BRAZIL: WOMEN AND LEGISLATION AGAINST RACISM

Women's Rights are Human Rights

A Cepia Publication

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Cover image

Artigo Primeiro
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Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

(Universal Declaration
of Human Rights)

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INTRODUCTION

The World Conference against Racism, Racial Discrimination, Xenophobia and Correlated Intolerance to be held in 2001 expresses the commitment of the United Nations to combat the persistence of discriminatory practices against specific groups and the revival of racism, of xenophobia and ethnic conflicts in several parts of the world. This conference also represents the great movement of individuals, groups and social movements that, all over the world, fight continuously against racism and in defense of human rights and instigate the United Nations to adopt concrete measures to combat racism and correlated intolerant practices.

The culture of intolerance is still present in many countries, acting through laws and discriminatory practices. In the fight against this culture, it is fundamental, amongst other actions, to invest in an effort to promote international legislation against racism and to present the legislative advances in this same sense, that are in course in various countries.

The aim of this book, that gathers articles of five Brazilian human rights activists, is to give visibility to this international legislation against racism and to present a more specific view of the legislation in Brazil, a Latin American country with a considerable contingent of afro descendents. In this effort, we introduced a gender perspective in order to facilitate the understanding of the legislation's reach over women, joining this specific legislation with that which repudiates sexism.

Based on an extensive survey, formerly conducted, on Brazilian laws against racism, Hédio Silva Jr. presents the legal historical treatment received by the Brazilian black population since the slavery period and indicates the importance of specific judicial demands, particularly in defense of black women's dignity.

Leila Linhares Barsted and Jacqueline Hermann highlight the legal international instruments and present a summary of the Brazilian legislation against racism. In spite of this legislation, the au-

thors call attention to the fact that, in Brazilian society, the effects and practices of racism over black women still persist. The effort to develop this synthesis revealed the incontrovertible difficulty in obtaining data on indigenous women — the authors were able to retrieve very little fragmented and dispersed data about them.

Rosana Heringer and Jacqueline Pitanguy highlight the ethnic/racial issue in the context of the economic integration processes and outline an overview on the legislation of the countries from the Mercosur, regarding the black and indigenous population, emphasizing the legal situation of black women.

As a contribution to the purpose of promoting ethical and moral principles against racism, this book includes the main international legal instruments that repudiate and combat racism and that act as stimulus to the construction of a more brotherly society.

CEPIA thanks the Ford Foundation for the important and decisive support that made this publication possible.

BLACK WOMEN AND THE NEED FOR SPECIFIC JUDICIAL DEMANDS

Hédio Silva Jr.[1]

Introduction

CEPIA's inquiry, both intriguing and challenging, aimed at understanding anti-racist legislation from a gender-based perspective, seemed remarkably perplexing at first. It posed the question: "Do (or should) black women, because of the unusual nature of the oppression they suffer, enjoy some kind of special protection or provision under the Brazilian legal system?"

The answer to that question is immediately positive, in spite of the reservations herein discussed as an attempt to demonstrate the importance of emphasizing the effective application of legislation by the Brazilian Judiciary.

The international legislation expressed in treaties, conventions and pacts, and the international law that has developed from the Declarations and Plans of Action, produced by the series of Conferences on Human Rights, stress the obligation of States not only to elaborate non-discriminatory legislation, but more importantly, to implement this international legislation through action by the Judiciary, as well as to implement public policies that will substantiate the rights declared.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 defined "racial discrimination" as:

> "... Any distinction, exclusion, restriction or preference based on race, color, descent, ethnic or national origin that has the effect or purpose of impairing or nullifying the recognition, enjoyment or

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exercise of an equal level (under the same conditions) of human rights and fundamental freedoms in the political, economic, social, cultural or in any other aspect of public life."

In 1979, the Convention Against All Forms of Discrimination Against Women[2] considered the definition of "discrimination against women" to be:

"Any distinction, exclusion, restriction made on the basis of sex and that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of marital status and based on the equality between men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other area."

The Convention's preamble states:

"The eradication of apartheid, all forms of racism, colonialism, neo-colonialism, aggression, foreign occupation and domination, and interference in internal affairs of States is essential to the full enjoyment of the rights of men and women."

Both Conventions present provisions in their texts that require member states to develop actions, legislative included, to curb racial/ethnic and sex discrimination.

In 1994, the General Assembly of the Organization of American States – OAS approved the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as the Convention of Belém do Pará,[3] which defined violence against women as:

"...Any action or gender-based conduct that may cause death, damage, physical, sexual or psychological suffering to women, in the public as well as in the private domain."

Taking into consideration the different socioeconomic and cultural contexts and the specific situations experienced by women, this same Convention declares in its Article 9:

[2] Ratified by the Brazilian Government on February 1, 1984

[3] Ratified by the Brazilian Government on November 27, 1995

"In order to adopt the recommendations to which this chapter refers, State Parties will take into special consideration the situation of vulnerability to violence which women might suffer as a consequence, among other factors, of her racial or ethnic condition, as a migrant, refugee or uprooted."

Similarly, the introduction of the Declaration on the Elimination of Violence Against Women[4] of 1993, approved after the World Conference on Human Rights, also in 1993, expressed "concern with the fact that some groups of women, such as women belonging to minorities, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict are specially vulnerable to violence."

Although the preamble of a law does not constitute a legal norm in itself, it acts, according to jurist Celso Bastos, as a "directive to be used in its interpretation"[5] so that when legal instruments that refer to women's rights consider, in their preambles, the unusual situation of black women, they should be interpreted in light of this central value.

It is important to indicate that Article 9 of the aforementioned Convention of Belém do Pará should be interpreted as a law that imposes a positive obligation on the State: to take into account, in the elaboration of its policies, the uniqueness of black women's situation and to include this particular group in its public policies. This means that the creation and application of national legislation should legally include such group and fully adopt the international legislation that holds the same objective.

[4] Approved by the United Nations Assembly in December 20, 1993

[5] Celso Bastos (1997, p. 80)

The strength of international treaties

While highlighting the ethical and legal importance of international treaties and conventions on human rights, it is necessary to explain the position of Brazilian law with respect to these instruments of defense of human dignity.

International treaties received special attention from the Constitutional Assembly that elaborated the Brazilian Federal Constitution of 1988; Its Article 5, paragraph 2 states:

> "The rights and guarantees expressed under this Constitution do not exclude others originated under the regime and principles adopted by it or in the international treaties of which the Federate Republic of Brazil is a member."

Not only did the Constitution acknowledge the validity of international treaties ratified by Brazil, but it also emphasized the need to ensure their application in the country through the Judiciary, particularly through the Brazilian Federal Supreme Court and the Superior Court of Justice. Two norms foreseen in the Constitution must be followed to ensure such warranty:

a) The Brazilian Federal Supreme Court is competent to pursue and judge cases ruled either in a single instance or as the last instance, when the decision declares the unconstitutionality of international treaties or of federal laws (Brazilian Federal Constitution, art. 102, III, "b")

b) The Superior Court of Justice is competent to pursue and judge cases ruled either in a single instance or as the last instance, when the decision contradicts or denies the validity of international treaties or the federal laws (Brazilian Federal Constitution art. 105, III, "a")

It is worth mentioning that Article 109, item iii of the Brazilian Federal Constitution attributes to the Federal Justice the competence to pursue and judge the "cases based on treaty or contract of the Brazilian Union with a foreign State or an international organism."

The Constitution thus reaffirms the internal validity of international treaties signed and ratified by the Brazilian State when it establishes, for example, that omission or lack of action on the part of the President of the Republic to take the necessary steps toward the execution and observance of international treaties constitutes a

crime of responsibility, subject to impeachment, as determined in Article 8, item VIII of Law nº 1079 of 1950.

Nevertheless, and in spite of these constitutional guarantees, the question of where these international treaties fit within the legal hierarchy has given rise to an intense controversy.

Flavia Piovesan[6], supported by a prestigious doctrine, invokes the principle of maximum effectiveness of constitutional laws and draws attention to the need to distinguish between treaties on human rights and other treaties. She concludes that the former enjoy legal status under the Constitution:

"The Constitution of 1988 welcomes the rights stated in international treaties in which Brazil is included, attributing them the status of constitutional law, i.e., the rights contained in international treaties integrate and complement the catalog of rights guaranteed by the Constitution, which justifies extending to those rights the constitutional treatment given to all other rights and fundamental guarantees."[7]

In a contradiction to this statement, however, the Federal Supreme Court issued its opinion on the subject by placing international treaties, like the laws passed by Congress, below the Constitution.[8] Such position is clear in the following Federal Supreme Court decisions:

1. "Treaties are at the same level as the Acts of Congress"
2. "Treaties concluded by the Federal State have the same degree of authority and effectiveness as national laws"[9]
3. "International treaties and conventions: considering the existing Brazilian legal system, they share equal normative relation with the statutory laws issued by the Brazilian state. Their increasing normative character, within the Brazilian legal system, allows these acts of international public law to be placed, as far as the hierarchy of sources is concerned, on the same level and degree of effectiveness as the internal laws of Brazil. The precedence of international acts over laws below the Constitution in Brazilian legislation will

[6] See Flavia Piovesan and Luiz Carlos Rocha (1998)

[7] *Ibid.* p.89

[8] Brazilian Federal Supreme Court, 1977

[9] Brazilian Federal Supreme Court, 1995

only occur — in the case of a contingent situation of antinomy with the domestic ordinance — not by virtue of a non-existing hierarchy, but always taking into consideration the criteria of specialty[10]. (Author's underlining).

Regardless of the controversy on international treaties and the discussion whether they are below or at the same level as the Constitution, there remains no doubt that these international instruments, as recognized by the Brazilian Constitution, are at the very least at the same hierarchic level as the internal statutory laws. Treaty, therefore, equals Law, and may and should be invoked by individuals during the legal defense of their rights and interests.

As such, it is fundamental for black women to know the contents of these international instruments as well as the anti-racist national legislation.

When analyzing the relation between Law and racial behavior in Brazil,[11] it is important to highlight the fact that the insertion of the principle of non-discrimination and the reiterated declarations of equality have not been sufficient to halt the reproduction of discriminatory practices in Brazilian society. These practices, discussed in earlier works, refer to the wide range of open, silent or disguised discrimination revealed through the statistics produced by trusted research institutions and by various academic papers focused on these problems.

It is not the intention of this text to list the countless laws against racism that exist in the Brazilian legislation.[12] Instead, it is important to emphasize the Brazilian judicial tradition regarding the country's black population, and to shed light on part of the Brazilian legislation that prevailed in the country over a long period of time. Although declared obsolete by the Federal Constitution of 1988, it still produces racist effects, both practical and ideological.

Thus, in spite of CEPIA's challenge to consider the law against racism from a gender perspective, it is still necessary to disseminate

[10] Brazilian Federal Supreme Court, 1997

[11] See Hédio Silva Jr. (1998)

[12] See Hédio Silva Jr., op.cit.

the little-known history about the legal condition of women and men who constitute one of the aspects of the racial fundaments of Brazilian society.

Discrimination against black women

It is important to stress that discrimination, in its designation as negative, illicit and unfair, refers to the violation of rights as a result of conduct based on personal characteristics. This is the understanding of the Convention on the Elimination of All Forms of Racial Discrimination (1965) and of the Convention on All Forms of Discrimination Against Women (1979).

Thus, discrimination of black women results from conduct that is based on two characteristics: race and gender.

It would be impossible, in principle, to divide discriminatory conduct in two segments, be it under the anti-discriminatory racial legislation or under the anti-discriminatory gender perspective, since these would already provide all the instruments we need do legally defend black women's rights and interests.

In this line of thought, for the jurist and legal operator, the question to be posed remains as follows: how could legal formulas reflect and legally fight for the rights of black women in light of the uniqueness of the oppression they suffer?

In lack of a more elaborate answer, it is possible to assert that in addition to seeking the joint observance of laws of international rights and internal norms, in particular those that obligate the State (as well as individuals), the singularity of the condition of being a woman and of being black, seen under the legal perspective, enhances the problem of the various types of violence an individual might be subject to, all of which are condemned and liable to punishment under Brazilian legislation. Thus, the contingent lack of necessity of specific legal instruments does not waive the need for proposing specific judicial demands.

The moral violence that victimizes black women – apart from the physical violence – only finds a parallel in the Brazilian society in its past, during slavery. Yet specific legal cases have not been used sufficiently to put a stop to this type of violence.

Therefore, it is not by chance that the famous popular *carnaval* song, written by Lamartine Babo in the 1930s, in which the chorus shows an aversion to the color of a black woman and, at the same time, expresses a desire for her body, is still very popular today in the *carnaval* repertoire and in people's memories. It is occasionally parodied by contemporary popular Brazilian musicians, among them the popular singer and clown known asTiririca.

Before discussing the need for judicial cases that consider the specific condition of black women, a short historical digression is in order, with the intent of defining the differentiated treatments that the legal system has given to black and white women in the past.

The Judicial Apparatus of Slavery

Until the approval of the Political Constitution of the Brazilian Empire, on March 25, 1824, followed by the issuance of the Criminal Procedure Code of the Brazilian Empire in 1830, Brazil had lived under the regulations of the Ordinances of the Kingdom: The Afonsinas Ordinances (1446-1521), the Manoelinas Ordinances (1521-1603) and the Filipinas Ordinances (1603-1830), with influence from the Canon Law and specially Roman Law.[13] Not only were these laws used during the whole colonial period, but they also placed Brazil in the gallery of countries existing under a legal system of Roman-German tradition — the Civil Law.

According to Ruy Rebello Pinho, "the Afonsinas Ordinances became law in Brazil soon after Cabral's discovery and were almost sixty years old when they arrived here. The Manoelinas Ordinances ruled for almost ninety years. And the Filipinas Code lasted over two centuries. During three hundred and thirty years, from 1500 to 1830, the struggle against crime and criminals in our country followed the old laws of Portugal."[14]

Among the three ordinances, the Filipino Code was the most commonly used in Brazil. An examination of the unfortunately famous *Livro Quinto das Ordenações Filipinas* indicates a set of gen-

[13] The *Lei da Boa Razão* (Law of Good Reason) of August 18, 1769, recommended the use of Roman Law as a normative guide as subsidiary to the Ordinations.

[14] Ruy Rebello Pinho, (1973, p. 19)

eral rules for society in general, along with rules aimed specifically to subdue and control African slaves. Thus, we find general and specific rules that: criminalized heresy and punished it with corporal penalties (Title I); criminalized the denial or blasphemy of God or Saints (Title II); criminalized witchcraft and punished the sorcerer with capital penalty (Title III); punished the invasion of a residence for the purpose of maintaining carnal encounters with virgin women, honest widows or white slaves (it may be inferred from this that if the woman was black or enslaved, the crime would not be considered as such) (Title XVI); punished rape and provided a milder judicial procedure that enabled the non-application of the death penalty in the case of a prostitute or slave(Title XVIII); punished the slave that brandished a weapon against his master (Title XLI); placed slaves in the same level as animals and objects (Title LXII); punished individuals who helped slaves escape or who gave them shelter (Title LXIII); punished loafing (Title LXVIII); criminalized meetings, parties or balls organized by slaves (Title LXX). In this long list of punishments applicable to men and women, the different treatment given to white and black women who suffered sexual violence is evident When a black woman slave suffered this kind of violence either she was not considered a victim or her aggressor received a milder legal treatment than if the victim was a white woman.[15]

The Political Constitution of the Empire[16] of March 25, 1824, introduced interesting modifications to this scenario, as did the Criminal Code, issued six years later. It is interesting to note the priority given to the repression of crime: the Constitution mentioned above determined the urgent organization of a Civil Code and of a Criminal Code (Article 179, XVIII). Yet nearly a hundred years passed until the Civil Code was enacted (1916), and only twenty-six years after the promulgation of the Constitution (1850) did the Commer-

[15] As we read these norms, we perceive the hierarchic structure that organized the Brazilian society at that time. For example: the penalties enforced upon nobles were much milder than those enforced upon white common men that committed the same offense.

[16] The Brazilian Constitution of 1824 was pro-slavery and did not insert one single word regarding the subject – an old and well known form of national racism – it abolished punishment by torture, branding and all other cruel punishments.

cial Code enter into force, containing its own rules and others typical of a civil code.

The Commercial Code of 1850, qualified slaves as livestock, a legal category that defines inanimate things, usually used to classify animals and cattle. To the present day, the Commercial Code (the same issued in 1850) continues to employ, in its Article 273, the word "slave" and to compare it to livestock.

According to Agostinho Marques Perdigão Malheiro,[17] for all civil purposes — agreements, inheritances, etc. — the slave (man or woman) was not considered a person, an individual entitled to rights.[18]

Yet under Criminal law, for the effects of penal prosecution, the slave (man or woman) was considered responsible and human when in the position of defendant. Yet if part of his body had been mutilated, the lesion was classified as a mere damage — a concept connected to property rights and not to penal law. If the slave was kidnapped, theft was determined as the type of crime. In short, if the slave was a defendant, he or she was a person; if the slave was a victim, *it* was an object.

A set of laws, warnings and municipal ordinances ensured owners of sugar plantations and mills the right to organize part of the instruments of force used to subdue and exploit enslaved black men and women. Some of these instruments are listed below:

- The Decision of November 5,1821 outlined the steps to be taken against black *capoeiras* (an Afro-Brazilian martial art and dance) in the Province of Rio de Janeiro;
- The Law of October 15, 1827 determined that Justices of Peace were to destroy the *quilombos* (communities of freed and/or fugitive slaves) *and* prevent others from being built;
- The Decree of February 21, 1832 dealt with slave labor in the Royal War Arsenal and determined the action of a Chaplain that

[17] Agostinho Marques Perdigão Malheiros, (1944)

[18] Recent historiography about slavery in Brazil has been pointing out breaches in this structure yet does not deny the referred structural mechanisms. With this in mind, see, among others, Silvia H. Lara (1988); José Roberto Góes (1993); Keila Gringberg (1994.)

"besides celebrating mass on Sundays and holidays, would instruct slaves on the principles of the Christian religion".[19]

- Decree nº 796 of June 14, 1851 regulated burial services and recommended the segregation of common graves: one type was destined to the poor and the indigent, and the other to the slaves;
- Decree nº 1331-A of February 17, 1854 prohibited the admittance of slaves of either sex in Royal municipal schools;
- Decree nº 3609 of February 17, 1866 determined the arrest of slaves found on the streets after 10 in the evening without the authorization of their masters;
- Decree nº 7001 of August 17, 1878 regulated the production of statistics on actions taken by the police and by the judiciary regarding blacks;

In addition to those restrictions and discriminations, it is important to address, however briefly, the extremely cruel punishments inflicted upon men and women slaves because of their importance in the history of slavery:

Whipping

Though the Constitution of 1824 recommended, in its Article 179, item xix, the abolition of whipping, torture, branding and all other cruel punishments, the Criminal Code of 1830 made express references to these penalties,[20] followed by the understanding of the courts that this rule did not apply to slaves.

Torture and other cruel punishments were thus widely employed as a means to subdue black men and women slaves, both during the colonial period and Empire.

With the adoption two Warnings (a type of norm of the period) edited in the 1830s, judges were to determine and follow the execution of punishment by whipping.

According to Lenine Nequete, "brutality was always incorporated in the system. In 1651, during the Dutch occupation of Brazil,

[19] Legal Documentation on the Brazilian black population: 1800-1888

[20] The articles 60 and 61 of the Criminal Code of the Empire determined the application of corporal penalties *lato sensu*: galleys, whipping and iron tourniquets

writer Pierre Moreau registered, 'I am almost afraid to express the inhuman and merciless treatment given to these unfortunate captives since, rather than mercy, it awakens repulse. They were tortured in such a manner by the diligent labor that was assigned to them, that even when it exceeded their strength, if one of them did not perform what was expected of him, he was tied and garroted in front of all the other slaves while the foreman ordered the strongest and most vigorous man to apply two to three hundred strokes of the whip, from head to toe, in such way that blood would run all over him; the skin, already thorn from the whipping was anointed with vinegar and salt and the slaves did not dare to cry, not even moan; for if they did they would risk receiving twice the penalty . Sometimes, depending on the seriousness of the fault, this punishment, that is, this torture was repeated for two or three days in a row. After being removed from that location, the slave would be imprisoned in a dark place, and on the following day sent back to work, more submissive than a donkey. Instead of losing spirit, they worked harder than ever, naked as animals, their bodies melting in sweat.'"[21]

The Death Penalty

The Empire, as a response to the murders committed against slave-owners by their slaves, on June 10, 1835, Law nº 4. Article 1 of this law reads as follows:

> "Article 1 – Slaves (men or women) who kill, for any reason, administer poison, seriously wound or perpetrate any serious offense against their master, his wife, his descendants or ascendants who dwell with him, or against the administrator, foreman, their wives or those who dwell with them will be punished with the death penalty." (Author's underlining)

The law did not foresee the possibility of revision[22] in the case of conviction and, according to Lenine Nequete, the legislator "was

[21] Lenine Nequete (1988, p. 8)

[22] Some authors bring contributions that find this impossibility relative. See the works mentioned in note number 18

guided by the thought that slaves were, at times, driven by a feeling of rebellion against the captivity that oppressed them and at other times, they committed a crime simply to be put to jail, which seemed more gentle and more tolerable than standing the wretched domination they were forced to endure."[23]

Nequete goes on to explain that "the legislator, possessed by the strength of such reasoning, sought to use the threat of heavy punishment to tie the slave's hands, which were always ready to strike the deadly blow upon the victims of his hatred, or on anyone who might represent a hindrance, which could possibly be removed, to the enjoyment of his freedom. Under this erroneous concept, since the slave escaped from captivity by killing his master, the foreman or members of either families (and since he could murder any stranger at his ill discretion), it is fair to believe that the law of June 10 was conceived to answer to any of these hypotheses, once it served the legislator, with its special penalty, as a preventive measure against such scenarios. The law, by eliminating the three degrees of penalties already accepted in the Code, demanding only two thirds of the votes to impose the death penalty, and at the same time denying the usual reviews of the sentence pronounced by the judge, certainly created a *sui generis* offense, punishment aside, through which it intended to stop the horrors that were repeated in large proportion throughout the Empire"[24]

Professor Basileu Garcia remarks on the same subject that:

> "In the parliamentary discussions on extreme torture, conservatives fought for its inclusion in the Code; the other group (the liberals) was opposed to its inclusion. The conservative group won by a small majority. Their main argument was the widely disseminated criminality of servants. They were of the opinion that, without the aforementioned penalty, it would be impossible to keep the order among the slaves who, due to the quality of their existence, would be indifferent to other punishments."[25]

[23] Ibid. p.57

[24] Ibid. p.57

[25] Basileu Garcia (1968, p. 121)

Defloration and rape of enslaved black women

Lenine Nequete notes repeated judicial decisions through which the Courts established jurisprudence against the punishment of slave owners who committed rape,[26] even after the adoption of the Code of 1830 that classified rape in its Article 219. According to the opinion of prominent magistrates, since the enslaved black woman was not a person, she did not enjoy reputation or honor, nor could she exercise the right of complaint, legally granted instead to their rapist masters.

This legal precept, as well as the offenses of seduction and libidinous acts described in the Criminal Code of 1830 (Articles 224 and 226), employed the expression "virgin woman under seventeen years old" without any reference to color/race or to the condition of slave. Therefore, the discrimination imposed by the Courts was a result of sheer interpretation and reflected the racist ideology and shameless engagement on the part of the Judiciary in the defense of landowners.

Another interesting piece of information is the statement of Article 220 of the same Criminal Code, which determined an aggravation of the penalty in the cases of rape perpetrated against a woman under the power or custody of the rapist, a circumstance that invariably showed the relationship between slave and master.

Nevertheless, there were many court decisions in which rapists were substantiated by the Courts:

> "I am one of those who think that slave owners, as far as their slaves are concerned, and as long as the current legislation prevails, cannot commit crimes other than those related to the abuse of their power as masters of their domains and of the right of correction and that, apart from these conditions, slave owners cannot commit crimes regarding their slaves. The slaves, deprived of their civil rights, hold no honor and reputation, their rights are limited to those of conservation and integrity of their bodies; only when their masters offend these rights do they fall under a crime liable to pun-

[26] Lenine Nequete, op.cit., p.60 and ss.

ishment, because there is no wrong unless a right is violated (Tribunal da Relação de Pernambuco – 1883)[27]

Prostitution of enslaved black women

The prostitution of enslaved black women (and a clear preference for 10 to 15 year olds), forced to pay their masters for selling their own bodies, was present throughout the colonial and imperial periods. Based on an interpretation of the law of property, established in the Ordinances and in Article 179, item xxii of the Constitution of 1824, the Courts understood that the comprehensive definition of property included the possibility of slave owners to play the roles of pimps and panderers: "No slave may use the allegation that she was forced into prostitution by her master for the benefit of gaining her freedom. This has been the jurisprudence of the Courts of the country, since there is no law authorizing the judicial concession of freedom for such reason. Nor do court practices register anything to the contrary"(Court of Supreme Justice, 1876)[28]

Charles Expilly states that "humble but respectable families used to live comfortably from the prostitution practiced by two or three slaves. Since captives were forbidden to walk the streets of Rio de Janeiro at night without the written permission of their masters, such permission was given to the slaves in exchange for the bringing back a given amount of money the following day..."[29]

Lenine Nequete notes that, during the decade preceding the formal abolition of slavery, the Judiciary registered 1,604 suits that resulted in freedom for 729 women slaves, since they managed to prove in Court that they had been forced into prostitution and forced to give their masters a daily sum as a product of the sale of their body; under the threat physical punishment.[30]

[27] Lenine Nequete, op. cit., p. 63-67

[28] Ibid, p. 79

[29] Charles Expilly (1862, p. 209-292), *apud* Lenine Nequete, op. cit., p, 85

[30] Lenine Nequete, op. cit, p. 85

Manumission as an instrument of slavery

For both men and women, from 1603[31] until the promulgation of Law nº 2040 of September 28, 1871, the purchase of a manumission document (*carta de alforria*) constituted an act of generosity on the part of the slave owner. The document frequently contained an ingratitude clause, according to which the freed slave who proved to be ungrateful, indignant, or inconsiderate towards his master, or who refused to render him services, could have his freedom revoked. In short, even after the law entered into force, manumissions were always linked to a relationship of subordination, servitude, and flattery, without which the freed slave could return to the condition of slave.

The Criminal Code of the Empire

Greeted as a symbol of modernity and the herald of the new liberal ideas that so much in vogue in Europe,[32] the Criminal Code exhibited, in its 312 articles, a significant set of norms directly intended to crush black defiance, be it from slaves, freed slaves, or ex-slaves. These norms:

- determined criminal responsibility from the age of 14 years;
- charged slave owners with the responsibility for compensations for damages caused by their slaves;
- established punishment by whipping penalty and the compulsory use of fetters;
- created the crime of insurrection;
- punished free individuals who led rebellions;
- punished any type of help, encouragement or advice to insurrection, as well as providing of weapons or ammunitions for the same purpose;
- punished insurrection propaganda;

[31] The Enfranchisement Letter had been foreseen in the Book IV, Title 63, paragraph 7 of the Filipinas Ordinances

[32] Jurandir Malerba, (1994)

- punished the celebration, propaganda or confession of a religious creed other than the official one;[33]
- considered loafing a crime;
- considered begging a crime.

The Code established very severe penalties — from death to the mildest penalty, i.e., 15 years of forced labor in the galleys for the slaves, men or women, who organized meetings in search of freedom.

The racist laws of post-slavery

A misinterpretation of racism in Brazil, easily found in the academic publications, and whose negative impact on the discourse of black and anti-racism militancy needs accurate examination, is the belief of the supposed neutrality of the law as far as the Brazilian model of racial relations is concerned. It is widely believed that racism in Brazil, even in its post-abolition version, would have continued to subdue and maintain the black population at a marginal condition independent of the support, the apparatus, and strength of laws. About this issue, says Eccles:[34]

> "My opinion is that the Brazilian legal system did not manage to ensure the principle of non-discrimination against blacks, although it has been historically neutral with respect to race, by granting equal protection under the law"(Author's underlining).

In another section, the author affirms that:

> "For a long time, the role of legislation concerning American racial relations was merely to prevent the domination of the white population over the black".

With due permission from this ingenious and adventurous North-American researcher, I would hereby argue that, much like in the

[33] The article 5 of the Constitution of 1824 recommended that the "Roman Catholic Apostolic Religion will be the Religion of the Empire"

[34] Peter R. Eccles (1991, pp. 135-163)

United States, the function of the Judiciary[35]and of Law in Brazil, especially criminal law, was for a long time (including the first half of the 20th century and to a lesser degree, the 1970s) the legitimization and institutionalization of the interests of the white population, while serving, at the same time, as an instrument to physically and mentally control the Brazilian black population. The so-called neutrality of the law also concealed the sexism against women that governed then and that continued to govern until the creation of the Federal Constitution of 1988.

The Penal Code of the Republic

When the Republic was proclaimed in 1889, the Provisional Government, that had as its Minister of Justice Campos Sales, ordered Counselor Baptista Pereira to organize a proposal for a Penal Code, which was made into law on October 11, 1890.

It was not until February 24th of the following year, that the first Constitution of the Republic was drafted. In this respect, it is fair to say that Brazil proclaimed its Republic and, before elaborating its Constitution imposed obedience through the Criminal Code of 1890, of a political and juridical order that was only later defined. In other words, first came the duty to obey, and later the details of the laws to be obeyed. According to Mirabete,[36]

> "The Code of 1890 was immediately object of severe criticism due to its flaws, which evidently resulted from the haste under which it had been elaborated. The death penalty was eliminated and a corrective penitentiary regime was adopted, an advance in penal legislation."

Among the articles of this Code it is worth to point out: the establishment of criminal responsibility at the age of 9, and the punishment, as crime, of various behaviors and activities such as *capoeiragem* (the act of playing *capoeira*), witchcraft-related medicinal practices, cults of spiritualism, begging, loafing, among others.

[35] See Andrei Koerner (1998)

[36] Julio Fabbrini Mirabete (1996 v. 8, p. 42)

Nina Rodrigues,[37] viewed today as an arduous defender of racist theories, applauds the determination of criminal responsibility at the age of 9 and thus describes the reasonable motivations of the legislator. According to this author:

> "Our present Penal Code, inspired in (may the legislator forgive me) a badly transcribed copy of the Italian penal code, brought us a progress, reducing the age of minors from fourteen to nine years of age (...) The more civilized, cultivated people like the English, the Italian, the German whose thoughts must develop slower, are happy with the age of seven, nine or twelve years; due to its barbarian and savage races, the Brazilian fourteen years old limit was still low! Puberty comes sooner for inferior races (...) Letorneau affirms that 'the black boy is precocious'; he frequently exceeds the white boy of the same age; but his progresses soon come to a stop: early fruit goes rotten (...) the lower the age in which Justice or better still, the State can exercise their action over minors, the greater the possibilities of success, since it will be the time to prevent the deleterious influence of a harmful environment over a character that is still being formed, a time when their action might still be efficient"

Raymundo Nina Rodrigues, who lent his name to the Legal Medical Institute and a museum in Salvador, and whom Lombroso[38] considered as a disciple in South America, found no hindrances in classifying, in the Brazilian context, the character of the inborn delinquent as created by his Italian mentor. Nina Rodrigues takes the following stand:

> "...It is fair to admit that the American savages and African blacks, as well as their mixed children, have already attained the adequate physical development and the psychological faculties necessary to

[37] Nina Rodrigues (1894)

[38] A doctor and a psychiatrist, member of the Italian Workers Socialist Party, Cesare Lombroso (1835-1909) is considered the founder of Criminal Anthropology and one of the predecessors of Criminology, a controversial science to this day. We owe to Lombroso the definitions of inborn delinquent, criminal atavism (remote inheritance), association between phenotype and criminal predisposition to wrong, among others. Lombroso is responsible, with Enrico Ferri and Rafael Garofalo for the Italian school of criminal positivism.

discern, in a given situation, the legal value of their acts (discernment) and to decide on their own whether to perform such acts (free will). Would it be possible, by any chance, to admit that these inferior races have the same conscience of right and duty as the civilized white race?[39](...) The blacks have kept the brutal instincts of the Africans: they are quarrelsome, violent in their sexual impulses, tending to drunkenness and this character disposition imprints its tone in the colonial criminality these days."[40]

In fact, among the displays of "genius" of scientist Nina Rodrigues, one statement in particular would have been comical were it not for tragedies that befell so many black children and youth, of both sexes, at the beginning of the century: the idea of phrenology became popular in Europe, with the association of certain physical characteristics or measurements with delinquency: hence the importance given to height, size of the head, of the medium finger, of the arms, etc., to which was added in Brazil, the width of the nose - certainly as a result of the adaptive efforts of the scientist.

Dr. Nina Rodrigues of Maranhão was a fierce critic of the equal treatment ascribed by the Criminal Code to blacks and whites, as well as to the notion of free will[41] and other characteristics of the Code; he defended the adoption of four codes: [42]one for superior mestizos, a second one for the evidently degenerate, a third one for the ordinary mestizos and, finally, one for the whites as follows:[43]

"The Aryan civilization is represented in Brazil by a small minority of the white race who is responsible for defending it, not only from the anti-social acts — crimes — committed by its own representatives, but also from anti-social acts practiced by the inferior races."

Master Nina Rodrigues enthusiastically applauded the criminalization of loafing:[44]

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[39] NinaRodrigues, op. cit, p. 112

[40] Ibidem, p. 124

[41] In Nina Rodrigues' opinion, behavior was determined by race and not by the individual. This is the reason why he opposed the principle of free will described in the Code.

[42] Nina Rodrigues, op. cit., p. 167

[43] Ibid. op. cit. pp 170-171

[44] Ibid., op. cit., p141

"The indolence of the mestizo population is perhaps one of the factors least discussed in Brazil and it is a general consensus that it is justified by the richness of the soil that does not require any work. The latest criminal code, along with this general consensus, satisfied with having found in the indolence of mestizos an expression of their free will in the refusal to work, acted swiftly to repair this damage, by issuing Article 399."

The professor concludes: "The well-known incapacity of slaves to perform continuous and regular physical work may find its natural explanation in the comparative physiology of human races"; [45] He certainly forgets that in 1894, date of the work in question, whites had had less than a decade of familiarity with actual work, in comparison with four centuries of black slave labor. In fact, it is interesting to mention that studies prepared by Boris Fausto[46]confirm the racial connotations of the criminalization of loafing:

"Reports made by the Secretary of Justice in 1904 and 1906 — the only ones that established a relation between prisoners by contravention and by nationality — show how Brazilians are in great majority under the classification of "loafing," while foreigners predominate the classification "drunkenness," and more so under "social disorders". (...) Data referring to people prosecuted for loafing in the 1907 and 1908 indicate that nationals are still the majority, but to a lesser degree (...) These data give some consistency to the hypothesis that the mass of loafers was formed predominantly by the national destitute population, which includes a significant number of blacks and mulattos who had been left out of attractive economic activities in the years before and after the Abolition."

According to Fausto, Audferheid[47] "showed how authorities always made a link between loafing and the black population. For example, the 'parts of the week,' described by the Judges of the Peace in Salvador (1834-1836), often referred to blacks as "freed Negro, Negro, mulatto, bum or Negro bum".

[45] Ibid., op. cit., p. 142
[46] Boris Fausto (1984)
[47] Apud Boris Fausto, p. 45

It is worth noting that the impact of the work of Professor Rodrigues and his "lombrosian" propositions are not limited to the premises of the Faculty of Medicine of Bahia where the legislator-doctor used to teach, but influenced medical literature and more importantly the hegemonic juridical discourse in the Law Faculties in Recife and São Paulo, establishing the basis of a true theoretical school. This was a period dominated by phrenology, phreniatry, and criminal biology, as demonstrated by anthropologist Lilia Schwarcz.[48]

Similarly, while conducting research on trials on witchcraft medicine and charlatanism dating back to the beginning of the century, Schritzmeyer[49] clearly indicates the association between such offenses and religious practices of African origin, seen as barbaric and primitive.

As such, the *capoeira* deserved a special, if not racial treatment, included in the code with a very suggestive title — "On vagabonds and capoeiras".

Fausto[50] affirms that "this is a clear example of the criminalization of a behavior with the purpose of repressing a specific social segment, discriminated because of its color. The concern about the "*capoeiragem*" is linked to a historical situation and to a city in particular — Rio de Janeiro, in the period immediately after the Abolition".

Though the quotations reproduced here do not refer specifically to black women, it can be inferred that the value attributed to them was not different from that given to black men; racism-related sexism has certainly produced specific effects, inclusive of and especially in the Brazilian legal thought.

The Constitution of 1891

The first Republican Constitution broadened civil and political rights but indirectly prevented blacks from reaching the ballot box – when it imposed literacy as a condition for the right to vote in a country

[48] Lilia Moritz Schwarcz (1993)

[49] Ana Lúcia Pastore Schritzmeyer (1997, pp 135-145)

[50] Boris Fausto, op. cit., p. 35

that had just abandoned slavery. It also excluded other segments, including women.

The illiterate were able to exercise the right to vote only almost one century after the editing of the first Republican Constitution, in 1985, because of constitutional Amendment nº 25.

The Constitution of 1934

The fact that the Constitution of 1934, promulgated by a constitutional assembly that counted, for the first time, on female presence[51] and class representation, might have emphasized the repudiation to racial discrimination, recommended the teaching of eugenics[52] and established ethnic restrictions in the selection of immigrants, is very significant. As a tribute to this last precept, Decree nº7967 stated in its Article 2:

> "When admitting immigrants into the country, it is necessary to preserve and develop the more convenient characteristics of their European ascendancy in the ethnic composition of the population"[53]...

It is also important to remember that in the decades of 1940 and 1950 the existing Criminal Code[54] entered into force and stipulated criminal responsibility at the age of 18, revoked the criminalization of *capoeiragem*, spiritualism and magic, kept the offenses of witchcraft medicinal practices and charlatanism and began to consider begging and loafing as criminal violation, a kind of criminal infraction to which little offensive character is attributed. Also noteworthy is the fact that in the section defining crimes and penalties, still effective today, there is a very strict stand that penalizes women in specific cases such as, for example, voluntary abortion, and it still maintains discriminatory language such as the term "honest woman,"

[51] Women's right to vote was legally conquered in 1932 and was declared a duty in the Constitution of 1934. See on the subject Branca Moreira Alves (1980).

[52] Eugenics (racial hygiene), an ideology created by the Frenchman Francis Dalton, promoted racial purity against the so called degeneration originated form the interracial mixtures.

[53] Decree nº 7.967 of September 18, 1945 – "Legislates about immigration and other matters"

[54] Decree nº 2848 of September 7, 1940

when describing a victim of sexual misconduct. In spite of the timid signs of racial democratization in the criminal statute, the actual practices of public security organs remained indifferent to change.[55]

In 1951, a criminal law intended for the first time, at least in theory, to regulate a constitutional precept included in the Constitution of 1934 regarding the prohibition of racial discrimination. In July 3, 1934 Law nº 1390, the Afonso Arinos Law, entered into force and, until October 5, 1988, was one of the most important anti-discriminatory legal instruments in Brazil.

It is important to remark that Law nº 3079 of 1972 from the state of Bahia, in force until 1976, ordered all temples of African origin to be registered in the Police Station in the district where they were functioning; this fact by itself is enough to illustrate the racist content that some juridical norms carried until quite recently.

The Constitution of 1988

The Constitution of 1988 represents a true landmark in the political and juridical treatment of racism, and may also be seen as a product of the growth of the Black Movement, where the role of black women may be historically highlighted. The new Constitution brought a breath of fresh air in the elaboration of anti-racist federal, state and municipal legislation, as described in a previous publication,[56] and incorporated the recommendations of the Convention on the Elimination of All Forms of Racial Discrimination against Women of 1979 and of the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatments or Punishment[57] as well as principles from other international documents on the protection of human rights.

The Constitution defines that one of the foundations of The Federate Republic of Brazil is the respect to human dignity[58] and that among the main objectives of the Republic is the promotion of the well-being for all, independent of race, sex, color, age and any other

[55] Hédio Silva Jr. (1998a, pp. 71-90)

[56] Hédio Silva Jr. (1998)

[57] This Convention was confirmed by Brazil in 1989.

[58] Article 1, item iii.

form of discrimination,[59] stating the rejection of terrorism and racism as one of the principles of the Republic.[60]

It should be kept in mind that the Constitution of the Republic protects the physical integrity as well as the moral integrity of the individual.

Dignity, honor, image and fair treatment are just a few of the words included in the constitutional statements that may and should appear in the judicial defense of the rights and interests of black men and women. Article 5 of the Federal Constitution defines rights and individual guarantees that confirm these statements.

Legal assets *(bem jurídico)* undermined violence against black women

In Portuguese, word "bem," often meaning "well," is also used to define asset, property, good, belonging and possession. Derived from the Latin *bene*, which convenes the idea of virtue, happiness, helpfulness and wealth, the term "bem," or "good," a classification of the gender "thing," refers to material or immaterial objects to which it attributes a special value, be it because it is necessary for the existence and development of human well-being, or because it carries an ethical content, essential to life in society. Thus, the degree of distinction that is socially attributed to a given good determines its inclusion, or not, in the roster of legally protected goods.[61]

Let us examine briefly the concepts of human dignity, image, honor and fair treatment, stressing some characteristics of these "legal assets" that are of extreme importance to men and women.

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[59] Art. 3, item iv

[60] Article 4, item viii

[61] Jurist Luiz Regis Prado remarks that "The material concept of 'legal asset' implies in the recognition that the jurist elevates to the category of a legal asset what in social reality appears to be a value. This circumstance is intrinsic to the constitutional rule in which virtue is only a picture of what constitutes the fundamentals and values of a given time. It does not create the values to which it refers but acclaims them and gives them legal treatment".

Human Dignity

As stated in Article 1, item iii of the Federal Constitution, promoting human dignity is one of the basic principles of the Republic and of the democratic legal state.

According to Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Philosopher Immanuel Kant, a shrewd thinker of the virtuous practices refers to the dignity that every human being is endowed with: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never only as a means."[62]

On this subject jurist Franco Montoro teaches that "the human being is the source-value of all rights. He is the reason and the purpose of all juridical norms. The fundamental demands of his nature, such as the right to life, to responsibility, to social freedom, to social interaction, to family, to property, etc. constitute subjective rights in the level of justice, be it commutative, distributive or social."[63]

Therefore, human dignity constitutes an inalienable attribute of human beings, men and women, and is an ethical and spiritual essence common to all, qualifying each human being as an individual with rights.

Image

The Brazilian Constitution, in its Article 5, item v, protects the image of a person. To jurist José Afonso da Silva:

> "The inviolability of a person's image consists of the protection of her physical aspect, as it is visibly perceived; Adriano de Cupis adds: 'This personal reserve, regarding the physical aspect — which, after all, also reflects the individual's moral personality — fulfills a spiritual demand for isolation, an eminently moral need.'" [64]

[62] Immanuel Kant

[63] Franco Montoro, (1997, p. 442)

[64] José Afonso da Silva (1999, p. 191)

It is worth noting that image may be transmitted by graphic representation, photography, masks, drawings, sounds or any other representation fit to identify the individual. A review of the iconography of blacks in Brazil, especially of black women, shows how the image of blacks has been stereotyped to justify discrimination and exaggerated female sexuality to justify abusive sexual practices perpetrated against black women.

Honor

The right to honor is protected in the constitutional norm of Article 5, item v. According to jurist Celso Bastos: "Protection of honor consists in the right of not being offended or insulted in one's dignity or social consideration"[65]

To jurist José Afonso da Silva: "Honor is the set of qualities that define human dignity, the respect he receives from his fellowmen, the recognition and reputation. It is a person's fundamental right to protect these qualities."[66]

Criminal dogmatics refer to the concept of objective honor, understood as the image that an individual enjoys in the community, as opposed to subjective honor, defined as the image that an individual has of himself, or self-esteem. National songs and anecdotes show plenty of violations of this legal asset, as previously pointed out.

Fair Treatment

Item III of Article 5 of the Brazilian Constitution endorses the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed and ratified by Brazil.

In its wording, the Constitution forbids degrading treatment, referring to acts that degrade, debase, and slander. It must be noted that the final part of Article 1 of the Universal Declaration of Human Rights recommends that human interaction be guided by the spirit of brotherhood. It must also be noted that the Penal Code defines illegal constraint (PC, art. 146) as an act that coerces the victim to go

[65] Celso Bastos (1997, p. 195)

[66] José Afonso da Silva, Op. cit., p. 191

against the law or to do something that is not legally required, a behavior that contributes towards degrading a person.

To define a fair treatment, a philosophical maxim by Kant seems very useful and current: treat others exactly as you would like to be treated. Several examples could be given to define the degrading treatment that black people have endured in our society. For black women, many of whom work force as domestic maids, the famous example of the "service elevator" for servants demonstrate how much of discrimination still exists in social practices.

Moral and psychological damage suffered by black women

The word "damage," derived from the Latin *damnu,* means detriment, loss. Jurist Marcus Cláudio Acquaviva defines damage:

> "Injury caused to a person's economic or moral patrimony. The damage may be material, also called real, when it touches an economically ascertainable asset; or moral, when it tarnishes goods of moral essence, like honor. The party harmed by a breach of contract by the other party may demand the rescission of contract as well as losses and damages. Damage may also portray a crime."[67]

Regarding patrimony, jurist Guilherme Couto Castro explains that "...losses and damages encompass, besides what was actually lost, what one failed to gain. Two adverbs, effectively and reasonably, dominate the interpretation of the law — the first one linked to emerging losses (what was lost) — and the second to *lucros cessantes* (what one did not gain).[68]

The author goes on, with respect to the moral damage: "First we must define it and we do so by paying attention to the injured feelings, anguish, resentment or suffering experienced by an individual".[69]

In practice, doctrine and jurisprudence often do not differentiate moral damage from psychological damage, a practice criticized by jurist Celeste Leite dos Santos Pereira and by other authors to

[67] Marcus Cláudio Acquaviva (1993, pp. 410-11)

[68] Guilherme Couto de Castro (*1997,* p. 18).

[69] Ibid., p. 19

whom, in principle, moral damage (suffering) may not degenerate into pathology, a characteristic aspect of a psychological damage (damage to health). "Therefore psychological damage is a category independent of moral damage and it integrates a constitutionally protected area of Health",[70] say various authors.

Moral damage, therefore, is characterized as an offense to honor, personal or technical dignity, moral integrity, social esteem, self-esteem, image; its dimension may be perceived by the Judge without hindrance.

Psychological damage consists of a mental disorder, a dysfunction, deterioration or a disturbance,[71] beautifully described by Pereira and other authors:

> "The study of the inter-relation between the characterization of the offender and the offended leads us to consider that there are cases in which the suffering occurred with only minor biological, psychological and social repercussions, and other cases in which such repercussion brought about significant harm to the health of the offended, and these may be of a biological nature (gastric ulcers, heart attack, ulcerative rectocolitis, stroke, etc.) or social (job loss, family breakup, loss of clientele, of friendship, etc.)."[72]

In analyzing procedural aspects, jurist Norma Griselda Miotto[73] presents the following basic procedures: checking consequences of that fact on the psyche of the offended; description of the consequences, degree and percentage of the resulting incapacity; determination of need and type of treatment; determination of the cost of treatment; prognosis.

It is interesting to reproduce here excerpts from a decision pronounced by the Court of Justice of Paraná where a compensation was determined to be paid by an employer to his domestic maid, a

[70] Celeste Leite dos Santos Pereira Gomes; Maria Celeste Cordeiro Leite Santos, & José Américo Santos (1998, p. 29)

[71] Disease catalogued in the International Diseases Classification – CID-10, issued by the World Health Organization

[72] Celeste Leite dos Santos Gomes et alii, op. cit., p. 15

[73] Norma Griselda Miotto (1997)

black woman, due to the verbal offenses made on occasion of dismissal of the maid:

- "Moral damage. Offensive words. Obligation to compensate for the moral grief. Partial precedence of 1st degree. Intention to raise the indemnificatory quantum. Subjective criteria of values. Federal Constitution, Article 5, item V. Partially provided review to raise the indemnification. The insult suffered by the petitioner had a strong sense of belittling to the human being in addition to the characteristics of racial prejudice, it is thus fit according to the Constitution, to repair damages inflicted, based on the repercussion of the fact, in the capacity of the offender to bear the sentence and, on the possibility of giving the victim the conditions to experience a benefit that may soothe her moral affliction." (Court of Justice of Paraná, 1998).
- "Moral damage. Racism. Refusal to pay the insurance indemnification because of devastating sinister, exclusively because of the skin color of the petitioner. Prejudiced attitude characterized. Financial compensation. Determination of value equal to the insurance quantum to be paid. Review provided for this purpose. Prejudice is the expression of a moral perversion that should be denounced and fought without an end." (Court of Justice of São Paulo, 1999).

This new interpretation that arises from the international instruments on Human Rights and from the Brazilian Constitution of 1988 but, but especially as a result of the strength of the Black Movement, encourages the appeal to legal means both for the protection of objective honor and of subjective honor, and must be an important mechanism in the fight of black women against sexual and racial discrimination.

Thus, the question posed by CEPIA — to understand anti-racist legislation from a gender-based perspective — requires not only new interpretations of the legal system but, above all, new and more complex efforts by those dedicated to the judicial struggle for the defense of the rights and interests of black women.

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BLACK AND INDIGENOUS WOMEN: LAW VS. REALITY

Leila Linhares Barsted and Jacqueline Hermann[1]

We would like to thank Dennis Linhares Barsted for his suggestions to this text.

Introduction

This text presents a sociological discussion of Law, having as object of our analysis the situation of black and indigenous women in Brazil. Recognizing that the structure of juridical ordinance is mediated by power relations, the action of social groups and movements is essential for introducing and enlarging the paradigm of Human Rights in the interplay of the social forces that exist in formal democracies.

By analyzing legal instruments in the Brazilian scenario, we tried to incorporate both a gender perspective to understand the power relations between men and women as well as an ethnic/racial perspective to understand how these power relations function in a more profound manner against black and indigenous women. To give greater exposure to the discrimination that these women have suffered, we collected statistical data that reveal the sex and color of this discrimination. These data justify the struggle for legal equality and for effective public policies in favor of black and indigenous women.[2]

It is important to recognize, from the very beginning, that the struggle for women's rights and Brazilian African descendants has

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[2] On the concept of race, Santos, Hédio (2001:83) considers that the concept is losing strength in the scientific fields. Likewise, Santos, Joel Rufino (2001:404) stresses that, scientifically, it is not possible to refer to races. Adeski, Jacques D'(2001:44-49) calls attention to the ambiguity of the concept of race; he agrees that from a genetic standpoint there is no race, but incorporates the theoretical contributions of Pierre-André Taguieff, considering that, within the context of the anti-racist struggle in Brazil, the word race has an ideological and political value within the struggle of the Black Movement. The same author also suggest that, although the notion of ethnicity is imprecise ands insufficient to express all the nuances on groups and communities, it can act as a source of solidarity and affirmation of social identity (Adeski, 2001:56-67)

not been an issue for the society as a whole. In fact, social movements have organized themselves in a fragmented way to defend the rights of specific groups. In reality, women, blacks, urban and rural workers, indigenous peoples, homosexuals, among other groups, struggle for specific rights without necessarily acting in a more articulated, synergetic way. This fragmentation and the non-incorporation of specific demands into general agendas have made it more difficult to implement citizenship for the Brazilian population as a whole.

On the other hand, the attainment of citizenship indicates the need to broaden this concept in view of the paradigm of human rights, which is understood as universal and indivisible. Therefore, the concept of citizenship should extend beyond the access to civil and political rights and should incorporate social, economic, cultural and environmental dimensions. For this purpose, and referring the 1948 Universal Declaration of Human Rights as a landmark, the concept of citizenship is intimately connected to the concept of human rights.

However, the universal perspective of the right to citizenship, which states that all are equal, has not been sufficient for the Brazilian legal ordinance to guarantee effective access to justice and respect of these rights regardless of sex, race and/or ethnicity. To assure equality it is thus essential that equal opportunities be guaranteed by means of specific rights. This requires that the universal principle of equality be reconciled with the acknowledgement of the specific needs of groups historically excluded from social wealth and culturally discriminated.

Much has been said about the enormous gap that separates formal declarations from the effective practice of citizenship. The statistical data available in Brazil shows a wide social inequality, even greater when we consider data on race/ethnicity and sex. In addition to socio-economic inequality, the recognition that all persons have rights and the capacity or the power to claim these rights is still at a preliminary stage in Brazil, especially where rights have only recently been recognized, as is the case of women, particularly black and indigenous women.

Though much remains to be done for an effective practical application of those rights already guaranteed by the Brazilian legis-

lation, the formal recognition of rights is a fundamental step. Obviously, this does not mean that men and women, white and black, will automatically enjoy greater decision power over their lives and over their country's destiny. In the specific case of women, the legal declaration of equality does not signify that they immediately consider themselves entitled to the rights expressed in the Brazilian Federal Constitution of 1988.

Petcheski and Judd (1988)[3] stress that for an individual to vindicate their rights, a number of conditions are necessary: a) the existence of a formal declaration of such rights in national and international laws; b) the correlation of these rights with habits, values, and social behavior; c) the effective implementation of these rights; d) the introjection and assimilation of these rights by all; that is, the consciousness that individuals possess basic fundamental rights as human beings.

In Brazil, formal declarations of equal rights for men and women of all races are present in national and international laws, protected by the Federal Constitution of 1988. Nevertheless, difficulties for the implementation of legal rights of women, and even more so of black and indigenous women, can be verified in the official statistics relating access to work, professional status, income, health, education, decision-making positions, among other indicators. In the case of indigenous women, we still face an absurd invisibility owing to the absence of data separated by sex on indigenous peoples.

Another obstacle for the acknowledgement of the entitlement to rights is worthy of examination: the ignorance about laws and the cultural behavior based on hierarchical, elite relationships, paternalistic practices of patronage, still very much in force in the Brazilian society. It is still difficult for men and women in Brazil to take full advantage of the rights they are entitled to. Nevertheless, since it took so long for women to achieve the status of citizens,[4] and

[3] On the notion of entitlement, see Petcheski, Rosalind and Judd, Karen (org) *Negotiating Reproductive Rights*. International Reproductive Rights Research Action Group – IRRAG, N.Y., Zed Books, 1998.

[4] Women's right to vote was only achieved in 1932 and it was considered optional; only with the Constitution of 1934 did it become an obligation to be fulfilled by both men and women.

because of their reduced representation in decision-making positions in government and in society, they are more strongly affected both by social discrimination and by the lack of acknowledgement — herein implied also self-acknowledgement — that they are entitled to rights.

This situation is even more serious in the case of African descendent and indigenous women. For the latter, apart from this statistical invisibility, it is important to consider the indifference of State and society as regards their real and specific needs, as well as their few legal achievements.

Nevertheless, the Brazilian anti-racist legislation is a result of a long and continues struggle by the Brazilian Black Movement and organized black women that have tried to interfere in the national juridical ordinance so as to introduce the racial/ethical perspective into the ethical and moral paradigm of Human Rights.

Using these principles as a starting point, we intend to emphasize national and international legislation against racism and understand the impact of this legislation through statistical data concerning the social, economic and cultural conditions that reveal the barriers existing in Brazilian society against the full exercise of rights formally guaranteed by law.

We call attention, therefore, to the amply discussed and historical imbalance between law and social reality in Brazil. It is necessary to understand how this imbalance has justified the lack of faith in the Law as an instrument for social change, and has made unequal treatment of individuals trite and natural - in particular the inequalities based color and sex. Thus, in many cases, we are confronted with the so-called "law that won't catch on," or with the expression: "Do you know who you're talking to?" which have so strongly delineated the limits of citizenship in Brazil. We thus agree with Hédio Silva Jr. when he states that "the insertion of the principle of non-discrimination and the reiterated declarations of equality have not been sufficient to halt the reproduction of discriminatory practices in Brazilian society."[5]

[5] See on this subject Hédio Silva Jr, 1998.

On the other hand, as has already been indicated, the presence of laws cannot alone immediately change the reality of society. We must not accept passively the ineffectiveness of legal norms, specially if we base ourselves on the Human Rights paradigm. It is our understanding, nevertheless, that laws play an important concrete and pedagogical role in the struggle for a just, truly equal and democratic society.

We believe that one of the basic elements needed to increase the efficiency of anti-racist and anti-discriminatory norms is their dissemination and their full comprehension by the society as a whole. This is one of the intentions of this text. It is also essential to give some exposure to the qualitative and quantitative studies that denounce persistent discrimination, in spite of the democratic and universally applied legislation found in Brazil today.

In the case of women in general, it must be noted that legal norms are sometimes so generic and abstract that not only do they ignore ethnic/racial diversity but they do not even include the word "woman", employing always the generic masculine plural, such as the Portuguese expressions for "all" and "citizens". In this sense, a critical reading of anti-discriminatory norms from a gender perspective is required.

The evolution of the repudiation of racism and sexism in international legislation

The 1965 International Convention Against All forms of Racial Discrimination and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women are the basic international legal instruments in the struggle against racism and sexism.

The United Nations First Conference on Women, held in 1975, was of prime importance to women. This Conference was held simultaneously with the development of studies, made especially by feminists, that brought greater exposure to the situation of women throughout the world and analyzed the causes for discrimination against women in societies in general. These studies became a powerful instrument for denouncing discrimination suffered by women and a mechanism used to pressure for more active social policies

aimed to overcome these forms of discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women, approved by the United Nations General Assembly in 1979, incorporates this concern, yet because it concentrated on women's issues in general, it did not specifically address black and indigenous women.

The continuity of these studies pointed to the need to recognize the significant differences that exist, particularly when color and race indicators are included. The analysis of gender/race and ethnic relations became an effective instrument used by the women's movement to reject the idea that the subordination of women, as well as of of black and the indigenous peoples, is a natural thing, and served as a foundation for the struggle for sex, racial/ethnic equality.[6]

We can affirm that, by the end of the 20th century, the legal ordinance of most democratic countries was greatly altered by the ethical paradigm of human rights, present in innumerable legal international instruments. Gender/race/ethnic perspectives influenced international legislation on the protection of human rights, which in turn became a valuable instrument against all forms of discrimination.

Among the international instruments for the protection of human rights, the Universal Declaration of Human Rights of 1948 was a historical landmark in its declaration that every human being is entitled to a set of economic, political, social, cultural and environmental rights. This instrument made explicit the rejection of any form of discrimination by reason of race, sex, religion, culture and other attributes. Nevertheless, the perception of the woman as a subject of rights remained in oblivion for a long time.

In the 1960s, a set of International Conventions, under United Nations, enabled the generic expression "all" to be replaced by the gender categories, "men" and "women." Among these instruments, the International Convention on Civil and Political Rights (1966, ratified by Brazil in 1992), the International Covenant on Economic,

[6] On the subject see Ribeiro, Matilde (organizer) *Dossiê Mulheres Negras* (1995) and Franchetto, Bruna (organizer) *Dossiê Mulheres Indígenas* (2000). On the concept of gender, see Rubin, Gayle (1975) and Heilborn, Maria Luiza (1992), and other contributions.

Social and Cultural Rights (1966, ratified by Brazil in 1992), the American Convention on Human Rights — San Jose de Costa Rica Pact (1969, ratified by Brazil in 1992) are noteworthy.

In December 1965, by means of Resolution nº 2 106-A, the United Nations drafted the International Convention Against All Forms of Racial Discrimination, totally ratified by Brazil on March 27, 1968[7]. It is interesting to remember that, in 1963, the United Nations had already approved a Declaration on the Elimination of All Forms of Racial Discrimination, which stated "...the need for rapid elimination of racial discrimination in the world, in all its forms and manifestations, and to ensure understanding and respect for the dignity of the human being."

This International Convention represented a commitment by the United Nations to fight colonialism and the forms of oppression found in that system of economic, social, political and cultural domination. The Convention repudiates racist doctrines, considered condemnable, untrue, unjust and dangerous.

We must not forget that the 1960s were marked by the struggle against colonialism in Africa and Asia and by the struggle for the civil rights by the black population in the United States. Sansone (1998) draws attention to the fact that halfway through the 1950s many North-American states had segregation laws (by color and ethnicity). Heringer mentions that after 1964, anti-discriminatory laws became effective in the United States and institutions were created for the purpose of implementing this new legislation, such as the Equal Employment Opportunity Commission — EEOC and the Office of Federal Contract Compliance Programs — OFCCP. Therefore, the International Convention Against All Forms of Racial Discrimination is part of the important manifestations that characterized the great struggle against colonialism and for the civil rights of African-American descendants.

The Convention affirms that "the existence of racial barriers goes against the ideals of any human society". That is why, in 1965, the United Nations was alarmed by manifestations of racial discrimination exhibited in several parts of the world. In this Convention, the

[7] In Brazil, this international instrument has the same legal power as internal laws, as described in Article 5, paragraph 2 of the Brazilian Constitution of 1988.

United Nations committed to adopting "all the necessary measures to rapidly eliminate racial discrimination in all its forms and manifestations and to prevent and combat racist doctrines and practices and to build an international community free from all forms of racial segregation and racial discrimination."

In its Article 8, the International Convention Against All Forms of Racial Discrimination called for the creation of a Committee on the Elimination of Racial Discrimination, composed by experts of international prestige, to be elected by the member states. Members of this Committee are empowered to receive and examine periodic reports on the compliance of the Convention; make recommendations and offer suggestions to the United Nations General Assembly; request information from member states; act towards the appeasement of conflicts between member states with regard to the compliance of the Convention; receive and analyze communication from individuals or groups of national individuals on violations of the rights recognized by the Convention, among others. In this way, member states of this Convention, as referred to in Article 9, must commit themselves to submit to this Committee a report on "... the legislative, judicial, administrative or other measures that they may adopt to make effective the provisions of the Convention."

By mid-2001, the Brazilian Government had submitted 13 reports to this Committee. It was only in the last reports, during the period that followed the re-democratization of the country, that Brazil recognized the existence of racial discrimination, revealing the grim socio-economic indicators of the black and indigenous population and pointing out measures being taken to transform this situation.

In its Article 1, the Convention describes racial discrimination as

> "Any distinction, exclusion, restriction or preference based on race, color, descent or origin, be it national or ethnic, which aims or results in the annihilation or limits the recognition, enjoyment or exercise in equal conditions, of fundamental rights and freedoms in the political and economical spheres, in the social and cultural or in any other sphere of public life".

There is no doubt that this Convention is a landmark in international law, not only because it condemns and exposes discrimina-

tion against large segments of the population, but also because it makes it mandatory for member states to develop policies to overcome these forms of discrimination. In addition, the Convention was the first international legal instrument to require a monitoring body in its implementation. In this way, upon its acceptance, Member states are committed to: a) condemn racial segregation and apartheid; b) condemn propaganda and organizations inspired in ideas or theories of racial superiority; c) punish through national law, the dissemination of ideas based on superiority or racial hatred; d) declare the illegality of the organizations that foster racial discrimination and forbid their action; e) ensure equal rights before the law, regardless of race, color, national or ethnic origin; f) assure protection and recourse to legal Courts to any person victimized by racial discrimination whose individual rights and fundamental freedoms have been violated, with the provision of redress or just compensation for any harm resulting from this discrimination; g) take immediate and effective measures in the educational, cultural and information sectors to render effective the struggle against prejudice; h) prohibit and eliminate all forms of racial discrimination and assure equal rights before the law, particularly with reference to rights of equal treatment in court, the right to security, to political rights, the right of access to all public places and services, to civil rights, including specifically economical, social and cultural rights, among others as expressed in Article 5, of the Convention.

In it's Article 1, item iv, the Convention emphasizes an important step ahead for public policies on affirmative action when it disposes that[8]

[8] On the subject of affirmative action see Heringer (1999). In this article, the author stresses the contribution of Reskin (1997) in defining affirmative action in the work field: "The term affirmative action refers to policies and procedures, obligatory and optional, designed to fight discrimination in the labor market and also to correct the effects of discriminating practices adopted in the past by employers. As in the case of anti-discriminatory laws the purpose of affirmative action is to make equal opportunities a reality, by means of field leveling. Contrary to anti-discriminatory laws, which offer remedies to which workers may recur after suffering discrimination, policies of affirmative action aim at preventing the discriminatory act. Affirmative action can prevent discrimination in the labor market by replacing discriminatory practices — intentional or routine — with practices that protect against discrimination".

"Special measures taken with the sole objective of ensuring the proper advancement of certain racial or ethnic groups or individuals who require the protection that may be necessary to provide these groups and individuals with equal enjoyment or exercise of human rights and fundamental freedoms, will not be considered racial discrimination, provided that these measures do not result in the maintenance of separate rights for different racial groups and that they are discontinued after the objectives have been achieved."

It should be emphasized that after the Universal Declaration of Human Rights of 1948, the International Convention Against Racism was the first international instrument with legal status to consider that ethnic/racial differences should not result in inequalities and discrimination. Perhaps this is also the first international legal document to specifically deal with the theme of human diversity.

In view of the recommendations of the International Committee Against Racism, Brazil signed — but has not yet ratified — the Convention on Indigenous and Tribal Populations (Convention 169), approved by the International Labor Organization (ILO) in July, 1989, but not yet incorporated into Brazilian law. This partially revises the United Nations Covenant on Indigenous and Tribal Populations of 1957 and makes advancements in relation to it.

The Convention on Indigenous and Tribal Populations (ILO's Convention 169) recognizes that indigenous persons and tribes aspire to "...take control over their own institutions and forms of life and economic development, maintain and strengthen their identities, languages, creeds, within the scope of the States where they live."

In its Article 3, the Convention declares that "indigenous and tribal peoples should fully enjoy human rights and fundamental freedoms, without hindrances or discrimination. The provisions of this Covenant will be applied without distinction to men and women of these groups."

The Covenant also states in it's Article 4 that "special measures needed to safeguard people, institutions, the property, the cultures and the environment of the peoples in question should be adopted (...) Such special measures should not be contrary to the wishes

freely expressed by these peoples. (...) The enjoyment with no discrimination of general citizenship rights should suffer no deterioration as a result o these special measures."

In it's Article 20, item iii (d), the Convention declares that Governments should adopt — within the scope of national legislation, and in co-operation with the peoples in question - special measures to ensure in particular that "...workers who belong to these groups will enjoy equal opportunity employment and equal treatment among men and women, as well as protection against sexual harassment."

The organizations of the Brazilian Indigenous Peoples urge for the ratification of this Covenant, for the advancement of the indigenous situation in our country. The text of this Covenant is specifically concerned with working women.

Contrary to the text of the Convention on Indigenous and Tribal Populations (nº 169 of the ILO), the text of the International Convention Against Racism does not take into consideration the diversity of situations lived by women and men, a fact that magnifies discrimination and gives rise to specific perverse effects against women. In this connection, the International Convention Against Racism of 1965 should be articulated with the International Convention Against all Forms of Discrimination Against Women, of 1979, along with the text of the Convention on Indigenous and Tribal Populations of 1989.

The Convention on the Elimination of All Forms of Discrimination against Women was approved by the United Nations General Assembly, through Resolution 34/180, on December 18, 1979. Brazil signed this resolution on March 31, 1981, with restrictions on the part that refers to the family. It was later ratified by the Brazilian National Congress — with the same restrictions — on February 1, 1984. In view of the recognition by the Brazilian Federal Constitution of 1988, of the equality between men and women in public and private life, particularly in conjugal relationship, in 1994[9] the Brazilian Government withdrew its restrictions and ratified the resolution in its entirety.

[9] In Brazil, this international instrument has the same legal power as internal laws, as described in Article 5, paragraph 2 of the current Brazilian Constitution (1988).

The Convention on the Elimination of all Forms of Discrimination against Women, like the International Convention Against Racism, defines the expression "discrimination against women" as:

> *"Any distinction, exclusion or restriction based on sex which aims at or results in prejudice or annulment of the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economical social, cultural and civil fields, or in any other field, regardless of their marital status, and having equality between men and women as a basis."*

This Convention resulted from the effort of the international women's movement[10] to commit member states of the United Nations to condemn discrimination against women in all its forms and manifestations. This legal instrument recognizes that discrimination against women violates the principles of equal rights and of respect to human dignity and is an obstacle to the increased well-being of family and society, and to the development of women's potentials.

In order to follow its implementation and evaluate the progress achieved in its application, the United Nations created, through Article 17 of of this Convention, a Committee on the Elimination of Discrimination against Women. Through this Convention, member states were urged submit to the Secretary General to the United Nations, within a year of its the becoming effective, a report on the measures adopted for the effective application of its provisions. This report should be updated every four years and again submitted for consideration by the Committee. Although 20 years have elapsed since the Convention was adopted, many countries, including Brazil, have never submitted reports to be evaluated by the Committee.

In the year 2000, as a result of pressure from international women's movements, the 1979 Convention was strengthened with

[10] Similar to the Black Movement, women began the fight for their civil rights throughout the world in the 1960s. In Brazil, this movement began to gain momentum in 1975 when, during the military dictatorship, a workshop on the "Role and the Identity of Women in the Brazilian Society" was held by the Brazilian Press Association (ABI) and The United Nations, as a result from the demand and the organization of a group of women feminists of Rio de Janeiro.

the addition of an Optional Protocol, which defines and regulates the powers of the Committee as described in the Convention, so that this important legal instrument for the protection of the human rights of women will become effective. Accordingly, this Protocol aims to: a) improve and amplify the set of mechanisms for the protection of women's rights; b) facilitate the understanding of the Convention and encourage States to implement it; c) foster alterations in discriminatory laws and practices, making available the international mechanisms for human rights protection; d) draw attention of the public opinion to discrimination against women with a view to overcome it.

In this manner, by the end of the 1960s and 1970s, racism and sexism, respectively, began to be internationally repudiated by specific legal instruments, a practice that must be absorbed into the national legislation. It is thus absolutely essential, in order for this absorption to occur, that an effort be made to relate all Conventions, Treaties and International Pacts that have the protection of human rights as their objective. International law and national law must be conceived in a systematic manner, so that their effects can be maximized.

It is also important to understand other treaties and conventions on human rights approved by the United Nations throughout its history. As such, emphasis must be given to the Convention on the Punishment and Prevention of Genocide of 1948, signed by Brazil in 1951. This Convention describes genocide as a crime, characterized by any action coupled with:

> "The intention of destroying, entirely or in part, a national, ethnic, racial or religious group, such as: a) murdering members of a groups; b) serious offence to the physical or mental integrity of group members; c) intentional submission of a group to living conditions that may result in physical or partial destruction; d) measures intended to prevent births in the group; and e) forced transfer of members from one group into another."

The Convention for the Punishment and Prevention of Genocide emphasizes equality and tolerance as fundamental values for the protection of the dignity of the individual and urges United Nations member states to prevent and combat this crime.

Other important international instruments reinforce the anti-racist struggle. Among these,should be mentioned Convention 111 of the International Labor Organization – ILO, against discrimination in employment and in professions, promulgated in Brazil through Decree nº 62150 of May 23, 1968. This Convention considers discrimination a violation of human rights as listed in the Universal Declaration of Human Rights and defines the term discrimination as follows:

> "a) Any distinction, exclusion or preference based on race, color, sex, religion, political opinion, national or social origin, which seeks to destroy or alter the equality of opportunities and treatment in employment or professional matters.; b) any other distinction, exclusion or preference that seeks to destroy or alter equal opportunities or treatment in matters regarding work and profession (...)".

Hédio Silva Jr. considers that the said Convention has great conceptual significance, since it distinguishes racism from prejudice and from discrimination.[11] This author also emphasizes that the Convention determines that the State should commit itself to non-discrimination and accept its obligation of promote equality through public policies.

Like the International Convention Against Racism, Convention 111 of the ILO states in its Article 5 that "special protection or assistance measures provided for in other conventions or recommendations adopted by the International Labor Conference are not considered discrimination."

Another important instrument is the Convention on the Fight Against Discrimination in the Field of Education of 1960, adopted by UNESCO, and transformed into a Brazilian law by Decree nº 63223 of September 6, 1968. According to this Convention, UNESCO also considers discrimination in the field of education a violation of human rights. In its Article 1, the Convention recognizes that discrimination consists of:

[11] Silva Jr., Hédio (1999: 93,94).

"... Any distinction, exclusion, limitation or preference based on race, color, sex, idiom, creed, public opinion or any other opinion, national or social origin, economic situation or birth which seeks to destroy or alter equal treatment in matters of education and in particularly to: a) deprive any person or group of persons of access to any type or level of education; b) limit to an inferior level of education any person or group of persons; c) with due attention to the provisions of Article 2, set up or maintain separate teaching establishments for persons or groups of persons[12] d) to impose on any person or group of persons conditions incompatible with human dignity."

In accordance with the Convention Against Discrimination in the Field of Education, State Parties, among other obligations, are committed to:

"Take the necessary steps, including legal measures to prevent discrimination in the admission of pupils into teaching establishments (...), render basic education mandatory and free; make high school education, in its various forms, general and accessible to all; take identical action in the case of superior education in view of individual capacities (...)".

Several important international legal instruments approved by the United Nations emphasize the non-acceptance of discrimination based on color, race, ethnicity, sex, among others. Examples include the International Pact on Economic, Social and Cultural Rights of 1966 and the International Pact of Civil and Political Rights of 1966.

As a result of the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992, the United Nations General Assembly approved the *Agenda 21*, whiched focused on issues of development issues and environmental cooperation. Agenda 21 dedicates its Chapter 24 to the "International Action for Women with a view towards Equitable Sustainable Development," broadening the Convention for the Elimination of All Forms of Dis-

[12] Article 2 of this explains the specific situations under which the creation or maintenance of systems of education or of teaching establishments for either sex will not be considered discriminatory.

crimination Against Women of 1979. This Chapter is an important instrument for the implementation of public policies against sex-related discrimination.

All United Nations Conferences held during the 1990s reinforced the principle of recognition of the importance of women in the developmental process, on equal conditions with men, in all spheres of public and private life. The Declaration of Vienna, signed after the World Conference on Human Rights of 1993, recognized explicitly the human rights of women and gave international exposure to the violations of these rights. This Conference concluded that women's rights are human rights and this prospect was explicitly indicated in many of its Articles.

Accordingly, Item 18 of the Declaration of Vienna states that

> "...the human rights of women and girls are inalienable and form an integral and indivisible part of the universal human rights. The full participation of women, on equal conditions, in political, civil, economic, social and cultural life, at a national, regional and international level and the eradication of all forms of sex-related discrimination are priority objectives of the international community".

In 1994, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as the Convention of Belém do Pará and approved by the Organization of American States (OAS), reinforced the Vienna Declaration specifically in what refers to the rejection of violence against women, which was considered a hindrance for development and a violation of human rights.

The 1994 World Conference on Population and Development, in Cairo, and the Fourth World Conference on Women of 1995, in Beijing, reaffirmed the principle of recognition of the importance for women to enjoy equal conditions to men in the developmental process.

The Declaration of Beijing, approved at the Fourth Conference on Women, in addition to reaffirming that women's rights are human rights, led the member states of the United Nations to agree to undertake a number of measures aimed at the empowerment of women and their full participation in all spheres of life, in equal conditions with men.

In addition to the conventions, pacts and treaties that are considered international and national law once they are signed and ratified by the member states, it is necessary to understand and employ the Declarations and Plans of Action of the International Conferences on Human Rights, which constitute the sources that establish the ethical, moral and legal precepts of the internal law of each member state of the United Nations.

As such, the Plans of Action of the 1990s Conferences, among which special mention should be given to the World Conference on Human Rights of 1993, The World Conference on Population and Development of 1994, and the Fourth World Conference on Women of 1995, should serve as a paradigm for the improvement of national legislation and as an instrument in the struggle against racism and sexism.

Brazil's ratification of the International Labor Organization (ILO)'s 169 and of the Optional Protocol for the Elimination of All Forms of Discrimination Against Women, approved in the year 2000 by the United Nations and which reinforces the Convention on the Elimination of All Forms of Discrimination Against Women, should constitute an urgent legislative demand of the women's movement and of all those who strive to defend human rights.

After having signed and ratified a great part of the Conventions on Human Rights, the Brazilian state recognized, through Decree nº 89 of December, 1998, the competence of the Inter-American Court of Human Rights to hear accusations and judge crimes of violation of these rights. In 1988, Brazil recognized the Permanent International Criminal Court, which also has the power to examine claims on violations of human rights and to condemn private individuals or States as authors of such violations. The existence of an international judicial power amplifies the protection of victims of human rights' violation.

The evolution of the Brazilian legislation against racism

The period from 1889 to 1988

Only in 1888, with the "Áurea Law," was slavery abolished in Brazil, the last country in the world to do so. This Law did not create any form of indemnity or compensation nor did it specifically pro-

pose any policy to assist the recently emancipated black population. On the other hand, no segregation law was approved. The first Constitution of the Republic, of 1891, however, recognized political rights to the illiterate, white and black. The lack of a legislation on segregation favored the rise of the so-called myth of a "Brazilian racial democracy," which emerged in the 1930s and was attributed to sociologist Gilberto Freyre.[13] The notion that slavery had been milder in Brazil than in the United States would explain the harmonious rapport between whites and blacks who still lived in their master's house and in slave quarters. In spite of his reputation as the "father" of such myth, it must be remembered that Gilberto Freyre was an important intellectual who rebuked certain theories that considered miscegenation as prejudicial to the national identity and promoted the whitening of the labor force through European immigration to Brazil.[14]

The myth of racial democracy was strengthened by the fact that all Brazilian Constitutions since 1934 declared that all persons were equal under the Law, with no restrictions. In 1951, through the Afonso Arinos Law, racism was recognized and lightly punished when considered a misdemeanor, a kind of minor offence, less severe than the crimes foreseen in the Penal Code. In 1956, through Law nº 2889,[15] Brazil began to penalize the crime of genocide, enforcing punishment for anyone who:

> "With the intention of destroying, entirely or in part, a national, ethnical, racial or religious group (...) kills members of the group, inflicts serious harm to their physical or mental integrity (...) intentionally submits the group to living conditions that might result in its physical destruction (...) adopts measures intended to prevent births within the group, (...) promotes the forced transference of children within de group into another group (...)"

[13] See Freyre, Gilberto. *Casa Grande e Senzala* (The first edition dates from 1933).

[14] Examples of such authors are Nina Rodrigues, Silvio Romero and Euclides da Cunha. For an analysis of the intellectuals who discussed the problem of mixture of races in Brazil, at the end of the 19th century and beginnings of the 20th century, see Schwartz, Lilian (1996). M. *O Espetáculo das Raças*. São Paulo, Companhia das Letras, 1996

[15] This law ratifies the United Nations Convention against Genocide of 1951, already referred to in this text.

In 1962, the Brazilian Telecommunications Code prohibited the means of communication from promoting discriminatory campaigns based on class, color, race and religion.

As emphasized by Heringer (1999) in the 1960s and 1970s, the military dictatorship[16] discouraged the debate on racial prejudice and the "national Census did not include in its forms a single question about race or color." Although Brazil signed the International Convention on Racism of 1968, it was not sufficient to produce an impact on Brazilian society or improve the situation of the black indigenous population, since neither the government nor the Brazilian society as a whole acknowledge the existence of racism.

Nevertheless, during the military dictatorship there was significant legislative action against racism. For instance, in 1968, as already mentioned, Brazil recognized the Convention 111 of the International Labor Organization (ILO), which deals with discrimination in the workplace. The Federal Constitutions of 1967 and 1969 explicitly stated that "the law will punish racial prejudice." Law nº 6620 of 1978 considered the promotion of racial hatred or racial discrimination a crime against national security. It is important to note that, from a gender perspective, all these laws are generic and make no explicit reference to men and women. Thus, according to Hédio Silva Jr.,[17] there was "...a paradoxical acknowledgement by the military dictatorship of the existence of racial distinctions, privileges and prejudices; after all, punishment is not applied to something that does not exist."

With reference to indigenous peoples, the Civil Code of 1916, considered this contingent of men and women to be "relatively incapable" and therefore in need of guardianship from the State. The Statute on indigenous people was approved in 1973, through Law nº 6001. These Statutes establish, in Article 58, the punishment for a series of crimes against Indians and their culture, such as:

[16] The period of military dictatorship lasted from 1964 to 1984, after which indirect elections established a President oh the Civil Republic along with the guarantees of a Democratic State.

[17] See Silva Jr, Hédio (1999:98)

"Mockery of ceremonies, rites, usage, habits or traditional indigenous cultures, belittling or disturbing by any means their practices (...) using the individual or the indigenous community in tourism advertisements or exhibitions for profit (...) facilitating by any means the acquisition, use and distribution of alcoholic beverage in tribes or among Indians who have not been integrated yet"

In the case of crimes against the individual, property or customs, these Statutes determine the application of the Penal Code with a one-third aggravation of the penalty. Aggravation of the penalty will also occur if the crime is committed by a "public official or employee of an indigenous relief agency". In Article 54, sole paragraph, these Statutes require that "In infancy and motherhood, in illness and old age, special treatment to the indigenous population will be assured by the public administration." This is the only article in which, when referring to assistance to motherhood, mentions indigenous women.

The Federal Constitution of 1988

The Brazilian Federal Constitution of 1988 was an important landmark for the rejection of racism and sexism. This was the first Brazilian Constitution to explicitly consider racism as a serious crime and to recognize the full civil capacity of women, both in public and in private life.[18]

In elaborating this Constitution, the existence of anti-racist and anti-sexist international legislation, and the action of organized social movements, among them the Black Movement, the women's movement had significant impact in the definition of a democratic constitutional legislation.

The presence of these democratic forces resulted in a Federal Constitution that establishes human rights as one of the principles of the Federal Republic of Brazil and recognizes the validity of international treaties and conventions for the protection of these rights in this country, provided they are duly ratified and signed by the Brazilian State.

[18] See on the subject Barsted, Leila Linhares (1999)

In spite of all this effort, the said constitutional text retains a type of discrimination, which concerns about 19% of the economically active female population: domestic maids. Though Labor and Social Assistance Laws recognized these workers in 1972, they have not yet succeeded in obtaining identical rights as the other workers. In spite of seemingly general in character, this discrimination particularly affects black women, since 56% of domestic maids are African descendants.

On the other hand, as early as in its introduction, the Constitution recognizes that development, equality and justice are the ultimate values of a brotherly, pluralistic and unprejudiced society. Article 1 states that one of the fundamental values of the Federal Republic of Brazil is human dignity. From this perspective, the promotion of welfare for all, regardless of origin, race, sex. color, age and any other forms of discrimination, is one of the fundamental objectives of the Republic, according to the provisions of Article 3, item iv. In Article 4, the Constitution makes explicit that among the guiding principles for Brazil's international relations are the prevalence of human rights (item ii) and the rejection to terrorism and racism (item viii). The Constitution also dedicates a full Chapter to individual and collective rights and duties. Thus, Article 5 guarantees that "...all are equal before the law without distinction of any kind; Brazilians and foreign residents in the country are assured the inviolable right to life, to freedom, to equality, security and property." Item xlii, of this Article, states that: "the practice of racism is a crime that is not entitled to bail or to prescription, and is subject to imprisonment as prescribed by the law."

In variou articles, the Constitution rejects all forms of discrimination. Accordingly, in a reference to labor rights, Article 7, item xxx determines the prohibition of unequal pay, in the exercise of function or as criteria for admission, because of sex, age, color or civil status. With reference to the right to culture, Article 215, paragraph 1, states that "... the State will protect expressions of popular culture, indigenous and Afro-Brazilian, as well as those of other groups that participate in Brazilian society."

In another reference to culture, Article 216 requires the preservation of all inventory documents and sites of historical value be-

longing to the *quilombos*, hidden communities of fugitive slaves. According to information given by the Instituto Socio-Ambiental (ISA):

> "The constitutional rights of indigenous populations are set forth in eight separate provisions and one Article within the Act of Transitory Constitutional Provisions[19]. They are marked by at least two important conceptual innovations. The first is the relinquishment of the perspective of assimilation, which considered indigenous people as a social transitory category, doomed to extinction. The second is that the rights of indigenous people to their lands are defined as Rights of Origin, that is, preceding the law or act that declares them to be so. This results from the recognition of the historical fact that the indigenous people were the first occupants of Brazil. By doing so, the new Constitution establishes new standards for the relationship between the State and the Brazilian society, on the one hand, and the indigenous populations, on the other."

Item 129, of Article 5 of the said Constitution states that one of the functions of the Public Attorney is to "legally defend the rights and interests of indigenous populations." Articles 231 and 232 recognize "the social organization, customs, languages, creeds and traditions and the original rights over the land which they have traditionally occupied;" forbids "the removal of indigenous groups from their lands;" and considers "null or extinct (...) the acts aimed at occupation, dominion and ownership of indigenous land or the exploration of the natural riches of the soil, rivers and lakes existing therein."

The Constitution further declares in these Articles that "indigenous people, their communities and organizations are legitimate parties to plead in court for any issue in the defense of their rights and interests; the Public Attorney will mediate in all steps of the action."

The Federal Constitution Transitory Provisions, in Article 67, assures that the State "shall demarcate indigenous land within a period of five years, to be counted as from the date of promulgation

[19] The *Ato das Disposições Transitórias* is a kind of Addendum to the Constitution that lists the provisions destined to last only for the period necessary to adapt form the old to the new Constitution. C. Leib Soilbelman. *Enciclopédia do Advogado*. 5ª. edição. Rio de janeiro, Thex Editora, 1995, p. 133.

of the Constitution." Article 7 requires the State to defend the establishment of an International Court on Human Rights and Article 68 recognizes the definite property of the land of the remaining descendants of the "quilombos."

Article 242, paragraph. 1, of the Brazilian Federal Constitution establishes that "The History of Brazil will be taught by taking into consideration the contribution made by different cultures and ethnicity in the formation of the Brazilian people."

In spite of its details, the constitutional text is generic when it refers to "all" rights. However, women succeeded in explicitly defining some of their rights in the Constitution, namely: a) the right of women prisoners to keep their children with them during the nursing period (Article 5, item L); b) the right to maternity leave for 120 days and to protection in the labor market;[20] c) increased rights for domestic workers (though incomplete);[21] d) the right to work stability for the pregnant woman;[22] e) social welfare[23] and social assistance for motherhood;[24] f) women's right to ownership of urban[25] and to rural[26] property through specific governmental programs; g) the right to equality in the conjugal bond; h) the right to family planning and the State's responsibility to provide means and methods to exercise of that right; I) the duty of State to prevent domestic violence.[27]

Brazilian Legislation after the Federal Constitution of 1988

We must not ignore the great legislative effort that has been made in Brazil, particularly at the end of the 1980s, to supply the country with laws compatible with international conventions and democratic declarations of respect to human rights.

[20] Article 7, item xviii and xx.

[21] Article 7, item xxxiv, Sole Paragraph.

[22] Article 10, item ii, b for the *Ato das Disposições Transitórias*.

[23] Article 201, item iii and v and Article 202, items i,ii,iii, paragaraph 1.

[24] Article 203, item i.

[25] Article 183, First paragraph.

[26] Article 189, Sole paragraph.

[27] Article 226, paragraphs 5,7, and 8, respectively.

With this in mind, Law nº 7668 of 1988 created the Palmares Foundation, a government institution with the mission of: "promoting the preservation of cultural, social and economic values that result from black people's influence in the formation of the Brazilian society."

Since 1988, Brazilian legislation has tended to include the prohibition of racism and discrimination in general and specific texts. The Code for Consumer Defense (Law nº 8078) of September 1990, for example, prohibits in its Article 37, paragraph 2, "discriminatory publicity of any kind."

In addition, the 1990 Statute for Children and the Adolescents (Law nº 8069), declares that "... no child or adolescent will be the object of any form of neglect, discrimination, exploitation, violence, cruelty or oppression."

In 1995, Law nº 9029 prohibited "... the use of any discriminatory or limiting measure while hiring or keeping of a work relationship, by reason of sex, origin, race, color, civil status, family situation or age." The requirement, by the employer, of a pregnancy or sterilization certificate is considered a crime, as is the inducement or incitement to genetic sterilization; the promotion of birth control, save for the provision of advisory services on family planning to be carried out through public or private institutions subject to the norms of the Brazilian Health System (SUS). In terms of sterilization, this law was complemented by Law nº 9263 of 1997, sanctioned by the Brazilian National Congress, who, in regulating Article 226, paragraph 7, of the Brazilian Federal Constitution, set the foundations for the implementation of policies aimed at the effectiveness of reproductive rights. In its various articles, the Law deals with the issue of sterilization and defines the conditions necessary for its accomplishment. It punishes abusive practices or any practice that encourages the adoption of this surgical procedure. Law nº 9263, Article 17, Sole Paragraph, ratifies the legislation on the crime of genocide.[28]

In 1996, Law nº 9394, which regulated the Law of Educational Bases and Directives, determined that the educational system must

[28] See on the subject: Barsted, Leila (1999).

take into consideration the contribution made by the various cultures and ethnic origins in the formation of the Brazilian people, particularly by indigenous, African and European sources.

In 1997, Law nº 9455, which punishes crimes of torture, states in its Article 1 that the "act of constraining someone, by means of violence or severe threat and the infliction of physical or mental suffering (...) by reason of racial or religious discrimination" is considered a crime of torture.

Still in 1997, Law nº 9459 modified Article 140 of the Brazilian Penal Code to include in the specification of the crime of defamation, the aggravation of the penalty of imprisonment to one to three years if any of the elements race, color, ethnicity, religion or origin be present.

Item xlii, of Article 5, of the Brazilian Federal Constitution, states that the practice of racism is a crime for which there is no bail or prescription, and is subject to imprisonment. This was an important step to overcome the generic prescription against discriminations and for the establishment of specific anti-racist laws. To this end, in January 1989, Law nº 7716 was approved to define crimes of race and color prejudice. This law qualified racism as a very serious crime, and not a misdemeanor, resulting in severe penalties for anyone who:

> "... Prevents or hinders the access of a duly qualified person to any public post, as well as to public services, (...) denies or hinders employment in a private enterprise (...) refuses or hinders access to a commercial enterprise/shop, refusing to serve, wait on or take in a customer or buyer (...) refuses, denies or hinders the registering or admission of a student into a public or private teaching institution of any grade (...) hinders access or refuses to take in guests at a hotel, hostel, inn or any other similar establishment (...) hinders access or refuses to wait on at restaurants, bars, cafeterias or similar public establishments (...) hinders access or refuses to admit into sports installations, public night clubs or social clubs (...) hinders access or refuses to serve in hair salons or barber shops, saunas or massage shops or similar establishments (...) hinders access to the main entrance of public or residential buildings and their elevators or stairways (...) hinders access to the use of public transportation, such as

airplanes, vessels, ships and boats, buses, trains, the underground or any means of public transportation by concession (...) hinders or obstructs someone's admission into any part of the Armed Forces (...) hinders or obstructs, by any means or way, marriage or family and social relationships."

This law, however, did not list the crimes against honor based on racial discrimination that are systematically practiced against the Brazilian Afro-descendent population. Such actions, when they occurred, were considered generically as crimes against the honor, foreseen in the Penal Code and with relatively mild punishments. In addition, the Penal Code classifies these crimes as private action (only the victim can denounce) and are prescribed within two years from the offence. As mentioned, under Law nº 7716, crimes of racism have no prescription and the victim may denounce them at any time.

On the May 13, 1997, Law nº 9450 broadened the scope of the preceding of Law nº 7716 with the inclusion of a new Article that classified crimes as "the practice, inducement or instigation of discrimination or prejudice against race, color, ethnicity, religion or national origin (...) the manufacturing, commercialization, distribution or circulation of symbols, emblems, ornaments, badges or publicity that use the swastika or the fylfot for the purpose of Nazi propaganda." This law classified discrimination and prejudice based on ethnicity, religion or national origin as criminal.

In what concerns specifically the indigenous population, since 1994 the so-called New Statute for the Indigenous Societies, which replaced the 1973 Statute of Indians, has been awaiting approval of the Brazilian National Congress. This bill expands the rights of indigenous populations, as it seeks to adapt the legislation to the provisions of the Brazilian Federal Constitution of 1988.

In 1996, the Law of Educational Bases and Directives (Law nº 9394) included indigenous populations and encouraged the promotion of culture and assistance to indigenous peoples, approving bilingual and multicultural education, with a view of respecting indigenous language and culture. In that same year, Decree nº 1775 disciplined the demarcation of indigenous land. In 1999, Decree nº 3156 specified the conditions for health assistance to indigenous populations, under the Brazilian Health System, known as SUS – Sistema Único de Saúde.

In general, most of the specific federal legislation against racism is of penal nature. In addition, the greatest part of this legislation consists of laws which do not explicity use the words "man" or "woman". In his study, included in this volume, Hédio Silva Jr. describes the moral and psychological damage caused by the reiterated practice of racism against black women, through popular songs and publicity. The author further emphasizes the possibility of breaking the limits of strict penal action, to promote judicial actions of a civil nature, in the form of financial compensation to the victims of such harm.

As seen earlier, these laws are basically punitive. Yet laws that reinforce civil and social rights are also extremely important. Thus lies the significance of the Federal Decree of November 20, 1995, which created the "Inter-Ministerial Task Force" for the purpose of developing policies that concentrate on the black population." This Task Force has many legal attributions, as the power " to suggest integrated action to eliminate racial discrimination, aiming at the development and participation of the black population; to develop, propose and promote government policies against discrimination and for the confirmation of citizenship for the black population."

Such is the intention of the Federal Decree of March 20, 1996, which created, within the Ministry of Labor, the Task Force for the Elimination of Racism in the Workplace – GTEDEO.

Since 1989, innovations made by State Constitutions and state and municipal laws, under the influence of the Federal Constitution of 1988, but mostly as a result of pressure by the Black Movement, began to include legal provisions aimed at the guarantee of rights and the implementation of public policies in the fields of education, culture, health, on access to land for the descendants of "quilombo" dwellers, and on quotas for African descendants, among other measures. Thus, based on the extensive legislative research carried out by Hédio Silva Jr.,[29] examples of State Constitutions, Municipal Laws and other state and municipal laws that state not only the rights, but also define the duties of the State in the implementation of anti-racist public policies come to light.

[29] See Silva Jr, (1998)

With reference to culture, for example, in 1989 the Constitution of the State of Bahia, in its Article 275, determined that "it is the duty of the State to preserve the integrity, the respectability and the permanence of Afro-Brazilian religious values." Articles 286 and 290 deal specifically with blacks and state that "the society of Bahia is culturally and historically marked by the presence of the Afro-Brazilian community; racism is a crime (...)."

In the field of education, in 1989 the Constitution of the State of Goiás adopted as one of the principles of education the "... guarantee of non-differentiated education, through the preparation of its educational agents and by means of the elimination of any discriminatory allusion to women, blacks and indigenous people in teaching materials."

As for issues such as policy of quotas, education, upgrading of public servants and respect to reproductive rights, in 1990 the Municipal Law of Belo Horizonte, capital of the State of Minas Gerais, dedicated a whole chapter to Afro-descendant populations, with the inclusion of provisions on the duties of the Public Administration, such as:

> "... the inclusion, in the municipal institutional propaganda, of black models compatible with their presence in the totality of the municipal population, (...) the periodic upgrading of public servants, especially those who work in day-care centers and elementary schools, in order to qualify them to educate against racist notions and practices; (...) the prohibition of demographic control and sterilization practices of black women by the public municipal administration (...); the inclusion the History of Africa and Afro-Brazilian culture in the curricula of public schools; the withdrawal of authorization to function of any private institution open to the public that commits anti-racist acts (..)."

Later, in 1995, the same city passed a municipal law that defined that "there should be a quota of 40% black models in motion pictures and other propaganda produced by publicity agencies and independent producers hired by the municipality."

With regard to education, the 1999 Organic Law of the Federal District, Brasília, required in Article 235, paragraph 3, that "school and university curricula will include content on the struggle of

women, blacks and indigenous people in the history of humanity and in Brazilian society."

The definition of racist and discriminatory acts was clearly defined in the State of Rio de Janeiro, through Law nº 1814 of 1991, which established "... administrative sanctions to be applied to any type of discrimination based on ethnicity, race, color, belief, religious faith, or disability."

Special Police Stations Against Racial Crimes were created in the State of São Paulo and in several other states to investigate racial crimes. In addition, an Office for the Defense of Black People Against Racism, "SOS Racismo" was created in various Brazilian cities, such as Vitoria, in the State of Espirito Santo.

With the aim of changing the mental disposition and for the eliminating racist culture, the State of Espírito Santo sanctioned in 1995 State Law nº 5225, which regulated the prohibition of the use of the expression "good looks," or other similar expressions, in job advertisements or contests for employment.

In 1997, through State Decree nº 41774, the State of São Paulo created a Technical Cooperation and Joint Action Program involving several public organizations, for the purpose of identifying and legitimitizing vacant state-owned land occupied by descendants of "quilombo" communities.

Hédio Silva Jr.[30] very appropriately emphasizes that state and municipal legislation suggest newer and more promising possibilities for a more productive struggle against racial discrimination, since they specify positive measures for the promotion of equality and also compel the state to employ not only punitive actions, but more importantly, to adopt measures that implement declared rights. In addition, the author draws attention to the fact that state and municipal laws "introduce principles and regulations which, at least theoretically, authorize the adoption of measures intended to compensate for inequalities." He also stresses the emphasis given in these laws on "education for tolerance".

It is important to recognize that these anti-racist state and municipal laws are indicative of the action of the Black Movement, of

[30] See Silva Jr., Hédio (1998 IX and X).

the women's movement and the movement of indigenous peoples in the drafting of juridical precepts that consider the broadening of citizenship and its effectiveness.

Thus, it is fair to say, from a formal point of view, that Brazil has to a great extent adapted its anti-racist and anti-sexist legislation to international commitments undertaken with the United Nations. It has yet to ratify the ILO 169 and the Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women.

In order to evaluate the symbolic and the actual effectiveness of this anti-racist legislation, it is extremely important to: a) examine the degree of knowledge and use of the law; b) observe the existence of legal demands in the Courts formulated by victims of discrimination and; c) evaluate the impact of anti-racist and anti-sexist legislation on the actual living situation of Afro-descendants and, particularly, of indigenous populations and black and indigenous women. This evaluation serves as a starting point to verify the wide gap that exists between law and social practices.

Black and indigenous women: law and reality

Racial discrimination and women of african descent

In spite of its generic content, which makes no specific mention of black and indigenous women, existing anti-racist legislation, if complied with, could influence the development of a less serious picture of social exclusion.

Yet however noteworthy the legal advancement and the existing constitutional guarantees, social discrimination suffered by Afro-descendent women in Brazil is still striking. Well-known examples of the inequality of opportunities and the lack attainment of full gender/equity as provided for in Brazilian legal texts include the difference in wages paid to men and women. Women earn 40% less than their male counterparts, in spite of identical degree of education. The representation of women in the Brazilian Congress (7%) is outrageously low. The number of women in decision-making positions in large businesses, public or private, is also very low. Yet if this information suffices to reveal the existence of gender discrimination, which is far from being eliminated, it become even more im-

pressive and dramatic when data is analyzed from a racial or ethnic perspective.

The first big challenge to reveal this situation comes from the lack of systematic research articulating gender, race and ethic data. The 2000 Census carried out by IBGE (Brazilian National Institute of Social Data), point at a total population of 169 million Brazilians. The National Research of Household Sampling (PNAD/IBGE) of 1999 indicates that 45% of the population would be formed by those that classify themselves as "blacks" and "pardos" (people of mixed white and black ancesty, i.e.,mulatto). If this percentage persists until the year 2000, the Afro-Brazilian population will reach the figure of 76 million. This number, according to the Black Movement, does not represent the true contingent of African descendents in Brazil, since self-identification may be distorted by the difficulty some individuals may have of declaring themselves black. The table below shows the distribution of the Brazilian population by color or race for 1996.

TABLE 1[31]

Population Distribution by Color or Race* - 1996
Percentage (%)

	White	Black	Mulatto	Yellow	Indigenous
Brazil	55.2	6.0	38.2	0.4	0.2
Northern Region (Urban)**	28.5	3.7	67.2	0.4	0.2
Northeastern Region	30.6	6.1	62.9	0.1	0.2
Southeastern Region	65.4	7.4	26.5	0.6	0.1
Southern Region	85.9	3.1	10.5	0.4	0.1
Central-Western Region	48.3	4.0	46.6	0.6	0.5

Source: Pesquisa Nacional por Amostra de Domicílios (PNAD) – 1996, [CD-ROM} Microdados Rio de Janeiro: IBGE, 1997.

* Excludes persons that did not declare their color

**Excludes the rural populations of the states of Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

[31] Tables provided by Rosana Heringer (2000).

Without discussing the methodology for the classification of *"color"* used by IBGE, the official statistics agency, the truth is that Brazil has a population of at least 38 million black women, that is, 23% of the total population. This enormous group of women is among those who suffer the worst social discrimination in Brazil, in all aspects.

With reference to education, the Survey on Living Standards (Pesquisa sobre Padrões de Vida, 1996-1997), also provided by IBGE[32], shows that the white population enjoys more years of education than people of African descent, in all age brackets. Black women show a education (78%) and literacy (76%) rates inferior to those of white women (90% and 83% respectively). Among the total black population, the illiteracy rate reached 20% in 1999, compared to 8.3% among the white population[33]. The table below indicates the difference between the length of education of white men and women and women of African descent.

TABELA 2

Average number of years of education for people 10 years of age or older, by sex and color or race*- 1996
Average of years of study

Descendent	Total	Men	Women	White	African
Brazil	5.3	5.2	5.4	6.2	4.2
Northern Region (Urban)**	5.2	4.9	5.4	6.3	4.7
Northeastern Region	3.9	3.6	4.2	4.8	3.5
Southeastern Region	6.0	6.0	6.0	6.6	4.9
Southern Region	5.8	5.8	5.8	6.0	4.3
Central-Western Region	5.5	5.2	5.5	6.3	4.7

Source: Pesquisa Nacional por Amostra de Domicílios (PNAD)1996, [CD-ROM] Microdados Rio de Janeiro: IBGE, 1997.

* Excludes the rural populations in of the states of Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

[32] APUD Articulações de Mulheres Brasileiras (Brazilian Women Articulation) (2001:12).

[33] IBGE. *Síntese de Indicadores Sociais*, 1992 to 1999, apud op.cit., p.12.

The consequences of this low educational level and of the racism that stills rules over social relations in Brazil are reflected in labor and income indicators of the country's female and black population. According to Fundação SEADE and DIEESE, of State of São Paulo, black women earn 55% less than their white counterparts in the metropolitan region of São Paulo, [34] the most developed State in Brazil. Black women are more vulnerable to unemployment and are for the most part employed in domestic work in private residences or in house-cleaning businesses.

Table 3 reflects the situation in the Metropolitan Region of São Paulo in 1998, It may be observed that, from the total contingent of employed black women, 56% are illiterate or have not completed primary education, compared with 31.5% of white women in the same condition.

TABLE 3

Distribution of employed persons by Level of Education, Race and Sex
Metropolitan Region of São Paulo – 1998 (%)

	Total			Race					
Educational Level				**Black**			**Non-Black**		
	Total	**Men**	**Women**	**Total**	**Men**	**Women**	**Total**	**Men**	**Women**
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Illiterate	3.7	3.7	3.6	6.0	5.9	6.0	2.7	2.8	2.5
Elementary School incomplete	39.3	41.8	35.8	54.0	56.7	50.4	32.8	35.4	29.0
Elementary School completed	12.2	12.9	11.2	13.3	13.6	121.8	11.7	12.5	10.4
High School incomplete	7.3	7.3	7.3	7.3	7.1	7.5	7.3	7.4	7.2
High School completed	18.9	17.2	21.3	14.1	12.2	16.6	21.1	19.4	23.5
University	18.6	17.1	20.7	5.3	4.4	6.5	24.5	22.5	27.4

Sources: Agreement DIEESE/SEADE.PED – Pesquisa de Emprego e Desemprego (Employment and Unemployment Research) – RMSP. Elaborated by DIEESE 2001.

[34] See Madeira, Felícia 2001.

According to a survey on domestic labor in Brazil, 19% of the economically active women are concentrated in this type of activity and 56% of these are of African descent.[35] By adding to this information the so-called "feminization of poverty" and the analysis of the demographic profile of families, run by women, demographer Elza Berquó concludes that 60% of the families led by women live on less than one minimum wage per month (about US$65 per month). This survey demonstrates that these heads of family have the lowest level of schooling and the highest level of illiteracy (276% in 1998).[36]

This inequality in the opportunities and possibilities to access education and to raise income reproduces a perverse socio-racial model, which deepens the already impressive imbalance between the black and white populations. This imbalance, and its specific negative consequences for African descendents, is reflected in all aspects and at all moments in the life of Brazil's black population.

Differences between black and white women, from life expectancy (66 years for black women and 71 years for white women)[37] to child mortality rates, which reach alarming numbers for black women, are immense. The mortality rate for the black population is twice that of the white population. The number of children of African descent who die at 5 years of age or younger is 40% higher than that of whites. In spite of significant reduction of children mortality rates throughout Brazil between 1977 and 1993 (a reduction from 87 to 37 deaths for each 1,000 born alive), this decrease was much lower for children of black women, a reduction of 25%, while among white women this reduction was near 43%.[38]

[35] See IBGE Sindicato dos Indicadores. Melo, Hildete Pereira de. "O serviço doméstico remunerado no Brasil: de criadas a trabalhadoras" *Jornal da Rede Saúde*, March 2001.

[36] See Elza Berquó. "Perfil Demográfico das Chefias Femininas no Brasil", apud *Articulação de Mulheres Brasileiras*, (2001:16).

[37] See *Articulação de Mulheres Brasileiras* (Brazilian Women Articulation), op. cit., p. 17.

[38] Ibid., op. cit., p.19

TABLE 4

Infant Mortality Rates and mortality rates of children under 5 years of age (1) by race – 1996

	Infant Mortality Rate (Rate per thousand)		Mortality Rate for Children under 5 Years of age (per thousand)	
	White	**Afro-descendent**	**White**	**Afro-descendent**
Brazil	37.3	62.3	45.7	76.1
Northern Region (Urban)*	–	–	–	–
Northeastern Region	68	96.3	82.8	102.1
Southeastern Region	25.1	43.1	30.9	52.7
Southern Region	28.3	38.9	34.8	47.7
Central-Western Region	27.8	42.0	31.1	51.4

Source: Pesquisa Nacional por Amostra de Domicílios (PNAD) 1996. Rio de Janeiro: IBGE, v. 18, 1998.

* Excludes the rural populations in Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

(1) These estimates were obtained by applying indirect demographic methods for mortality to data on the survival rates of infants born alive, provided by women and collected by PNAD in 1996. Due to the methods used, the results of these estimates refer, on average, to the period of 1993/94 and not to the year of 1996.

These high mortality rates, the most cruel expression of racism, are caused, in addition to other inumerable reasons, by the lack of basic conditions of infrastructure in homes of the majority of the Brazilian black population, as shown below:

TABLE 5

Households classified by sanitary conditions and race of heads of household – 1996

Percentage (%)

	Treated water		Sewage*	
	White	**Afro-descendent**	**White**	**Afro-descendent**
Brazil	81.0	64.7	73.6	49.7
Northern Region (Urbana)**	63.0	54.8	56.5	41.6
Northeastern Region	64.2	52.6	47.0	33.5
Southeastern Region	89.1	52.6	86.8	74.8
Southern Region	77.0	52.6	69.2	50.0
Central-Western Region	72.0	76.8	43.6	35.1

Source: Pesquisa Nacional por Amostra de Domicílios (PNAD) 1996 [CD-ROM] Microdados. Rio de Janeiro, IBGE, 1997.

* Sewage net or septic tank

** Excludes the rural populations of Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

Rosana Heringer lists other indicators of inequality on the access to urban infrastructure, as the fact that 76% of African descendants lived in districts without garbage collection while this number was only 3.4% among the whites. In addition, 48% of the African descendents lived in houses without electricity, while only 10.2% of the white population lived under the same conditions.[39]

The National Research on Demography and Health, conducted in 1996 and analyzed by Ignez Oliva Perpétuo[40] from a racial perspective, reinforces the combination of factors that produce and reproduce racial and gender inequality in Brazil. Among 7,541 women interviewed, aged between 14 and 49 years, 44% declared themselves "white," and 56% "black." Included in this group was an ample spectrum of colors that Brazilian women of African descent attributed themselves. While 7.7% of white women had had their first child at the age of 16 or under, this number increases to 13.7% among

[39] Heringer, Rosana. (2000:9)

[40] Perpétuo, Ignez Oliva (2000)

black women; 38% among the white women interviewed had 3 children or more at the time of the survey, a percentage that reached 51.1% among those of African descent; 8.3% of black women had never used a contraceptive method, a figure that fell to 4.1% for white women; 26.1% of black women were not using a contraceptive method at the time the survey was conducted, compared to 19% of white women. At the time of the survey, 11.6% of black women were pregnant because of "failure" of the contraceptive method or because no contraceptive method was used even though they were aware of their fertility and had no wish to get pregnant. This percentage among white women is of 7%. Finally, while 37.7% of the white women were sterilized at the time the survey was conducted; this number was over 42% for black women.[41]

With reference to so-called ethnic/racial diseases, a controversial and polemic terminology[42], special attention should be given to "falciform anemia," a hereditary type of anemia. Among genetic diseases, it is the most common among the black population[43] worldwide. Although it affects a large portion of the Brazilian black population, the disease is hardly studied or known in Brazil.[44] In addition to the consequences of poverty for the black population in Brazil, "falciform anemia" has been suggested as the major cause of black children's mortality. Further studies suggest that "falcemic" women may suffer various types of infections during pregnancy, which may explain their greater incidence of maternal mortality[45].

These observations, based on statistical data, are presented here for the purpose of discussion and do not draw a complete picture of racial inequalities in Brazil. Instead, they reveal a more impressive scenario of the conditions of Brazilian African descendents.

Racial inequality in Brazil manifests itself in differences to access to education and basic knowledge, both in the areas of school-

[41] *Articulação de Mulheres Brasileiras* (2000: 21)

[42] See on subject, Oliveira, Fátima. (1999)

[43] This anemia results from a mutation in the hemoglobin molecule through the substitution of glutamic acid. On this subject, see Oliveira, Fátima (1999: 430 and following).

[44] It is worth registering the *Programa da Anemia Falciforme*, created by the Health Ministry whose work is based on a 1996 research and may improve the knowledge about the disease in Brazil

[45] See Souza, V.C. (1995).

ing and of fundamental rights guaranteed by Brazilian laws, of adequate living conditions, job opportunities and salaries, information, and health services, among others.

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be held at the beginning of the new millennium, should be considered not only an appropriate moment for the reflection on all forms of racial discrimination, but more importantly as an occasion to indicate new and concrete ways and objectives to overcome these inequalities. In Brazil, this situation reveals a very serious reality because the gap that separates the richest from the poorest, the whites from the blacks and indigenous people, seems to increase and contradict the assumed relation of balance between economic and human development, an essential for Human Rights to become fully effective.

Brazil occupies the 74th position in the Index of Human Development (IHD – 2000 Report), an index created by the United Nations Development Program (UNDP), with the special purpose of examining the relation between these two aspects of development. Brazil, one of the 10 most economically advanced countries in the world, falls behind countries like Trinidad and Tobago, Colombia and Kazakhstan. Certainly it would rank even lower if the variables considered included aspects of gender and race.[46]

Rosana Heringer[47] affirms that racial discrimination and inequality in Brazil has undergone a process of recognition by the general public as well as by experts. Furthermore, as already has been illustrated, while anti-racist legislation defines rights and promotes programs and public policies, it cannot be used to maintain the tradition of a society that sees the Law as a palliative or a veil to conceal the harsh reality.

Thirteen years elapsed since the promulgation of the Brazilian Federal Constitution of 1988 and the subsequent State Constitu-

[46] Researchers Wânia Sant'anna and Marcelo Paixão used these and other data used the Human Development Index (HDI), of United Nations Program for Development (UNPD) to asses the relative living standards of African descendents (blacks and mulattos). The HDI among the Brazilian population was 0.796 (for a maximum for 1,000). For Afro-Brazilians, the HDI was 0.573. "The HDI for Afro-Brazilians is the worst of Latin American countries, except Nicaragua that is immediately behind with a HDI of 0.568. (...) A very sad situation for the paradise of racial democracy..." (Sant'anna & Paixão, 1997: 33)

[47] Heringer, Rosana (1999)

tions and Municipal Laws. Without these legal instruments, statistical data would reveal a more dismal panorama of the violation of the human rights of blacks and indigenous populations.

As earlier sections on the post-1988 legislation suggested, in order to evaluate the symbolic and actual effectiveness of anti-racist laws, it is of fundamental importance to evaluate the impact of this legislation on the actual situation of African descendents, especially black women. In this respect it is fair to assume that, considering the social indicators available, produced by official agencies like IBGE, this impact has not yet been registered. Regarding the second requirement (to observe the degree of knowledge, use and access to Justice by victims of racial discrimination), it is important to stress the increase in legal cases in labor relations, promoted by trade unions and based on ILO Convention 111. In the criminal and civil spheres, Piovesan and Salla (2000)[48] have published some information on legal demands for punishment for racist practices and moral damage perpetrated against people of African descent. The authors consider the behavior of the Brazilian Judiciary to be heterogeneous and that the jurisprudence oscillates and sometimes fails to incorporate the principles of the Federal Constitution and those of the International Convention Against Racism.[49]

Racial discrimination and indigenous women

If, despite of the difficulties, we can attempt to show the dimension of racial inequality in Brazil that characterizes the situation of African descendants, even more insurmountable are the obstacles to evaluate the discrimination suffered by the so-called "ethnic groups," as the indigenous peoples still surviving in Brazil are denominated.[50] Today they make up hardly 2% of the Brazilian population, about 338,000 indigenous people concentrated in the Northern, Northeastern and Central-Western regions of the country. It is important to mention that this total is based on data on the population that live in settlements in indigenous land and does not include those who are dispersed in urban areas.

[48] Piovesan, Flávia & Salla, Fernando. *Versão Preliminar do Décimo Quarto Relatório Relativo à Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial.*

[49] See Adorno, Sérgio (1995) and Silva Jr. (2001)

[50] See paper by *Conselho Indigenista Missionário* – CIMI (1997)

TABLE 6

Brazilian population by color/raçe*, according to the Units of the Federation – 1996

Units of the Federation**	Total	White	Black	Mulatto	Yellow	Indigenous	Undeclared
Rondônia	852,370	363,491	24,592	461,830	2,457	–	–
Acre	315,140	104,073	1,623	209,444	–	–	–
Amazonas	1,792,300	465,923	38,027	1,283,422	1,385	5,543	–
Roraima	182,083	44,247	2,926	133,813	–	1,097	–
Pará	3,012,704	745,127	139,047	2,107,746	16,645	3,451	688
Amapá	292,563	98,049	11,734	181,880	–	–	–
Tocantins	1,024120	269,605	74,283	659,736	16,128	4,368	–
Maranhão	5,316,411	1,029,870	216,991	4,055,138	5,087	5,087	4,238
Piauí	2,765,373	544,244	100,790	2,109,801	–	538	–
Ceará	6,812,575	2,051,346	145,912	4,605,027	1,169	8,056	1,065
R. G. do Norte	2,629,517	1,099,224	65,189	1,461,950	2,103	1,051	–
Paraíba	3,379,313	1,494,766	134,910	1,748,011	1,606	–	–
Pernambuco	7,535,000	2,621,170	414,663	4,487,741	2,900	7,560	966
Alagoas	2,733,885	1,271,113	227,687	1,208,196	9,155	17,734	–
Sergipe	1,637,334	288,157	55,613	1,289,260	1,537	2,460	307
Bahia	11,575,633	3,574,522	1,433,805	7,756,744	28,616	67,717	4,649
Minas Gerais	15,235,930	9,004,588	1,500,388	6,186,817	21,401	5,837	1,899
Espírito Santo	2,839,327	1,479,691	139,088	1,309,582	1,016	7,641	2,037
Rio de Janeiro	13,434,673	7,852,681	1,638,791	3,891,500	23,667	23,133	4,901
São Paulo	34,313,000	25,803,376	1,694,728	6,436,370	367,861	8,863	1,782
Paraná	8,787,511	6,950,771	162,945	1,579,109	77,154	17,043	489
Santa Catarina	4,919,973	4,529,983	122,941	281,754	2,353	1,765	1,177
R.G. do Sul	9,703,042	8,619,879	449,204	620,463	3,206	9,716	574
Mato G. do Sul	1,950,247	1,196,104	78,456	614,595	17,697	43,061	334
Mato Grosso	2,394,651	1,029,456	84,938	1,258,745	20,418	1,094	–
Goiás	4,390,316	1,995,064	163,817	2,205,871	18,620	5,996	946
Distrito Federal	1,776,490	856,467	87,956	822,488	6,970	2,609	–

Source: IBGE – PNAD, 1996

*Excludes the rural population that has not declared its colour.

**Excludes the rural populations of Rondônia, Acre, Amazonas, Roraima, Pará and Amapá.

The demographic situation of the indigenous population of Brazil is very particular if we compare it, for example, to that of Bolivia or Peru, where the national indigenous population constitute 57% and 40% of the total populations respectively. In Brazil, this group is divided in about 215 peoples and 170 different languages; according to data provided by the Social Environment Institute (Instituto Socio ambiental – ISA) and only half of these have been studied by ethnologists.[51] These groups are further divided into micro-societies and 73% of them live in communities with a population of up to 1,000 individuals. Researchers warn that there are many difficulties in collecting demographic data on these populations, even when the information results from direct counting: those working in the census, quite frequently, do not speak the native languages, don't understand their social organization, space and seasonal dynamics of indigenous societies and therefore produce inconsistent and often inaccurate information. In any case, it is possible to assume that, contrary to the belief prevailing in the 1970s, when the extinction of indigenous populations seemed to be certain, a continuous demographic growth has occurred since the 1980s, indicating a situation that needs to be better understood.

Nevertheless, the visibility of these peoples is still very reduced since only after the Constitution of 1988 did new forms of indigenous associations and organizations begin to emerge, independent of the guardianship of the National Indian Foundation (Fundação Nacional do Índio – FUNAI). These associations enabled the formation of new leaderships and political alliances. Even so, in face of the diversity already referred to and the different stages of organization of each group — some indigenous organizations are linked to one ethnic group only and others intend to have political or local representation — the visibility of these groups is still very fragile. Equally fragile are the possibilities for a more concrete inclusion into the Brazilian society, understood herein as a space for

[51] The Instituto Socioambiental is a non-governmental institution founded in 1994. To the data that ISA owns today was incorporated the patrimony of *Programa Povos Indígenas do Brasil*, that belonged to *Centro Ecumênico de Documentação e Informação* (PIB/CEDI) and to the *Nucleo de Direitos Indigenos de Brasília*. The countless data gathered by ISA in twenty-five years through research and organization of the information are available in the site www.isa.org.br.

the guarantee of rights and the respect to the diverse cultures and forms of organization of these groups.

With reference to the indigenous woman, this "invisibility" is even greater. The dossier on "Indigenous Women", published by the *Revista de Estudos Feministas*[52] points to the need for broadening the studies from a gender-based perspective on this specific population, discussing on the one hand, the relation between the production of academic knowledge on ethnic groups and, on the other, the reduced attention given to the specificity of indigenous women. Indigenous women had been represented by outdated and prejudiced stereotypes that depicted them as promiscuous, sexually insatiable and heartless cannibals. Bruna Franchetto[53] made a careful assessment of the academic production of the 1970s and 1980s. Although she does not waive the importance of Americanist debates on what she calls "gender anthropology" she stresses that there is much to be done in order to come closer to the meaning of the practices and rituals of these societies, the way in which the sexual roles and functions are experienced, and to the understanding of these women about gender asymmetry as well as the perceptions of male dominance in these communities.

Among the concrete initiatives to unite the academics and the indigenous peoples publicized by ISA, it is worth to mention the graduation of 16 auxiliary nurses from the Parque do Xingu reservation at the Paulista School of Medicine, in association with the Department of Health of the State of Mato Grosso. The indigenous population requested this program with the aim to substitute non-indigenous professionals working in the region. With reference to gender, it must be stressed that although Nursing is basically a profession dominated by women in Brazil, it was not until 1988, after the graduation of these first students, that the course was offered to women of these communities.[54]

[52] This dossier was organized by anthropologist Bruna Franchetto for the magazine *Revista de Estudos Feministas*, vol. 7, n. 1. Rio de Janeiro, Instituto de Filosofia e Ciências Sociais/Florianópolis/Centro de Filosofia e Ciências Humanas/IFSC, 1999.

[53] Franchetto, Bruna (1999).

[54] In January 2001, indigenous people from different groups concluded the program that had started in 1997:7 Kaiabs, 1 Suiá, 2 Juruna, 1 Ikpeng, 2 Kamaiurá, 1 Nfuku', 1 Waurá and 1 Kuikuro. At present, there are about 40 indigenous professionals working as health agents, boat drivers and administrative assistants. Next step is to hire the new graduates as assistant nurses of DESEI – Distritos Sanitários Especiais Indígenas – Xingu.

Challenges

The South African Conference should bring international visibility to the problems of African descendants and to Brazilian indigenous populations, and will offer an opportunity to ponder on a more diversified indigenous policy aware of the diversity of the more than 200 Brazilian indigenous peoples. ISA defends compensatory actions and regulation of constitutional rights; a new indigenous policy that rids itself of image of a patronized "good savage" or of the barbarian that needs to be controlled.

The double militancy of Brazilian women of African descendent — in the black movement and in the women's movement — reveals their strategic role in the fight against racism and sexism. It has been challenging to create an impact in the black movement with the gender issues, and to create impact in the women's movement with the ethnic/racial questions, in a long path filled with obstacles and advances.

Other challenges include: to create an impact on the State for it to implement the formally declared rights that will reverse the dramatic situation revealed by statistical data; to create an impact on the society as a whole, so that it recognizes racism as a violation of human rights, an obstacle to democracy and social development, and may begin ruling itself based on a brotherly society; to create an impact on the fight of all groups and organizations that defend Human Rights so that they will join forces to fight racism and sexism; and to create an impact on the media so that it will defend a perspective of respect to human dignity.

Though the strategic role of black women is recognized, the struggle against racism cannot be restricted to their actions or to those of the black movement. This struggle must belong to all those who are politically, ethicly and morally committed to effective Human Rights. This commitment, as Muniz Sodré points out, should bear the perspective that: "Human equality is accomplished through an equitable recognition of the singularity of each person. (...) We must work for the social organization of equality."[55]

[55] See Sodré, Muniz (2001) in the introduction to Jacques D'Adelsky's book.

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ECONOMIC INTEGRATION, HUMAN RIGHTS AND RACISM

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Economic Integration and Human Rights

Regional integration is a theme that cannot be postponed in discussions on economic growth, social policies and international relations in the contemporary world. During the last decades, the world has been witnessing a politico-institutional and economical reorganization that has led to the restructuring of regional blocs, which are increasingly important in defining international regulations on trade, industrial production, and labor flow, among other aspects. This reorganization of the economic scenario is being accompanied by a growing interdependence among countries in issues related to social policies, environmental protection, and the promotion of human rights.

Processes of regional integration date back to the 1950s, when the European Economic Community (present European Union – EU) was created. During the decades that followed, Asian countries also organized a regional bloc of their own, as did part of the African countries. In the American Continent, four regional trade agreements coexist, namely: NAFTA (North American Free Trade Agreement), which includes the United States, Canada and Mexico; Caricom (Caribbean Community and Common Market); the Andean Pact (Bolivia, Peru, Colombia, Ecuador and Venezuela); and Mercosur, formed by Brazil, Argentina, Paraguay and Uruguay, with Chile and Bolivia as associate members.

During the 1990s, negotiations led by the United States aimed at the creation of the FTAA (Free Trade Area of the Americas), which would bring most American countries together under the same trade

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bloc[3]. The first meeting dedicated to the creation of the FTAA to include government leaders and heads of state took place in Miami (USA) in 1994, and was followed by the 1998 Second People's Summit of the Americas, in Santiago, Chile, and the Third People's Summit, held in Quebec in 2001. Primarily, the FTAA aims to be an area of free trade of products, capital, and in some cases, services. "In addition, the agreement will regulate investments and intellectual property, among other themes of special interest to the United States and Canada."[4]

While governments, the trade sector, and financial institutions have been maintaining a dialogue to define joint strategies in matters relating to economic integration, the critical link between trade and human rights has been neglected: individuals and organizations involved in the defense of human rights have often been excluded from these talks. Many discussions are being centered in the flow of capital in common markets, and little progress has been made in terms of citizenship rights for the populations who are part of the process of regional and global integration.

Activists and representatives of civil society throughout the world have been drawing attention to the need for a shift in the paradigmatic matrix of this dialogue, stressing that "this debate cannot and should not remain restricted to discussions on the inclusion or non-inclusion of the so-called 'social clauses' in trade agreements. The free trade-based developmental model is itself in check. Themes such as poverty, social disparities and the environment must be at the heart of discussions".[5]

During the 1990s, through critical and vigilant analysis and proposals, civil society organizations played a fundamental role in domestic public policies. They also acted internationally by influencing treaties, agreements, and programs of various hues involving United Nations member countries. Today, these political agents continue to closely follow the processes of economic globalization, free trade, and market integration, with the objective of exercising greater

[3] Only Cuba has not been participating in FTAA negotiations.

[4] CAMPOS; OLIVEIRA e BIANCHINI, 2001.

[5] ROQUE, 2001.

impact upon them. Their chief concern lies upon the negative aspects of such processes in terms of social exclusion and increase of poverty.

In recent meetings of international trade institutions, which took place in 1998 and 1999, in Montreal, Seattle and Davos, as well as in the World Bank meeting in Washington (April, 2000), the joint meeting of the International Monetary Fund (IMF) and the World Bank in Prague (September, 2000), and most recently the Third Summit of the Americas (Quebec, April 2001) and the Geneva's G8 meeting, civil society organizations pointed out the need to redefine the terms of the social debate on the future of the global governance. The final reports submitted by the civil society organizations at the closing of some of these meetings are a clear indication of the urgent need for the elaboration of a different paradigm, which would place values of social solidarity, racial, gender and social equality and environmental protection above the narrow vision of efficiency. The World Social Forum (Porto Alegre, January 2001) was a step ahead in the formulation, by civil society, of alternatives and strategies at a continental and world level.

The political action agenda of civil society organizations includes the economic issues introduced by globalization and goes a step further. During the last decades, legal texts adopted by the United Nations and ratified by most countries have proved to be strategic tools in the struggle to guarantee human rights at an international level and increasingly, at a national level. The debate around these international and national instruments for the protection of human rights has been gaining importance in the agenda of these organizations and serves as a guide for discussions on globalization.

Human rights sources are numerous and can be found in national constitutions, regional and international treaties, and in conventions considered acts of law in national states. Civil society has been playing a fundamental role in the broadening of sources and instruments of human rights, shaping new spaces for citizenship and reshaping the relation between State and individual, thus making legitimate the idea of a humanity that shelters differ-

ences but does not allow these differences to delimit hierarchies among citizens.[6]

Flávia Piovesan stresses that the universalization of human rights is a process that began in the second half of the 20th century and is now consolidated in international agreements that have created obligations and responsibilities for States, who must represent the people subject to their jurisdiction.[7] According to Antônio Cançado Trindade, two factors contribute to the irreversibility of this movement. On the one hand, human rights treaties assign specific functions to national public organs. On the other, a growing number of constitutions add those rights, already sanctioned in international treaties, to rights guaranteed internally. The author believes that, far from operating in a fragmented way, national and international rights are constantly interacting.[8]

The process of expanding the concept of human rights by means of political action by civil society has been constant in United Nations conferences, particularly during the 1990s. In the United Nations Conferences on Environment and Development (Rio, de Janeiro, 1992), Human Rights (Vienna, 1993), Population and Development (Cairo, 1994), Social Development (Copenhagen, 1995), Habitat (Istanbul, 1996) and the Women's Conference (Beijing, 1995), the platform of human rights has been widened and its concepts redefined, thanks largely to the action of new NGOs that included issues such as health, domestic, urban and rural violence, reproduction, gender, race and ethnicity, and the environment, among other themes. These new social actions have formed well-structured national, regional and international networks, and in spite of the diversity existing among them, have succeeded in drawing up international strategies based on common grounds.[9]

There is a general consensus among civil society organizations that it is necessary to adopt social and political measures that pro-

[6] This subject is further developed by Jacqueline Pitanguy in "Gender, Citizenship and Human Rights, Language as a Political Fact", submitted at the seminar "Gender Studies in the Face of the Dilemmas of Brazilian Society". São Paulo, Carlos Chagas Foundation, 2001 (preliminary draft).

7 Piovesan, 2000.

8 Cançado Trindade, Antônio A. in Piovesan, F. op. cit.

[9] Sikkink, 2000.

mote better distribution of income and wealth in countries involved in integration processes. It is also urgent to define an acceptable standard in terms of labor legislation, in order to ensure that those rights already sanctioned by some of these countries be also respected by other countries. Another challenge is the expansion among member countries of various types of rights in accordance with more advanced legislation. Therefore, developing a human rights and social rights agenda to accompany the processes of economic integration is an urgent task.

The critical social situation in most Latin American countries forbids us to be lured once again into accepting solutions presented as guarantees for the well-being of the population. Ordinary formulas raise tariff agreements and foreign trade mechanisms to the condition of chief instruments in the solution of the serious problems of inequality that are characteristic of Latin America. Contrary to this belief, such problems tend to become even more serious if the processes of commercial integration fail to provide a joint platform of human rights. Therefore, it is imperative to redefine the basis over which integration agreements are to be drawn up, through the establishment of a social, environmental and human rights agenda that will provide parameters, restrain abuse, and define desirable levels of well-being to be achieved.

The inclusion of human rights as a central point of this debate implies the acknowledgement of the deep changes that this concept has undergone throughout the 20th century, after the Universal Declaration of Human Rights in 1948. Restricted at first to civil and political rights and later to social rights, during the latest decades and as a result of the political action of various agents, the language of human rights is being expanded to include new historical subjects and dimensions of life.[10]

Commercial Integration, Human Rights and Racism

In spite of the widening of the debate on globalization, the issue of ethnical and racial inequalities have not gained due attention so far. This discussion is necessary since it is possible to identify differ-

[10] See PITANGUY, Jacqueline, 1998.

ences in the impacts of the process of globalization and economic integration on specific groups. Several studies have demonstrated, for instance, that women are affected differently by adverse economic consequences resulting from commercial liberalization.[11]

This unequal impact is also present when we compare diverse ethnical and racial groups, as gender differences are found within them. A recent document prepared by CEPAL synthesizes some important indicators of ethnic and racial inequalities in Latin America and the Caribbean.

"The black and mestizo population totals 150 million people, about 30% of the regional population, and is mostly concentrated in Brazil (50%), Colombia (20%) and Venezuela (10%). It is estimated that there are between 33 and 40 million indigenous people (natives), who are divided into 400 ethnic groups (except for Uruguay, all Latin American countries have indigenous populations). The majority of indigenous, Afro-Latino and Afro-Caribbean populations live in poverty and their access to health, education, work, income, justice, and political decision are well below those of the white population. Among the factors that originate this situation are the gradual loss of land and the breakdown of community economies. Other contributing factors include the process of countryside-to-city migration and the structure and dynamics of insertion into the labor market, both in rural areas and cities.[12]

Latin American researchers point to other characteristics of these ethnic and racial disparities: "Though in Latin America the majority of people are poor, more than two-thirds of the bilingual Indians and nearly three-fourths of the monolingual Indians are poor. The situation is similar among African descendants and is apparent in the areas of education, health, land ownership, job opportunities, and others".[13]

Researcher Paulo Sérgio Pinheiro, in a recommendation to the United Nations Human Rights Commission, made a similar diagnosis:

[11] I.e., CEPAL / ECLAC (2000b); see also ESPINO, 1999.

[12] CEPAL / ECLAC, 2000.

[13] CUNNINGHAM, (2001)

"If we consider the right to education, the right to adequate living conditions, the right to fair wages or any other economic and social right, the situation of Afro-Latinos and indigenous peoples of Latin America and the Caribbean, for example, is still disastrous at the threshold of the World Conference on Racism. Afro-Latinos and Indians still do not occupy higher ranks in public administration and are absent from decision-making jobs."[14]

Though multilateral organizations such as the World Bank and the Inter-American Development Bank (IADB) have been increasingly more concerned about the impact of regional policies on Afro-Latin and indigenous populations, the debate is still incipient, not only in terms of governments and financial institutions but also as regards the civil society. Recent results from the Second People's Summit of the Americas — held in Quebec parallel to the Summit of the Americas, which intended to foster negotiations for the FTAA — indicate that these themes have gained little consideration.

In fact, considering that this was a meeting focused on the hemisphere, with its wide diversity of groups and peoples that make up the Americas, the text does give some emphasis to the rights of the indigenous populations: it draws attention to the risks that agreements such as the FTAA may bring in terms of placing the indigenous populations in a marginal situation and promoting the appropriation of their knowledge for commercial purposes. It later reiterates its concern for indigenous peoples when it holds that the signers of the declaration should "greet the Declaration of the Indigenous Peoples Summit of the Americas, held in Ottawa on 29 to 31 March, 2001 and claim the recognition of their fundamental rights."[15]

The Declaration also sustains that participants of the Summit "are opposed to the racist, sexist, unfair and environmentally destructive neo-liberal project". This being stated, no further mention is made of the impact of the FTAA and other integration agreements on black populations in these countries, which historically and because of continued racism have clearly been affected by these policies in a different way.

[14] PINHEIRO, 2000.

[15] Declaration of the Second Peoples' Summit of the Americas. Quebec, Abril, 19, 2001.

Another example of the importance and need to deal regionally with ethnic and social inequalities is illustrated through the analysis of the active legislation in countries of the Mercosur.

A study prepared by CEPIA, within the scope of the Civil Society Forum of the Americas, as part of the activities of the Project "Civil Society and Human Rights in the Mercosur"[16] noted that initiatives aimed at specific legal protection of blacks and Indians at regional levels are still insufficient.[17]

The Forum has drawn attention to the fact that civil society has been absent in the process of economic integration that is taking place in the southern part of the continent, the Mercosur, and points to the urgent need for initiatives that will ensure its participation in debates about the common market and its social impacts. Its purpose is to contribute towards setting up a minimum ground for political, social, civil, environmental and health rights, and protection against gender, race and ethnic discrimination, by which member countries should agree and respect, through the proposal of an agenda on human rights for the Mercosur.

Anti-racist legislation in the Mercosur

Comparative research conducted by CEPIA on the level of incorporation of human rights into laws and other active instruments in Argentina, Brazil, Chile, Paraguay, and Uruguay, aimed at analyzing the main obstacles as well as the requirements and demands for a normative system. This picture shows the scope of Mercosur, the recurrences, specifications, the gaps and the main achievements, both in terms of human rights from a legal point of view and with regard to the instruments available for their effective implementation.

[16] PITANGUY & HERINGER, 2001.

[17] The Civil Society Forum of the Americas is an independent space for dialogue where leaders of civil society organizations (CSOs) in the Americas, with differing objectives and perspectives, come together to share experiences, design common strategies, and develop collaborative approaches to address social problems. The Civil Society Forum of the Americas was launched in September 1997, in Rio de Janeiro, Brazil, at a meeting convened by CEPIA and The Center for Health and Social Policy. The meeting brought together 26 leaders of civil society organizations from 13 countries in the region and from a variety of fields, including human rights, development, environment, women, poverty, health, sexual and reproductive health, and violence.

The results of this study show that in Mercosur countries, ethnic and racial disparities find their greatest expression in the uneven distribution of wealth and opportunities. In the case of indigenous peoples, though countries like Chile and Paraguay enjoy advanced legislation that protects their common heritage and ensure access to land, in practice the implementation of such programs and instruments is still timid. In all countries of the region indigenous populations remain the most vulnerable group in society.

As regards the black population, disparity is striking. The majority of society fails to acknowledge the need to implement specific policies for this group. Whereas in the case of indigenous peoples where the legal acknowledgment of their rights does not guarantee compliance with them, it is still difficult to validate the adoption of mechanisms that will ensure black populations full citizenship in the region's countries.

We face a gap between the international human rights language, the governmental rhetoric, and the actual protection of these rights. The width of this gap is related to social inequalities, power and politics, and results from stresses, struggles and alliances between national and international agents. Therefore, it is impossible to discuss human rights without referring to the historical process that enables the declaration and the consolidation of such rights. They begin to exist from a social standpoint once they are stated in national laws and international conventions, thus shaping the scope of formal citizenship, which does not always coincide with its effective exercise. The borderline between both spaces, formal and effective, is delineated by political action and therefore subject to both progress and recession.

As can be verified from the charts presented at the end of this article, the consolidation of principles of non-discrimination in the constitutions and, in some cases, in ordinary laws is predominant in the region. In many instances, however, there is no provision for punitive mechanisms against discriminatory practices or for their prevention.

This analysis leads us to believe that these themes deserve special attention, at a time when the drafts of joint policies in various areas for the countries of the Mercosur are being discussed. At the

same time, it is necessary to include the discussion on the impacts these trade agreements will have on specific groups in the debate on FTAA implementation. Governments, international financial institutions and the business sector should understand the demands of civil society organizations for the elaboration of a new paradigm that will raise values of social solidarity, gender and race equality, and environmental preservation above the narrow vision of efficiency.

These issues gain even greater importance within the context of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), to be held in South Africa in September 2001. Unfortunately, the denial of rights to historically discriminated groups in our societies is not an isolated phenomenon, limited to a few countries; rather, persistent ethnic and social discrimination is a shared reality in the Americas. In the context of Latin America, Myrna Cunningham remarks that disparities have historical roots associated with the consolidation of national states.

"National states and their constitutional order were conceived and organized with the principle of 'legal equality' as their starting point; this, however, did not acknowledge differences, but rather promoted the ideal of homogeneity."[18]

The World Conference against Racism

In South Africa, where strategies to fight racism and promote equality will be discussed, it is essential to consider the promotion of well-being and the expansion of opportunities for indigenous peoples throughout the American Continent, as well as for African descendents. This should be a concern both within the scope of national policies as well as for the definition of an agenda for national integration with the perspective of human rights protection.

The preparatory process for the WCAR has shown that this is a difficult theme to discuss — as it is also difficult to reach global consensus on it. Today we are familiar with different forms of discrimination, intolerance, ethnic and racial conflicts throughout the world, which must be boldly condemned by the international community. At the same time, there is a demand for specific solutions

[18] CUNNINGHAM, M. – op.cit.

that take into consideration the particularities of each issue under dispute. Regional preparatory meetings for the World Conference have indicated that measures must be taken urgently to prevent these conflicts. The two preparatory conferences (Prepcon) held so far have also brought to light the diversity of conflicts and the difficulties in reaching a consensus.[19]

In short, it can be noted that the four preparatory conferences were unanimous in the condemnation of racism and xenophobia and pointed to the need for adopting measures, at a regional and international level, to curtail such practices. When considering separately the conclusions reached by each of these conferences, a different emphasis will be identified in each document.

The Strasbourg conference, attended by European countries, strengthened the multicultural and pluralistic nature of European society and drew attention to the various groups that are continually victimized by discrimination. It also stated that "stability and peace in Europe and throughout the world can only be built on tolerance and respect for diversity".[20]

The Asian preparatory meeting held in Tehran points to colonialism and slavery as the principal sources and manifestations of racism. The document is emphatic in its criticism of countries that receive a massive contingent of migrants, and yet discriminate them:

> "We reject the concept of regional fortresses, bolstered by political and economic accords amongst some developed countries, that generate a climate in which foreigners are racially discriminated against and are regarded as rivals or competitors, and a threat to local prosperity, culture and identity." [21]

[19] This article was concluded in June 2001, when the Second Prepcon had just been held in Geneva. Since some 600 paragraphs had to be negotiated in order to define the text for the Final Declaration and Plan of Action, and after 15 days of this Prepcon only 25 had been approved, a Third Prepcon has been convened for July 30-Aug.10, just 20 days before the start of the World Conference. A 21-country Work Group was set up to submit a text proposal to be analyzed in the Third Prepcon.

[20] Political declaration adopted by Ministers of the Council of Europe member states at the concluding session of the European Conference against Racism. Strasbourg, October 2000.

[21] Declaration and Plan of Action – Asian Preparatory Meeting for the Wold Conference against Racism. Tehran, 2001.

This regional document also lists in a more explicit manner problems linked to the Palestinian situation, including the specific case of the City of Jerusalem. The Tehran document vehemently condemns the Israeli occupation and the racial discrimination against Palestinians and other dwellers of occupied Arab territories. Finally, it emphasizes the "responsibility of the international community to provide international protection for the Palestinian people under occupation against aggression, acts of racism, intimidation and denial of fundamental human rights, including the right to life, liberty and self-determination".[22]

The Dakar document shows the results of the Regional Preparatory meeting in Africa. The emphasis of this document is to denounce the problems faced by the African Continent. The lack of international solidarity in an age characterized by growing globalization and technological advancement is also criticized.

> "We express our deep concern that the socio-economic development of our continent is being hampered by widespread internal conflicts, which are due, among other causes, to violations of human rights, including discrimination based on ethnical or national origin and lack of democratic, inclusive and participatory governance."[23]

The text also describes the traffic of African slaves as a "unique tragedy" and a crime against humanity: it states that the consequences of this tragedy "are still present in the form of damage caused to descendants of the victims by the perpetuation of prejudices against Africans in the continent and people of African descent in the Diaspora".[24]

Among the recommendations, the document suggests the creation of an International Compensatory Scheme for the victims of slave trade and a Development Reparation Fund to provide re-

[22] Declaration and Plan of Action – Asian Preparatory Meeting for the World Conference against Racism. Tehran, February 2001.

[23] Declaration and Recommendations for a Program of Action – African Regional Preparatory Conference for the World Conference Against Racism, Dakar, January, 2001.

[24] Ibid.

sources for the process of development in the countries affected by colonialism.

The document that resulted from the Preparatory Conference of the Americas, held in Santiago, is probably the most detailed and comprehensive in its propositions. The official document included many suggestions given by NGOs, particularly with regard to the rights of indigenous peoples and Afro-Latins.[25]

The document begins by emphasizing the democratic principle and the consolidation of the Rule of Law as assumptions for the eradication of racism. In addition, it defines the American Continent as multi-racial, multi-cultural, pluri-ethnical, multilingual and pluralistic, stating that "the wide diversity of our societies constitutes a contribution to human relationships and towards the building of a culture of mutual respect and of democratic political systems".[26]

The document is progressive in its condemnation of all forms of racism and makes explicit reference to its structural nature, "regarding economic, social, cultural rights and other related issues, including employment, social policies, access to capital, to credit, to technology, to education and professional qualification, to housing and sanitation, to the environment, access to cultural activities, to the protection of property, as well as equal access to public service and to national immigration policies".[27]

The text is extensive in defining the victims of discrimination and racism and emphasizes the multiple natures of discriminations, particularly gender prejudice. The mobilization promoted by black women is noteworthy, both in specific countries and in Latin America overall, for providing evidence for their specific preoccupations and leading to the successful incorporation of many of their demands into the final document of the Santiago Conference.

[25] In her analysis of the final Santiago document, Sueli Carneiro stresses an aspect which, in her view could be negative, i.e., the inclusion — suggested by the Peruvian delegation — of the *mestizo* category in the group under discrimination, since this term would enfeeble the strength of recognition of other ethnic groups, indigenous and Afro-Latinos. See CARNEIRO, 2001.

[26] Proyecto de Declaración y Plan de Acción — Conferencia Regional de las Americas preparatoria a la Conferencia Mundial contra el Racismo. Santiago de Chile, Diciembre 2000.

[27] Ibid.

In its recommendations the document presents a wide range of measures to be adopted by national states and international organisms, giving emphasis to the adoption of policies aimed at promoting social equality for the benefit of historically discriminated groups:

> "We stress the need for the promotion of political strategies and programs which may include affirmative action measures, in order to increase the protection of the economic, social and cultural rights of indigenous populations, and of African descendants, migrants and other vulnerable groups; and to ensure greater opportunities for these groups so that they may participate in the prosperity and wealth of the societies in the Americas, and also that the benefits of development, science and technology will effectively contribute towards improving the quality of life of these populations."[28]

Finally, the document of the Americas requires the states to open a dialogue on reparation, so as to consider, among other measures, the establishment of a special development fund and to facilitate the access of products originating from countries affected by the phenomena of slavery, servitude and colonialism to international markets.

One of the debates developed at the closing of the Second Preparatory Conference refers to the conflict between:

a) the inclusion of varied types of discrimination and xenophobia found in the world today as an object of this conference; and

b) the definition of some groups and/or types of discrimination that would be the sole object of this conference, and action strategies thus being defined in relation to them.

The Work Group formed by 21 countries and intended to work on the conference texts until the Third Prepcon was responsible for reaching definitions for the following issues:

- Factors which produce discrimination;
- Definition of the victims of discrimination;
- Conditions that produce multiple forms of discrimination.

Several proposals were put forth, different definitions and "lists" of victims were submitted, but no consensus was reached. Accord-

[28] Ibid.

ing to Edna Roland, Director of the NGO Fala Preta, "Western countries tended to present an endless list of victims, thus weakening entirely the importance of slavery and slave traffic. (...) The dilemma is to find a balance in expanding the knowledge about factors that can generate discrimination (racial or multiple), but not to the point of rendering commonplace such factors as race, color, origin and ethnicity — to the point of reducing them to dust. Admitting that victims are not only individuals but also groups is another problem".[29]

Two issues have been central to the debates within the preparatory process for the Conference. The first refers to the Palestinian situation, which is repeatedly put forward by the Asian countries. The second is the issue of defining the traffic of African slaves as a crime against humanity[30], thus easing the way for the debate on compensation (to African countries, to Africans in the Diaspora and to African descendents out of Africa). According a report on the Second Prepcon by Sueli Carneiro, Director of the NGO Geledés, the theme of compensations to African descendents has gained significance and "reveals a moral, material and symbolic condemnation of African slavery".[31]

This theme gained strength within the scope of the conference because of the growing mobilization of African descendent activists throughout the world, constituting a new kind of global actor. The Santiago Prepcon "gave rise to the Latin American African descendent in the role of a new social actor. At the Second Prepcon in Geneva there was an articulation of this group with Africans and European African descendents."[32]

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[29] ROLAND, 2001.

[30] To understand the nature of the dispute around these two issues in the 1st Prepcon, it is enough to note that the debate on African descendents was simply withdrawn from the outline of the final declaration. This decision took place because the Palestinians demanded equal treatment for their cause. Because of this obstacle the High Commissioner for Human Rights removed these themes from the discussion, under the allegation that they had a national rather than global character. In the intersectional meeting held in May, these themes were once again included in the conference's agenda.

[31] CARNEIRO, Sueli – Statement given at interview conducted by a team from Ibase and guests for the magazine *Democracia Viva*, nº 11, June 8, 2001.

[32] CARNEIRO, Sueli, op. cit.

The proposal of the Final Declaration and Plan of Action submitted for discussion acclaims the principles of equality and non-discrimination and emphasizes the importance of the commitment by national states and international organisms to implement anti-racist and equal opportunity policies. It stresses the importance of looking at diversity as something to be prized and acknowledges racism as a threat to democratic values. The first draft of the Plan of Action presented measures to be taken at national, regional and international levels; proposed solutions in different areas such as education, training and information; the media, specially in relation to the internet; the relationship between racism and poverty; actions to be taken by NGOs in relation to women, children and youth, to underprivileged groups, to migration and people smuggling, to impunity, to refugees, to displaced persons and to asylum seekers, to minorities, to Roma (known as gypsies), to indigenous issues and to African descendents.

Final considerations

The information and reflections contained herein point to transformations and expectations in respect to racial relations worldwide and particularly in Latin America. From the standpoint of international norms and the active anti-racist legislation in the Mercosur, there is already a legal framework for the punishment of discriminatory practices in most countries. However, structural characteristics by which racism and prejudice are expressed require more effective action, both by states and by different sectors of society.

The debate centered on the World Conference against Racism shows that much remains to be done to define a joint agenda against racism in global terms, particularly when considering the perspective of such consensus. It is expected that the results of the World Conference against Racism will point to an even more vehement and symbolic condemnation of discriminatory practices throughout the world, which will foster the adoption of preventive measures. On the other hand, this increased sensibility towards the issue should be reflected in the process of negotiation of regional agreements, so that specific groups will not be penalized once again as a result of

policies adopted in these agreements. In particular, negotiations regarding the FTAA should be specifically concerned with the situation of indigenous peoples and Afro-Latinos.

Finally, it is worth stressing the growing visibility that the theme of racial and ethnic inequalities has been gaining on a regional scale. Not only does the emphasis on statistical data show the dimension of these inequalities, but more importantly it demonstrates the connection established in various analyses between the consolidation of democracy, the respect for human rights and the need to correct historical episodes of ethnic and racial inequality.

The previously mentioned CEPAL document, which analyzes the situation of Latin America and the Caribbean, concludes that "the vigor with which democracy has stepped in the political life of all countries of the region allows for the development of citizenship to be reconsidered in such a way as to incorporate cultural diversity. The relevance gained by the themes of diversity and identity has been accompanied by the development and universalization of economic, social and cultural rights. American societies should appraise their multi-ethnical and pluri-cultural character. (...) Citizenship is a value in which it is vital to recognize the specificity and cultural difference of the other".[33]

Likewise, Paulo Sérgio Pinheiro attests that "in spite of the favorable evolution of the transition and consolidation of the democratic process that took place during the 1980s in most continents — and especially in Europe and Latin America — most democracies are still a long way from ensuring freedom and justice for vulnerable groups and minorities that are penalized by social exclusion and racism". He points out as well-known examples the cases of the indigenous and Afro-Latin populations and of migrants from Western European, African and Arab countries.[34]

Strategies that aim to fight against this picture of inequality must define policies that have as their starting point the recognition of the historical and uninterrupted injustice to which certain sectors of the population have been submitted; and reach a consensus that

[33] CEPAL, 2000.

[34] PINHEIRO, 2000.

will recognize the absurd and unsustainable nature of racial discrimination and its consequences. As Cunningham states:

> "The eradication of the structural racism that we face will only be accomplished if pressure is exercised by the various sectors of society, accompanied by mobilization, sensitizing of public opinion, as well as by the creation of adequate participation processes that enable us to operate on the decisions of our communities, from the municipal and regional to the national and international levels."[35]

In this sense it is urgent to include issues related to racism and xenophobia in the debates on commercial integration, and more specifically in debates on Mercosur and the FTAA. These are basic premises for defining the direction that this process will take and for structuring the position of the various agents involved.

[33] CEPAL (2000a)

[34] PINHEIRO (2000)

[35] CUNNINGHAM, op. Cit.

Legislation concerning indigenous people and racial discrimination in Mercosur countries – 2000

	Argentina	Brazil	Chile	Paraguay	Uruguay
International Convention for the Elimination of all Forms of Racial Discrimination	1968	1968	1971	Did not ratify	1968
Indigenous people in legislation	Article 75, n.17 Law 425/81	Articles 109 XI and 233 and subsequent articles. Comprehensive; Protection and Rights. Law 6001/73 And Bill n. 2057/91 Law 9314/96	No reference Law 19253/93	Article 62 and subsequent articles. Comprehensive with difficulties in implementation. Law 904/81 Law 1372/88	No reference
Racial discrimination in legislation	Law 23592/88 Law 24782/97 Law 20744/95	Constitution Law 7716/89 Law 8081/90 Law 9459/97	–	Articles 46 and 88 of the Constitution Article 9 of the Labor Code	Law 13670, dated 6/26/68

Source: Pitanguy, Jacqueline and Heringer, Rosana (orgs). "Direitos Humanos no Mercosul." Rio de Janeiro: Cepia/Civil Society Forum of the Americas, 2001. Forum Notebook Series: nº 4.

ARGENTINA

The Constitution of the Argentine Republic acknowledges the ethnical and cultural pre-existence of indigenous peoples, including their costumes, idioms, creeds, traditions and social organizations. It affirms that it is incumbent upon the Congress to guarantee the respect for their cultural identity and their right to bilingual and multicultural education. It acknowledges the legal personality of indigenous communities and the joint property of the land they have traditionally occupied.[36]

In May 1998 the Government passed a law with the objective of counting and identifying indigenous peoples throughout the country. In that same year, estimates based on information provided by the Indigenous Association of the Argentine Republic (AIRA) indicated that there were 700,000 Indians in Argentina, though non-governmental organizations point to 1.5 million. A total of 2.5 million acres of land were separated for indigenous peoples in Argentina, but it is expected that this extension will soon reach 5 million acres. Law nº 23302, relating to indigenous policies and sanctioned in 1985, was not taken into consideration since indigenous peoples claimed that they had not been consulted as to its content. In 1985 the National Institute for Indigenous Issues (Instituto Nacional de Assuntos Indígenas – INAI) was created.

In Argentina, Law nº 20744 established the principle of equality and non-discrimination, in accordance with Act nº 24515. Promulgated in July 1995, the National Institute Against Discrimination and Racism was established, aiming at the development of national policies and practical measures intended to fight discrimination and racism. Among other activities, the Institute provides assistance to victims of discrimination and holds educational campaigns and comparative studies on related international laws. Law nº 23592 (Ley Nacional contra la Discriminación) became effective in September

[36] Art. 75, nº 17 of the Constitution of Argentina.

1988 and was altered by Law nº 24782 in March 1997. This law considers discriminatory those acts and omissions originated on the basis of race, religion, nationality, ideology, political opinion, sex, economic situation, social condition or physical characteristics. This law provides for the arrest of anyone who participates in organizations that make discriminatory propaganda and determines that the text of the law be exhibited in public places.

PARAGUAY

Paraguay enjoys extensive legislation on the rights of indigenous peoples. Nevertheless, compliance with such legislation is limited by significant institutional barriers and by the lack of funds for its implementation. The indigenous population is estimated at 75,000 – 100,000 people, representing six different idioms and 1.8% of the total population of the country.

The Constitution determines that indigenous peoples are entitled to participate in the economy, in society, in politics and in the cultural life of the nation, though discrimination is still significant. The norm also protects the rights and interests of Indians, though the regulation has not yet been fully codified. The Public Attorney acts on behalf of Indians in matters involving the right to life and property. The National Institute for the Indians of Paraguay is empowered to purchase land on behalf of the indigenous community and to expropriate private properties in certain circumstances. It is important to stress that the indigenous population of Paraguay is not obliged to render social service or to serve in the military; it is also exempt from the payment of the public taxes stipulated by law.[37]

Law nº 904/81, denominated "Statute of the Indigenous Communities" allows these peoples to obtain property deeds for the land they own. The basic purpose of this law is the socio-cultural preservation of indigenous communities in the defense of their traditions and their heritage. Another law, nº 1372/88, which regulates settlements of the indigenous communities, was sanctioned as a landmark of the requirements determined by the World Bank.

[37] Art. 62 to 67 of the Constitution of Paraguay.

This law created the Indigenous Institute of Paraguay (Instituto Paraguayo del Indigena – INDI), an official government institution responsible for the application of indigenous-related policies. It lays down the administrative procedures for processing of territorial claims. Article nº 1 of the law states: "The purpose of this law is the social and cultural preservation of indigenous communities, the definition of their property and traditions, the betterment of their economic situation (...)"

The issue of discrimination is referred to in the Constitution of Paraguay in the same articles that refer to the question of equality among persons; it mentions "all the inhabitants", and declares that there will be no discrimination". In addition, Article nº 88 states that "discrimination of workers on the basis of ethnicity will not be permitted..." The Labor Code, in its Article nº 9, clearly indicates that "race-based discrimination of workers will not be allowed". Notwithstanding, it must be noted that no penalty exists for any type of discriminatory practice.

CHILE

According to the 1992 census, the indigenous population is estimated at 1 million people, out of a total 13 million Chilean inhabitants. This figure is not fully reliable since the question on indigenous classification was addressed only to individuals above 14 years of age — a total of 8,661,982 persons. The question intended to quantify the indigenous population was included for the first time in a nationwide research in 1992. The question was: "If you are Chilean, which of these cultures do you belong to: Mapuche, Aimara, Rapa Nui, or none of the above?" According to experts the purpose of the question was to identify both the ethnic origin and the sense of belonging to some ethnic group. Both conditions should be reached for the question to fill out its objective. However, it is probable that some people who do not originate from a specific group have declared themselves as belonging to one of the proposed groups. It is also possible that other people of specific ethnic origin have failed to reveal it.

In Chile, Law nº 19523 of October 5, 1993 established norms for the protection and development of indigenous populations, through

the creation of the National Corporation for Indigenous Development (Corporación Nacional de Desarollo Indígena – CONADI), an agency responsible for the promotion, coordination and execution of state action aimed at the full development of indigenous peoples and communities, particularly with regard to the economic, social and cultural situation. It is also intended to stimulate the participation of these communities in national life. Among its members there are eight indigenous representatives: four Mapuche, one Aimara, one Atacameño, one Rapa Nui and one residing in an urban area within the national territory. These representatives are nominated by the President of the Republic, based on recommendations of indigenous associations and communities.

The law acknowledges that the indigenous peoples of Chile are direct descendents of groups that have existed in the Chilean territory from pre-Colombian times. It places a high value on their existence as an essential branch of the roots of the Chilean nation. The law also appreciates their integrity and development according with their traditions and values. It states that it is the duty of society as a whole and of the state in particular, through its institutions, to respect, protect and foster the development of indigenous peoples, their culture, families and communities, by adopting measures for such purposes. In addition, it affirms that it is incumbent upon the society and the state to protect indigenous lands by safeguarding their adequate exploration and their ecological preservation, and by encouraging their enlargement.

To put this declaration into practice, it was determined that the acknowledgment, respect and protection of indigenous idioms and culture implies:

- Using and safeguarding indigenous idioms, together with the Spanish language in areas where there is a high density of indigenous peoples
- Introducing into the national educational system a program for students to adequately learn about indigenous culture and languages, as a means to contribute to their due worth.
- Fostering the broadcasting of programs in the indigenous languages in radio and TV stations of regions with large indigenous presence.

- Supporting the creation of radio and other means of communication for the indigenous population;
- Promoting and setting up Indigenous History, Culture and Languages departments in institutions of higher education.
- Making it obligatory for the Civil Registry to register names and surnames of indigenous people as expressed by their parents and in accordance with the norms of the phonetic transcription they may indicate.
- Promoting artistic and cultural expressions
- Protecting the indigenous architectonic, archaeological and cultural inheritance.

In addition, many norms are laid down for the protection of land; indigenous land is inalienable and is not subject to any form of embargo; nor can it be purchased by prescription, except between indigenous communities or people from the same ethnicity. Expropriation of land on behalf of people who do not belong to the same ethnicity will only be permitted after consultation with CONADI. Likewise, land belonging to indigenous persons may not be leased, loaned or surrendered to third parties for use, fruition or administration. In the case of barter, it will only be feasible for lands of equal value and with previous authorization from CONADI. The law also determines that a fund be created to promote the recovery of land by indigenous peoples.

In accordance with the aforementioned law, customary legal procedures adopted by indigenous peoples have legal value, provided they are not incompatible with the Constitution of the Republic. As far as penal laws are concerned, customary law is acceptable when used as an antecedent for the application of extenuating circumstances of responsibility. The law determines that customary law practices will be applied in their entirety in the case of inheritance of community-owned land.

Finally, with the purpose of correcting discrimination against these peoples, the law establishes a sanction, in the form of a fine to be paid by anyone who practices explicit or purposeful discrimination against an indigenous person on the basis of his or her origin or culture.

In Chile the issue of racial discrimination is specifically addressed to the indigenous population, owing to the almost nonexistent black population in the country.

BRAZIL[38]

There are about 330,000[39] Indians in Brazil, who speak 170 different languages. However, enormous pressure and disrespect for the fundamental rights of the individual have been constant in the day-to-day lives of indigenous communities in Brazil. Violence, transmission of diseases, land takeover and poor education are the forms most commonly used in this disintegration. The Government must guarantee through the National Foundation for Indigenous Peoples (Fundação Nacional do Índio – FUNAI), an agency responsible for safeguarding indigenous rights, the right of indigenous communities to the lands they occupy. The text of the Brazilian Federal Constitution acknowledges social organizations, costumes, languages, beliefs and traditions of indigenous peoples,[40] and in 1988 the Federal Government became responsible for delimitating indigenous areas within five years. At the end of this period it was established that 11% of the Brazilian territory would be reserved for indigenous peoples.

In accordance to the same article of the Brazilian Constitution, the lands traditionally occupied by Indians are intended for their permanent domain and they have the sole right of enjoyment over the riches found in the lands' soil, its existing rivers and lakes. Such lands are inalienable, they cannot be disposed of and rights to them will not be subject to prescription. Use of water and energy sources, and research and mining in indigenous soil can only be carried out after authorization by the National Congress. Indians, their communities and organizations are considered legitimate parties in court in the defense of their rights and interests; the Public Attorney will mediate in all the steps of the action.

[38] See article by BARSTED, Leila Linhares and HERMANN, Jacqueline, in this volume on the Brazilian legislation.

[41] Informação prestada pela INESC – Instituto de Estudos Sócio-Econômicos.

[39] This total refers to indigenous peoples living in reservations.

[40] Art. 231, chapter of the Constitution of the Federal Republic of Brazil.

In addition to the 1988 Constitution, the Brazilian Civil Code of 1916 also refers to Indians when it classifies them as "relatively incapable" of the exercise of their civil rights, "subject to legal guardianship to be provided by special laws and regulations, which shall terminate as they become adapted to the civilization of the country."

Bill nº 2057/91, known as the "New Statute of the Indigenous Societies," was approved in 1994 to replace Law nº 6001/73 (Statute of Indians), which, in view of the Federal Constitution of 1988, needs substantial alterations. The bill was on standby until 2000, waiting for the House of Representatives' examination since 1994.[41] The "LDB" – Lei de Diretrizes e Bases da Educação Nacional (Law No. 9394/96) complements the educational legislation provided by the Federal Constitution. The law specifically refers to the Indians when it places within the competence of the educational system of the country to promote culture and assistance to indigenous populations. This implies providing bilingual and inter-cultural education, in order to grant indigenous communities the rehabilitation, reaffirmation and worth of their languages and sciences, as well as to ensure the necessary acknowledgment by indigenous or non-indigenous societies.

As for the black population of Brazil, after slavery was abolished in 1888 the existence and consequent punishment for racial discrimination was not recognized until 1951, with the approval of the "Afonso Arinos Law". The Federal Constitution of 1988 classifies discrimination as a crime and therein establishes that the law shall punish any form of discrimination that may go against fundamental rights and freedoms.[42] On January 5, 1989 Law nº 7716, known as the "Anti-Racism Law", or "Caó Law," was approved. It dealt with crimes resulting from race or color prejudice. In spite of its name, this law did not represent a significant advancement in the field of racial discrimination: it was excessively evasive and laconic, and in order to characterize a crime as racist, it demanded that the author of the crime expressly declare — after having performed the action -

[41] Information provided by INESC – Instituto de Estudos Sócio-Econômicos.

[42] SILVA Jr. (1998), after extensive examination of state and municipal laws of anti-racist nature, states that "the Chart of 1988 stimulated a national process, characterized by the creation of norms of conduct to fight racism and/or to promote racial equality within state and municipal spheres frameworks."(pg. VII).

that his conduct had been motivated by racial discrimination. Otherwise, it would be his word against that of the discriminated individual. Federal Law nº 8081/90 defines the crimes and related punishments for discriminatory actions on the basis of race, color, religion, ethnicity or national origin, practiced by means of communication or through any type of publication. Recently, Law nº 9459/97 introduced the concept of "racial injury" to the Brazilian Penal Code.

This issue has been included in the Agenda of the Black Movement; resulting in acceptance by the Constitutional Assembly of Article nº 68 of the Act of Transitory Constitutional Provisions, which states: "Descendents of communities of the *quilombos* who are occupying their land are entitled to its definitive ownership; the state will issue them the respective deeds of property." This is the first evidence of a compensatory policy being applied to descendents of slaves.

URUGUAY

Uruguay is the only country under analysis that does not include the protection of indigenous peoples in its Federal Constitution due to the almost complete non-existence of that community in this country. The constitution of Uruguay does not adopt the word "discrimination." The issue is referred to in Law nº 13670 of June 26, 1968 (law against racial discrimination). The latest census did not include questions of ethnicity or race (information provided by the Instituto Nacional de Estatística).

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INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (Gen-

* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19

eral Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of Al l Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1 – General comment on its implementation

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2 – 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3 – States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4 – States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination

and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5 – In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6 – States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7 – States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8 – 1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number

of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9 – 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:

(a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10 – 1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11 – 1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12 – 1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be

appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13 – 1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such rec-

ommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14 – 1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certi-

fied copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15 – 1 . Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries

and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2. (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16 – The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its special-

ized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17 – 1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18 – 1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19 – 1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20 – 1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21 – A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22 Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23 – 1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24 – The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures, ratifications and accessions under articles 17 and 18;

(b) The date of entry into force of this Convention under article 19;

(c) Communications and declarations received under articles 14, 20 and 23;

(d) Denunciations under article 21.

Article 25 – 1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

* Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 *entry into force* 3 September 1981, in accordance with article 27(1)

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1 – For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2 – States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3 – States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4 –1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5 –States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6 –*States* Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7 –States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8 – States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9 – 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure

in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10 –States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particulary those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11 –1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12 – 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13 – States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14 – 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counseling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15 – 1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16 –1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17 – 1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18 – 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19 – 1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

Article 20 – 1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21 – 1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22 – The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23 – Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24 – States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25 – 1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26 – 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27 – 1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or

accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28 – 1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29 – 1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30 – The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

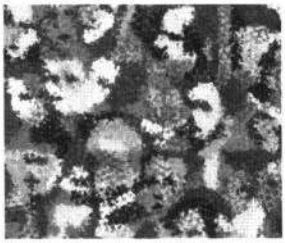
OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN*

The States Parties to the present Protocol,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights Resolution 217 A (III). proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights Resolution 2200 A (XXI), annex. and other international human rights instruments prohibit discrimination on the basis of sex,



Also recalling the Convention on the Elimination of All Forms of Discrimination against Women4 ("the Convention"), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

* Adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day entry into force 22 December 2000

Have agreed as follows:

Article 1 – A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2.

Article 2 – Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

Article 3 – Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 4 – 1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The Committee shall declare a communication inadmissible where:

(a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(b) It is incompatible with the provisions of the Convention;

(c) It is manifestly ill-founded or not sufficiently substantiated;

(d) It is an abuse of the right to submit a communication;

(e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 5 – 1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 6 – 1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7 – 1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications under the present Protocol.

3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

Article 8 – 1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 9 – 1. The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 10 – 1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.

2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 11 – A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 12 – The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

Article 13 – Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

Article 14 – The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

Article 15 – 1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.

2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 16 – 1. The present Protocol shall enter into force three

months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 17 – No reservations to the present Protocol shall be permitted.

Article 18 – 1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 19 – 1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

Article 20 – The Secretary-General of the United Nations shall inform all States of:

(a) Signatures, ratifications and accessions under the present Protocol;

(b) The date of entry into force of the present Protocol and of any amendment under article 18;

(c) Any denunciation under article 19.

Article 21 – 1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

CONVENTION 111 CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION*

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights, adopts the twenty-fifth day of June of the year one thousand nine hundred and fifty-eight, the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958:

Article 1 – 1. For the purpose of this Convention the term discrimination includes

(a) any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opin-

* Date of coming into force: 15 June 1960.

ion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2 – Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3 – Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:

(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;

(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(d) to pursue the policy in respect of employment under the direct control of a national authority;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4 – Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5 – 1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 6 – Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation.

Article 7 – The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8 – 1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 9 – 1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10 – 1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11 – The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 12 – At such times as may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13 – 1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 14 – The English and French versions of the text of this Convention are equally authoritative.

CONVENTION 169 CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES*

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

*Date of coming into force: 5 September 1960.

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957; adopts the twenty-seventh day of June of the year one thousand nine hundred and eighty-nine, the following

Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

PART I

General Policy

Article 1 – 1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or

partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2 – 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3 – 1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4 – 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5 – In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6 – 1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7 – 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8 – 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internation-

ally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9 – 1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10 – 1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11 – The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12 – The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II

Land

Article 13 – 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14 – 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15 – 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the explora-

tion or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16 – 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17 – 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented

from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18 – Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19 – National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to: (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART III

Recruitment and Conditions of Employment

Article 20 – 1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) admission to employment, including skilled employment, as well as measures for promotion and advancement;

(b) equal remuneration for work of equal value;

(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

(a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV

Vocational Training, Handicrafts and Rural Industries

Article 21 – Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22 – 1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23 – 1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V

Social Security and Health

Article 24 – Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25 – 1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may

enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI

Education and Means of Communication

Article 26 – Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27 – 1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28 – 1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29 – The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30 – 1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31 – Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII

Contacts and Co-operation across Borders

Article 32 – Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII

Administration

Article 33 – 1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfillment of the functions assigned to them.

2. These programmes shall include:

(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;

(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX

General provisions

Article 34 – The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35 – The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X

Provisions

Article 36 – This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37 – The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38 – 1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39 – 1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40 – 1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41 – The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42 – At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43 – 1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44 – The English and French versions of the text of this Convention are equally authoritative.

Cepia's Directors

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Cepia is a non-governmental, non-profit organization, dedicated to developing projects that promote human and citizenship rights especially among groups historically excluded from exercising their full citizenship in Brazil.

For this purpose, since 1990 Cepia has been conducting studies, as well as educational and social intervention projects, and has been committed to sharing its findings.

Working from a gender perspective and within a human rights framework, Cepia focuses on issues of violence and access to justice, health, sexual and reproductive rights, poverty and employment.

Advocacy is also a part of Cepia's agenda via the proposal, monitoring and evaluation of public policies, while maintaining an open dialogue with different social groups and civic organizations.