at least three great rivers, the São Francisco, Tocantins, and Araguaia—a journey on foot that lasted 200 years or more, which implies difficult periods of adaptation and confrontations with renewed enemies.
- 10 Galdino had gone to Brasília, with other members of his people, to claim their rights to the land and spent the night on a public bench. Mistaking him for a beggar, a group of youths decided upon a violent joke, pouring gasoline over him and setting him alight. He died as a result of the burns.
- 11 The Pataxó Hãhãhãe, numbering approximately 2000, is grouped in the area known as Paraguaçu-Caramuru.
- 12 Cláudio and Orlando Villas-Bôas are the two most famous Brazilian supporters of the indigenous peoples. They promoted contact with many native peoples and for a long time ran the experiment of the Indigenous Park of Xingú.
- 13 The Indigenous Park of Xingú, centered on the river Xingú, was created in 1961. On the one hand, it left out important territories occupied by indigenous peoples and, on the other, did not include the rivers that flowed into the Xingú. Today, the effects of these mistakes are seriously detrimental to the Park, which now has polluted waters as a result of the predatory actions of those living in the surrounding areas and of the increase in the number of its inhabitants. For further information, see the two books entitled *Povos Indígenas no Brasil* by Carlos Alberto Ricardo (1996; 2000).
- 14 FUNAI was responsible for the contact and the dislocation.
- 15 Nowadays, it is estimated that the Ticuna number 20,000.
- 16 Geraldo Andreello and Marta Azevedo, anthropologists at the Instituto Socioambiental (Socio-Environmental Institute), in unpublished research describe more than ten ethnic groups living in Iauraté.
- 17 In 1988, the Macuxi, inhabiting the extreme north of Brazil, on the border with Venezuela and Guyana, met, as they do every year, in January, and invited me to participate. During the meeting, someone asked me the meaning of the words "constituente" [constituent] and "constituição" [constitution]. I explained as best I could, and not only did they understand but thought that they too should have a local constitution to define both their territory and who should have rights within it. This account is described in two books: *O renascer dos povos indígenas para o direito* (Souza Filho, 1998) and *Derechos de los pueblos indígenas en las constituciones de América Latina* (Marés, 1996).

- 18 Even before the Brazilian constitution of 1988, in the period immediately preceding what was referred to as "redemocratization" (1983), the city of Curitiba was the setting for an experiment that was the catalyst that increased the status of local urban cultures. At its heart was a circus that served as an itinerant cultural center, and this instigated the flowering of various demonstrations of local urban culture. The experiment is described in a text I wrote, which was published in the *Boletim Informativo da Fundação Cultural de Curitiba* in December 1996, in the period presided over by the Fundação Cultural de Curitiba (Cultural Foundation of Curitiba). The most durable and striking example, however, is that of the MST (Movimento do Trabalhadores Rurais Sem Terra, or, the Movement of Landless Rural Workers) that claimed and occupied lands, exercising a right that directly challenged property rights. However, the collective right of the MST exists in the social function of the land as recognized in the constitution, yet it has not been easy to get the system to recognize it, apart from a number of rather timid initiatives by the Brazilian Judiciary.
- 19 After more than twenty years of claims, the Indigenous Area of Yanomami of 9.4 million hectares, located on the border with Venezuela, was officially recognized on 25 May 1992. The 8.15 million hectare territory of the peoples of the Upper Negro River was recognized on 15 April 1998.
- 20 Uninhabited lands are those that neither belong to any private landowner nor are for public use. They have belonged to the member states of the Federation since 1981 and can be transferred to private individuals according to regional legislation. The unrecognized indigenous lands were considered uninhabited and as such were transferred to private individuals who became the legitimate owners.
- 21 In January 1996, the President of the Republic signed Decree 1775, which redefined the procedural rules for the recognition and demarcation of indigenous lands. In this decree, which broke with tradition, there was introduced the possibility of interested third parties (including states and municipalities) in disagreement with the demarcation to manifest their discontent in order to claim rights, compensation, or to denounce unfair dealings.
- 22 I had the opportunity of participating personally in these discussions as the President of FUNAI (the Fundação Nacional do Índio, or the National Indian Foundation). Restarting the discussion, moreover, led to direct pressure by FUNAI and the Indians.
- 23 As of June 2001, the new statute still had not been approved. Personally, as President of FUNAI, I delivered a copy of the statute to the indigenous leaders in April 2000, at the same time as it was delivered to the person responsible in the National Congress. Discussions were restarted and the text is ready to be voted on.
- 24 This is Law No. 1551, 20 April 1994, referred to in Spanish as "La Ley de Participación Popular."
- 25 Aerial photographs of the Amazon clearly show the limits of the indigenous areas. When taken during the day, the process of deforestation is visible in the surrounding areas; when taken at night, dots of artificial light precisely describe the indigenous areas.
- 26 The Pankaru are from Pernambuco and have, since 1988, managed to obtain an area of demarcated land in the state. The land is too small to support the

4000 Indians who survive on their traditional territory and the 1000 Indian inhabitants of the shantytowns of São Paulo who have returned. Even if it were sufficient, they still would not want to return and constitute a group with claims of their own. Those from Pernambuco still make claims for the expansion of their lands because of the difficulty of practicing their sacred rituals far from prying eyes.

- 27 Article 1, Number 3 clearly establishes the meaning of the word "people," or, rather, what the word does *not* mean: "The use of the term 'pueblos' in this Convention must not be interpreted in the sense of having anything to do with the rights that could be conferred in international law" (Gómez, 1991).