

# Indigenous Rights in Democratic Brazil

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## I. INTRODUCTION

In 1831, nine years after Brazil's independence from Portugal, the government enacted legislation addressing indigenous peoples' rights in the new country. The progressive set of laws revoked decrees by the Portuguese Crown that had authorized "total war" against indigenous peoples and servitude for war prisoners. The Brazilian law, instead, determined that indigenous peoples' material and personal rights be placed under the protection of the "Justice of Orphans."<sup>1</sup> Clearly, the legislator operated under the two prevailing assumptions about indigenous peoples at the time: First, that Indians were incapable of autonomous interaction with Brazilian "civilized" society and thus needed the guidance and protection of the state (as did orphan children); second, that such guidance and protection should ultimately lead to the eventual assimilation of indigenous peoples into the Brazilian society.

Such a paternalist and assimilationist approach remained dominant within Brazil's legislation and state institutions for most of the twentieth century. When, in 1916, the Brazilian Civil Code was approved, it included "Indians" among those considered "relatively incapable" to exercise their rights (together with minors and the mentally ill).<sup>2</sup> In their interactions with

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1. "Justice of Orphans" was, in nineteenth century Brazil, the branch of the judiciary in charge of overseeing the rights of orphan children. It is currently known in Portuguese as *Juizado de Menores* (Minors Court), and its role is equivalent to a juvenile court within the United States.
2. *Código Civil Brasileiro e Legislação Complementar*, Lei n. 3.071 of 1 Jan. 1916, 20th edition, updated 9 Jan. 2001 by Theotonio Negrao, Editora Saraiva, Sao Paulo. [C.C.] arts. 5–6 (1916) (Br.). Articles 5–6 determine which individuals belong to the categories of relatively and absolutely incapable of exercising their civil rights and obligations.

the Brazilian society, indigenous peoples were to be assisted by the state, in a regime of “tutelage.”<sup>3</sup> The 1973 Indigenous Peoples’ Statute (*Estatuto do Índio*), issued during the most repressive period of the military regime that governed the country between 1964 and 1984, further extended the scope of the state’s tutelage over indigenous peoples.<sup>4</sup> The state was in charge of managing indigenous peoples’ properties and income, overseeing any dealings between indigenous peoples and members of the dominant society, and even determining whether an Indian could travel abroad.<sup>5</sup>

Brazil’s transition to democratic normality in the mid-1980s and the promulgation of the 1988 Constitution promised a new era in the relationship between the Brazilian state, Brazilian society, and Brazilian indigenous peoples. To what extent have these promises been fulfilled? For instance, I argue that the return to democracy has had no real impact on indigenous rights and that the “assimilationist” culture still prevails among Brazilian institutions.<sup>6</sup> The predominant answer, however, among most Brazilian indigenous rights’ activists and domestic and foreign analysts is that democracy’s promises have been partially fulfilled, i.e., despite concrete advances, indigenous peoples’ rights continue to be constrained by economic interests, development goals, and nationalist ideologies.<sup>7</sup> In this article I analyze how the Brazilian indigenous movement has met these constraints, and argue that in the past fifteen years, its capacity to demand and monitor the implementation of indigenous peoples’ citizenship rights has been affected by three main factors. First, as stressed by Alison Brysk, Margaret Keck, and Kathryn Sikkink, among others, the Brazilian indigenous movement has benefitted from the political and material resources provided

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3. C.C. art. 60.

4. *Estatuto do Índio*/6,001, 1973 [hereinafter *Indian Statute*].

5. Carlos Frederico Souza Filho, *Tutela aos Índios: Proteção ou Opressão?*, in *Os Direitos Indígenas e a Constituição*, 295–312 (Juliana Santilli ed., 1993). This article points out that when, in 1980, the Indian chief Mario Juruna was invited to travel abroad, the state vetoed his trip. Juruna was eventually able to leave the country after the Supreme Court intervened. *Id.* at 309.

6. Dave Treece, *Indigenous Peoples in Brazilian Amazonia and the Expansion of the Economic Frontier*, in *The Future of Amazonia—Destruction or Sustainable Development?* (David Goodman & Anthony Hall eds., 1990); Carlos Frederico Mares de Souza Jr., *On Brazil and its Indians*, in *Indigenous Peoples and Democracy in Latin America* 213 (Donna Lee Van Cott ed., 1994).

7. Interview with ISA employee (anonymous), in Brasília (19 May 2000); interview with Paulo Cesar de Souza Dutra, staff, Indigenous Peoples Missionary Council (CIMI), Belem (25 June 1995); Márcio Santilli, *Os Direitos Indígenas na Constituição Brasileira*, in *Povos Indígenas no Brasil 1987/88/89/90*, 11–14 (Centro Ecumênico de Documentação e Informação [hereinafter CEDI] ed., 1991); Wagner Gonçalves, *Natureza Jurídica das Comunidades Indígenas, Direito Público e Direito Privado. Novo Estatuto do Índio. Implicações*, in *Os Direitos Indígenas e a Constituição* 241–50 (Juliana Santilli ed., 1993); ALISON BRYSK, FROM TRIBAL VILLAGE TO GLOBAL VILLAGE: INDIAN RIGHTS AND INTERNATIONAL RELATIONS IN LATIN AMERICA (2000).

by its links with transnational advocacy coalitions concerned with environmental and human rights issues.<sup>8</sup> Second, indigenous peoples have acquired a growing understanding of Brazilian politics, and have been willing to operate within its institutional framework. Third, indigenous peoples have benefitted from the emergence and consolidation of a network of domestic advocacy organizations committed to indigenous rights. These organizations have been instrumental in providing legal and political assistance to indigenous peoples while educating the dominant society about their demands and expectations.

My claims regarding the indigenous peoples' increased political capacity, however, must be taken with a "grain of salt." The political space that indigenous peoples have carved in the Brazilian political and legal systems is not secure for at least three reasons. First, Brazil's democracy is often characterized as elite-dominated.<sup>9</sup> As such, it continues to impose enormous constraints on the participation of non-elite groups. Second, international attention and support have been elusive and are driven by factors outside the control of Brazilian indigenous peoples. As a result, international mobilization constitutes, at best, a circumstantial advantage, rather than a dependable resource for indigenous peoples. Finally, occasional ideological and political cleavages among advocacy organizations have weakened the pro-indigenous rights' lobby.

In the sections below, I assess the strengths and limitations of the Brazilian indigenous movement by comparing its level of activism and accomplishments during the periods of democratic transition (1985–1990) and democratic consolidation (1990–present). A brief description of indigenous policies and indigenous peoples' rights in Brazil during the period of authoritarian rule (1964–1984) precedes the comparative analysis in order to provide a benchmark for my evaluation. Data for this research were obtained from Brazilian legal documents on indigenous peoples' rights (such as the Brazilian Federal Constitution, summaries of debates in the Constitutional Assembly, law projects presented to the Brazilian Congress by organizations representing indigenous peoples' interests, and by congressional representatives linked to interests opposed to indigenous peoples' rights); reports, maps, publications, and internal documents issued by Brazilian and international organizations who support indigenous peoples; reports and internal documents from the Brazilian agencies linked to indigenous peoples' issues (such as the National Foundation for Indigenous

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8. Brysk, *supra* note 7; Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998).

9. Frances Hagopian, *Traditional Politics Against State Transformation in Brazil*, in *State Power and Social Forces: Domination and Transformation in the Third World* 37 (Joel Migdal et al. eds., 1994).

Peoples (FUNAI), and the Brazilian Institute of Geography and Statistics, (IBGE)); articles in the Brazilian and international press, and open-ended interviews with Brazilian and international indigenous rights activists.

For the purposes of this article, indigenous peoples' citizenship rights are defined as the right to participate in local and national politics, by means of formal and informal political action. They are also defined in terms of the participation of the community in political life, rather than that of the individual and his or her struggle for autonomy vis-à-vis the state.<sup>10</sup> Political participation by indigenous peoples, as I approach it here, compensates for socioeconomic inequalities.<sup>11</sup> In this sense, this discussion of citizenship rights has a narrower focus than that used by Sônia Alvarez and Arturo Escobar, which includes social, economic, and cultural rights.<sup>12</sup>

## II. INDIGENOUS PEOPLES' RIGHTS IN AUTHORITARIAN BRAZIL (1964–1984)

Indigenous peoples' rights during the period of military rule in Brazil were constrained by several factors. Among the most relevant were the state-sponsored ideology of national security that prevailed over any other political and socio-economic consideration, the insulation of the policy-making process and apparatus, and the 1973 Indian Statute.

The national security ideology affected indigenous peoples rights in two ways. On the one hand, it provided the basis for the perception that any claim for indigenous peoples' autonomy was a threat to Brazil's political and territorial unity. According to that ideology, the condition of being "Indian" was a temporary attribute, the assimilation into Brazilian society was the goal, and the tutelage of the state the means toward that inevitable goal. On the other hand, the national security ideology prioritized economic development, particularly Brazil's north and northwest Amazon regions. The idea of securing indigenous peoples' lands in any part of the Brazilian territory, but in particular in *Amazônia*, was anathema to the military's economic development plans. The creation of indigenous reserves

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10. Carlos Vilas, *Participation, Inequality, and the Whereabouts of Democracy*, in *THE NEW POLITICS OF INEQUALITY IN LATIN AMERICA: RETHINKING PARTICIPATION AND REPRESENTATION 3* (Douglas A. Chalmers et al. eds., 1997).

11. Due to space constraints, this article does not address issues related to the prevailing economic, social, and cultural exclusion that still plagues most indigenous communities in Brazil today. Fábio Wanderley Reis, *The State, the Market, and Democratic Citizenship*, in *CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP, AND SOCIETY IN LATIN AMERICA 121* (Elizabeth Jelin & Eric Hershberg eds., 1996).

12. SÔNIA ALVAREZ, EVELINA DAGNINO & ARTURO ESCOBAR, *CULTURES OF POLITICS/POLITICS OF CULTURES* (1998).

would stand in the way of productive activities such as road and railroad construction, mining, and agricultural settlements.

The negotiations between the World Bank and the Brazilian government for the financing of the Polonoroeste project illustrate the protectiveness of the latter vis-à-vis indigenous issues.<sup>13</sup> Brazilian authorities initially refused to discuss any measures to protect indigenous groups from the impacts of road construction and increased migration to the area. They argued that indigenous issues were a matter of national security and thus off limits to international actors' influence. Although Brazil eventually capitulated to the pressures of the project's major funding agency, it kept the Amerindians Special Project outside the legal scope of the Polonoroeste loan (and thus insulated from formal monitoring by the international agency).<sup>14</sup> As a consequence, throughout the project's implementation, both Brazilian and World Bank monitoring teams faced constant obstacles to their activities from the Brazilian bureaucracy.<sup>15</sup>

Policymaking processes and apparatus during military rule were characterized by bureaucratic centralism and insulation from civil society. The state was the single actor responsible for defining policy priorities<sup>16</sup> and it did so based on considerations of economic growth, sovereignty and national security, and technical expertise. Indigenous peoples' demands, instead of making their way to the government's agenda through pluralist channels of participation, were "filtered" by the techno-bureaucracy, mainly through FUNAI and the Interior Ministry.

Thus, it should be no surprise that the indigenous policies formulated during that period, namely the 1973 Indian Statute, reflected the interests of the Brazilian state, rather than the genuine demands of indigenous peoples. The bureaucratic compartmentalization of the Brazilian authoritarian policy-

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13. The Polonoroeste project was a development initiative in the Brazilian Amazon state of Rondônia. Its main components were the pavement of a national highway (BR 364) and the establishment of agricultural settlements. The project's impact on Rondônia's natural and human environments has been extensively documented.
  14. The Polonoroeste Amerindian Special Project was a set of initiatives drafted by the National Foundation for Indigenous Peoples (FUNAI) in response to pressures by the World Bank. The Project aimed at mitigating the impact that the Polonoroeste project would have on indigenous populations in its area of implementation. In the early 1980s, many local groups were still in initial stages of interaction with the Brazilian civilization. The Amerindian Project, however, was a complete failure. Diseases and malnourishment grew rampant among indigenous communities, invasions of indigenous lands became the norm, and most of the money allocated to the Amerindian Project was lost within the FUNAI bureaucracy and in useless infrastructure works in indigenous reserves.
  15. Interviews with José Juliano de Carvalho Filho & Betty Mindlin, independent consultants for the Polonoroeste project through the *Fundação Instituto de Pesquisas Econômicas da Universidade de São Paulo* (FIPE), in São Paulo (Sept. 1994); Interview with Jane Pratt, World Bank's Environmental Department, in Washington, D.C. (Aug. 1993).
  16. PHILLIPE SCHMITTER, *INTEREST CONFLICT AND POLITICAL CHANGE IN BRAZIL* (1971).

making process kept social and environmental considerations from affecting decisions concerning indigenous peoples' rights. One of the most significant consequences of such a compartmentalization was the indiscriminate concession of authorizations for mineral research on indigenous lands previous to 1988, an issue that will be discussed later in this article.<sup>17</sup>

Finally, the 1973 Indian Statute imposed constraints not only on indigenous peoples' pursuit of their political rights but also on the pursuit of their individual, social, cultural, and economic rights.<sup>18</sup> The Statute provided the legal framework within which the state, through FUNAI, would fully implement its assimilationist policies.<sup>19</sup> In fact, for some Brazilian lawyers, the Statute represented a step backward in relation to legislation that had regulated indigenous rights since the 1920s.<sup>20</sup> The Statute expanded the scope of the state tutelage over the lives and property of indigenous peoples beyond what had been established by previous legislation.<sup>21</sup> The Statute implicitly brought back the association between Indians and orphan children (which had been abandoned in the 1920s).<sup>22</sup> For example, orphans eventually become of age and independent from the state's protection. The same is expected to happen with indigenous peoples. When they become "Brazilians"—and here the assumption is that they will be assimilated into Brazilian society—Indians also become independent from the state's tutelage. Until then, however, the state determines the destiny of economic resources available in indigenous areas,<sup>23</sup> whether or not an indigenous individual is able to travel abroad, and the type of education indigenous communities should receive (in Portuguese, rather than bilingual, for instance), among other things.

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17. For more information on the compartmentalization of policymaking processes regarding environmental and indigenous rights issues in authoritarian Brazil, see Maria Rodrigues & Maria Lemos, *Environmental and Indigenous Policies in Democratic Brazil*, paper presented to the Annual Meeting of the New England Conference on Latin American Studies, Mount Holyoke College, Mass. (18 Oct. 1997) (on file with author).
  18. See Indian Statute, *supra* note 4, art. 1, which clearly states that the law will regulate the juridical situation of indigenous peoples with "the aim of integrating them, progressively and harmoniously, to the nation." Likewise, article 2 of the same law promises respect for indigenous culture and traditions until indigenous communities are integrated into national society. Finally, article 7 determines that the Union is responsible for overseeing all legal transactions of indigenous peoples under the regime of tutelage.
  19. *Id.*
  20. Souza Filho, *supra* note 6.
  21. Indian Statute, ch. II, tit. III.
  22. Souza Filho, *supra* note 6, at 306.
  23. The FUNAI has acted as a broker and signatory party in mining and logging contracts between indigenous communities and private companies. In 1987, the agency actually kept an office in Brasília for this purpose. See Betty Mindlin, *Os Índios e o Programa Polonoroeste*, in *O CERCO ESTA SE FECHANDO* (Jean Hebette ed., 1991). For a partial list of logging contracts in indigenous areas brokered by FUNAI in 1987, see CEDI, *POVOS INDÍGENAS NO BRASIL 1987/88/89/90* 44 (1991).

The assimilationist approach of the 1973 Indian Statute was put in practice by FUNAI during the years that the military held power, and many of the agency's policies still prevail today, despite the legal and political changes during the past fifteen years. FUNAI's policy of establishing Indian posts within the indigenous communities, forcing those communities to have permanent contact with the agency's staff and their outside supply sources, has undermined their traditional social structure.<sup>24</sup> Since the early 1980s, Brazilian anthropologists have criticized FUNAI for introducing products such as cigarettes, alcohol, sugar, and carbonated drinks into the indigenous communities, affecting the diet and health of their members. FUNAI's policies have also been blamed for encouraging the dependence of indigenous peoples on state resources and patronage. This has happened whenever FUNAI has "promoted" communities' economic sustainability. The agency's provision of tractors, motorboats, and pickup trucks to the communities tended to create individual rivalries and to disrupt traditional subsistence practices.<sup>25</sup>

Despite the structural changes brought about by the 1988 Constitution regarding indigenous peoples' rights and the obligations of the Brazilian society toward them, the 1973 Indian Statute remains, to date, the main piece of ordinary law regulating the relationship between indigenous peoples and the state.<sup>26</sup> This anachronism will not be resolved until legislation in line with the constitutional principles of 1988 replaces the Statute. The struggle of the indigenous peoples' movement to replace the Statute is among the issues that I discuss in the following sections.

### III. INDIGENOUS PEOPLES' RIGHTS AND BRAZIL'S TRANSITION TO DEMOCRACY (1985–1990)

In March 1985, after twenty years of military rule, a civilian president, José Sarney, assumed office. The process of transitioning to democracy, however, was still far from completed. Among the priority measures to be undertaken was the replacement of the 1967 Constitution, enacted by the military, with a new constitution that would reestablish democratic principles and

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24. DAVE TREECE, *BOUND IN MISERY AND IRON—THE IMPACT OF THE GRANDE CARAJAS PROGRAMME ON THE INDIANS IN BRAZIL* (1987).

25. Interview with Maria E. Ladeira, anthropologist, Centro de Trabalho Indígena (Center of Indigenous Works, CTI), in São Paulo (Sept. 1994); ANTÔNIO CARLOS MAGALHÃES, ET AL., *COMPANHIA VALE DO RIO DOCE, OS POVOS INDÍGENAS E O PROJETO FERRO-CARAJÁS: AVALIAÇÃO DO CONVÊNIO COMPANHIA VALE DO RIO DOCE–FUNAI*, in São Paulo (11 Dec. 1985) (on file with author).

26. *Constituição Federal 1988 [C.F.] (Br.)*; Indian Statute, *supra* note 4.

procedures in Brazil. Indigenous peoples participated actively in the process leading to the promulgation of the 1988 Constitution. In fact, their presence in Brazilian politics had been visible since the beginning of the 1980s.

Given the impact of the authoritarian legacy on indigenous peoples, the proactive participation of these populations in Brazil's democratization process is all the more striking. Space constraints, however, impose limits on the discussion of the many instances, at the local, regional, and national levels, when indigenous peoples attempted to demand their rights, articulate their priorities, and assert their autonomy *vis-à-vis* Brazilian society during that period. An illustrative, albeit not representative, example of indigenous peoples' increased understanding of Brazilian politics and their skillfulness in dealing with it was the political trajectory of the indigenous Chief Mário Juruna. Juruna became famous in the early 1980s for tape-recording the promises made to him and his people by Brazilian government officials. The gesture—which quickly captivated media attention and was popularized by comedy shows on Brazilian television—indicated the indigenous peoples' awareness of the Brazilian state's lack of commitment to indigenous people's rights.

More significant than Juruna's individual struggle was the formal participation of eight indigenous candidates (including Juruna himself) in the 1986 elections for the Constitutional Assembly. Although none of them was successful, in part due to the lack of funding for their candidacies,<sup>27</sup> indigenous candidates carved an important space within Brazilian leftist parties.<sup>28</sup> Finally, indigenous peoples demonstrated significant lobbying skills during the drafting of the 1988 Brazilian Constitution. The leadership of the União das Nações Indígenas (Union of Indigenous Nations, UNI), founded in 1979 and until 1995 the only national indigenous organization, and of the Kayapó indigenous group was crucial in this process.

Once the Constitutional Assembly was elected, indigenous peoples, together with a coalition of support organizations, launched the campaign "Indigenous Peoples in the Constitutional Assembly."<sup>29</sup> The campaign devised strategies that would eventually enshrine in the Constitution indigenous peoples' rights to land and to social and cultural autonomy.

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27. CEDI, *supra* note 23.

28. Ten years later, in the 1996 elections, the electoral results for indigenous peoples' candidates were more positive. Two indigenous mayors and several councilmen and vice-mayors were elected throughout Brazil. Most of them had direct links with the indigenous movement. See Conselho Indigenista Missionário [hereinafter CIMI], *Two Indigenous Mayors are Elected*, SEJUP NEWSL. No. 231 (Serviço Brasileiro de Justiça e Paz, Brazil), 10 Oct. 1997 (on file with author).

29. Santilli, *supra* note 7, at 11–14.

Possibly the most effective lobbying strategy implemented by the indigenous movement was to have indigenous representatives present at the Brazilian Congress, almost on a permanent basis, whenever there were scheduled discussions and voting sessions on issues of their interest. Although representatives of the Kayapó ethnic group often led mobilizations, at least thirty-five indigenous nations made themselves present in the constitutional debates during 1987 and 1988. The indigenous peoples' movement used other lobbying strategies, such as organizing group visits to influential constitutional representatives, forwarding legislation proposals, and celebrating conquests with traditional song and dance.<sup>30</sup>

As significant as indigenous activism was for the 1987–88 constitutional process, the activism went beyond trying to shape changes in the new constitution. Throughout the 1980s, different indigenous groups engaged in local and regional struggles to protect their lands, resources, and life styles. These actions unfolded both inside and outside of formal political and institutional arenas. In the eastern amazon region of Carajás, for instance, the Gavião people blocked the Carajás railroad on several occasions to pressure state authorities and the Vale do Rio Doce Company (the manager and major user of the railroad) to demarcate their land. In the early 1990s, the Gavião also joined the Carajás Consulting Seminar, a regional initiative that brought together grassroots movements, and domestic and international nongovernmental organizations (NGOs) in order to raise awareness about socioeconomic, environmental, and citizenship rights.<sup>31</sup> Throughout Brazil, indigenous peoples, with the help of organizations such as the Núcleo de Direitos Indígenas (Nucleus of Indigenous Rights, NDI), began resorting to the courts to force invaders out of their lands. Indigenous peoples also became increasingly aware of the power of high visibility events, and the impact they had on national and international public opinion. In 1989, the Kayapó people organized the First Meeting of Indigenous Peoples of Xingu (Xingu Meeting), bringing together 600 indigenous leaders, governmental officials, representatives of environmental and indigenous rights NGOs from Brazil, the United States, and Europe, and over 300 Brazilian and international journalists.<sup>32</sup> The goal of the meeting was to state the indigenous peoples' opposition to the plans that the state-owned electric company,

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30. See *Lobby de índio é pajelança*, O ESTADO DE SÃO PAULO, 23 Apr. 1987, at 2; *Sem Bordunas, Kaiapó Tomam Conta do Plenário*, O LIBERAL, 19 Mar. 1988, at 1; *Kaiapó Fazem Festa no Congresso*, CORREIO DO BRASIL, 19 Aug. 1988, at 2.

31. Interviews with Benatti, J., consultant for the Sociedade Paraense Para Defesa dos Direitos Humanos (Society for the Defense of Human Rights of Pará (SPDDH)), in Belém (June, 1995).

32. *O Aviso dos Caiapó*, VEJA, 1 Mar. 1989, at 68–70; Claudia Kuck, *Tensão no diálogo Eletronorte com a tribo Caiapó em Altamira*, GAZETA MERCANTIL, 22 Feb. 1989, at 4; *On the Move Against Xingu Dams*, WORLD RIVERS REV., v. 4, n. 1 (Jan.–Feb., 1989).

Eletronorte, had to build a major hydroelectric complex in the Amazon region of Altamira. Eletronorte eventually redesigned its plans for the hydroelectric complex, claiming budget constraints as the major reason for its decision. It is hard to believe, however, that the Xingu Meeting did not contribute, at least in part, to Eletronorte's decision, given the visibility that the Indians' position gained in the national and international media and the support they obtained from different segments of Brazilian society.<sup>33</sup>

The support of Brazilian organizations concerned with indigenous and human rights issues was a key element in the indigenous peoples' struggle for their citizenship rights in the late 1980s. These institutions have never claimed to represent indigenous peoples, yet they constitute a vital part of the indigenous peoples' movement in Brazil. The Conselho Indígena Missionário (Indigenous Peoples Missionary Council, CIMI), linked to the Catholic Church, the Centro Ecumênico de Documentação e Informação (Ecumenical Center of Documentation and Information, CEDI), and the Associação Brasileira de Antropologia (Brazilian Association of Anthropologists, ABA) were among the indigenous peoples' first and strongest advocates. Throughout the 1980s, these organizations played a crucial role in documenting injustices against indigenous peoples, providing technical and legal assistance, and criticizing whenever possible (given the authoritarian context), the assimilationist approach of the military's indigenous policies.

In 1986, CEDI, together with the Coordenação Nacional de Geólogos (National Coordination of Geologists, CONAGE), published a document that highlighted the concession of titles for mineral research on indigenous lands.<sup>34</sup> The extent to which the Brazilian state ignored the potential environmental and social impacts of such concessions shocked Brazilian constitutional representatives.<sup>35</sup> The document added further impetus to the

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33. See, e.g., *Ciclo de Debates "Hidroelétrica na Amazônia"* (workshop), *Carta da Amazônia (Amazônia's letter)*, 29 Aug.–1 Sept. 1988 (Belem, Pará, Braz.). This workshop was organized by the following institutions: Associação de Pesquisadores em Agricultura do Estado do Pará, ASPAGRI (Association of Agricultural Researchers of the state of Pará, Núcleo de Altos Estudos Amazônicos, NAEA (Center of Advanced Studies of Amazonia), and Sociedade de Proteção dos Recursos Naturais e Culturais da Amazônia, SOPREN (Society for the Protection of Amazonia's Natural and Cultural Resources), and produced a document issued on 1 September, 1988, signed by forty-one entities from different regions of Brazil (indigenous peoples, professional organizations, rural unions, grassroots groups, and scientific organizations), repudiating the state's energy plans in Amazônia.
  34. Grupo de Estudos Mineração em Áreas Indígenas, *Empresas de Mineração e Terras Indígenas na Amazônia* (Ecumenical Center of Documentation and Information (CEDI) & National Coordination of Geologists (CONAGE), São Paulo, Braz.), 10 Apr. 1986 (on file with author).
  35. The impact of the CEDI/CONAGE document can be illustrated by its receptivity by the members of the Constitutional Assembly (all members received a copy of the report) and by the impact that an oversized copy of its map had when it was presented in the Assembly's plenary session of 16 March 1988. Carlos Alberto, *Legislation, in Povos INDÍGENAS NO BRASIL 1987/88/89/90*, at 15–30 (1991).

efforts of indigenous peoples and their support organizations to include indigenous peoples' land rights in the constitutional text. In 1987, the Constitutional Assembly received two proposals for amendments to the chapter on indigenous rights. The first was presented by UNI, with the support of the eighteen organizations, among them CEDI and ABA, and contained 43,057 signatures.<sup>36</sup> The second was presented by CIMI and contained 44,171 signatures.<sup>37</sup> Both proposals highlighted the need to protect indigenous peoples from indiscriminate mining activities in their lands, restricting prospecting rights to the Indians themselves.<sup>38</sup>

The impact of the CEDI/CONAGE report and of the popular constitutional amendments on indigenous peoples' rights can be measured by the reaction it generated from mining interest groups, both inside and outside of the Brazilian Congress. The conservative newspaper *O Estado de São Paulo* (ESP) launched a defamation campaign against CIMI, the Catholic Church, and other organizations committed to the defense of indigenous rights. In a series of articles entitled "A Conspiracy Against Brazil," the newspaper accused those organizations of colluding with foreign companies to block access by Brazilian companies to Amazonian mineral reserves.<sup>39</sup> It also charged international mining interests, through their "agents" in Brazil, of plotting to impose the concept of Brazil's "restricted sovereignty" over indigenous lands.<sup>40</sup> The series concluded that the goal of the Catholic Church, CIMI and associated organizations, and the foreign mining interests was to constrain Brazil's capacity to compete in international mineral markets.<sup>41</sup>

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36. *Proposta de Emenda Popular ao Projecto da Constituição (Popular Proposal for Constitutional Amendment)*, by the initiative of the Associação Brasileira de Antropologia (ABA), Coordenação Nacional dos Geólogos (CONAGE), e Sociedade Brasileira para o Progresso da Ciência (SBPC), presented to the Sub-commission of Blacks, Indigenous Peoples, the Physically Impaired, and Minorities, 13 Aug. 1987 (on file with author).

37. *Proposta de Emenda Popular ao Projecto da Constituição (Popular Proposal for Constitutional Amendment)*, by initiative of the Conselho Indigenista Missionário (CIMI), Associação Nacional de Apoio ao Índio (ANAI/RS), Movimento de Justiça e Direitos Humanos, and Operação Anchieta (OPAN), presented to the Sub-commission of Blacks, Indigenous Peoples, the Physically Impaired, and Minorities, 11 Aug. 1987 (on file with author).

38. Constitutional amendment proposed by ABA/CONAGE/SBPC, with the support of UNI/CEDI/IECLB and others, art. 3, ¶¶ 3, 4, 5; Constitutional amendment proposed by CIMI/ANAI-RS, art. 7, ¶ 6.

39. *A Conspiração contra o Brasil (The Conspiracy Against Brazil)*, O ESTADO DE SÃO PAULO, 9 Aug. 1987, at 1.

40. The accusations were both explicit and implicit, as can be inferred from the titles of the articles that followed *The Conspiracy Against Brazil*, such as *O CIMI e seus irmãos do estanho* (CIMI and its tin brothers), O ESTADO DE SÃO PAULO, 12 Aug. 1987, at 1; *Índios, O caminho para os minérios* (Indians, the way to mineral wealth), O ESTADO DE SÃO PAULO, 13 Aug. 1987, at 1; and *O Evangelho do CIMI: índio, ouro . . .* (CIMI's Gospel: Indian, gold . . .), O ESTADO DE SÃO PAULO, 15 Aug. 1987, at 1.

41. *A Conspiração contra o Brasil* (parts I—VI), O ESTADO DE SÃO PAULO (Os índios na nova Constituição, at 1) 9 Aug. 1987.

As a result of ESP's accusations, the opposition that conservative interests had been garnering since the beginning of the constitutional debates, was further strengthened. Yet, the accused organizations as well as constitutional representatives associated with indigenous peoples' interests, including Senator Severo Gomes, reacted quickly.<sup>42</sup> CIMI and the Conferência Nacional dos Bispos do Brasil (National Conference of Brazilian Bishops, CNBB) released statements to the press denouncing the several inaccuracies, falsities, and even a forged signature that constituted the bases for the ESP's charges.<sup>43</sup> Furthermore, CIMI and CNBB firmly denied any connection to foreign mineral interests. Finally, indigenous peoples' allies in Congress pressed for the establishment of a parliamentary investigating commission (Comissão Parlamentar de Inquérito). As a result of the commission's work, it became clear that the ESP's accusations had been fabricated with the support of anti-indigenous sectors, including the Brazilian mineral company Paranapanema<sup>44</sup> and the Conselho de Segurança Nacional (National Security Council, CSN).<sup>45</sup>

Although the ESP's charges failed to undermine the progressive treatment provided by the 1988 Constitution to indigenous peoples' rights in general, they seem to have fueled the conservative strategy. The crux of this strategy was to place issues that related to the mining of indigenous lands outside of the constitutional chapter dedicated to indigenous rights.<sup>46</sup> The 1988 Constitution, however, secured one important gain for indigenous peoples: authorization for mining in their lands became the exclusive competence of the National Congress.<sup>47</sup> This placed the process within the framework of a democratic forum, rather than keeping it under the control of bureaucratic agencies such as FUNAI and the Ministry of Mines.

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42. See Senator Severo Gomes, Editorial, *Cronologia de uma Conspiração*, FOLHA DE SÃO PAULO, 16 Aug. 1987, clarifying many of the inconsistencies of the ESP's series.

43. Press release, National Conference of Brazilian Bishops, CNBB Repudia a Denúncia de Conspiração (10 Aug. 1987), in *TEMPO E PRESENÇA* No. 223, 1987 (on file with author).

44. *A Campanha do jornal O Estado de São Paulo e os interesses das mineradoras*, *TEMPO E PRESENÇA* No. 233, 1987, at 1–12.

45. The CSN was directly involved with the project "Calha Norte," implemented since 1985 by the Brazilian military in the country's borders. The Calha Norte's conception was assimilationist and attempted to intensify the military "tutelage" over indigenous peoples. Santilli, *supra* note 7. Indians were to be colonized and settled around the military bases and other centers of Brazilian presence (airports, missions). Anthropologists and staff from indigenous peoples' advocacy organizations were banned from the Calha Norte's areas of influence. Some observers argue that Calha Norte operations seemed to coincide with areas of known concentration of strategic mineral resources. See also ANTHONY HALL, *DEVELOPING AMAZONIA: DEFORESTATION AND SOCIAL CONFLICT IN BRAZIL'S CARAJAS PROGRAMME* (1989).

46. Those issues are addressed in a separate session which deals with economic and financial matters.

47. C.F., art. 49, ¶ XVI.

The dilemmas generated by mineral resources located in indigenous lands are best illustrated by the first major struggle implemented by the indigenous peoples and their supporters after the promulgation of the 1988 Constitution—the demarcation of the Yanomami indigenous area. The defense of the Yanomami area also exemplifies the strategic importance of international support for the consolidation of indigenous peoples' rights in Brazil.<sup>48</sup>

Because of the predominance of conservative interests in the Sarney Administration (1985–1990) and the uncertainties of the constitutional process, the demarcation of indigenous lands was all but paralyzed during the period. As the strength of indigenous peoples' activism became increasingly visible in Brazilian politics, political and economic interests in the state of Roraima (home of the Yanomami people) began to pressure the President to “settle” the Yanomami issue.

Tensions between indigenous peoples, settlers, and miners had been mounting in the area for years. In 1985, the situation was further aggravated by the increasing number of gold miners that had arrived in the Yanomami area. Those arrivals were encouraged by the Calha Norte infrastructure and later by the political support of Roraima's governor Romero Jucá (elected in 1988). With the support of Roraima's political leadership and the Brazilian military, President Sarney signed decrees in 1989 reducing the area originally assigned to the Yanomami people by anthropological research.<sup>49</sup> Instead of a continuous area, the Yanomami would have access to nineteen “islands” of territory, interrupted by “national forests.”<sup>50</sup> By designating part of the Yanomami territory as national forest, rather than as indigenous land, the government was able to circumvent the constitutional constraints to mining on indigenous lands.

Indigenous rights' advocates were aware of the threat that gold mining posed to the Yanomami people—a threat that had existed since the mid-1980s. In 1987, for example, Senator Severo Gomes presented a project for the demarcation of Yanomami Indigenous Park to the Brazilian congress. In that same year, Davi Yanomami, one of the nation's leaders, wrote to President Sarney denouncing the gold miners' invasion and the threat to the Yanomami's health and lifestyle. For the next three years, the Brazilian and

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48. The Yanomami case only exemplifies, without exhausting, the several instances in which international environmental and human rights organizations have lent invaluable support to the struggles of Brazilian indigenous peoples. Support for the Kayapó's campaign against the Altamira Hydroelectric Complex, and the pressure by US Congress members against the World Bank-funded projects Polonoroeste and Carajás Iron Ore have also played a role.

49. Decreto Nos. 94.945–6, de 23 de Septiembre, D.O. 23.09.1987.

50. *Id.*

international media published information about the clashes between miners and Indians, and reported on the outbreaks of epidemics among the indigenous people as a result of the contact with the miners.<sup>51</sup> In 1988, the international community began to mobilize in defense of the Yanomami people. The United Nations awarded the Global Prize of its Environmental Program to Davi Yanomami, thus creating an opportunity for the Yanomami leadership to present its struggle to international audiences. In October, the organization Survival International led a network of environmental and human rights activists on a series of rallies in front of Brazilian embassies in twenty different countries expressing solidarity with the Yanomami people.

The international campaign for the Yanomami gained further strength when it joined forces with the initiative *Ação pela Cidadania* (Action for Citizenship), organized by the Catholic Church, Brazilian organizations concerned with indigenous rights, and congressional representatives, among them Senators Severo Gomes and Fernando Henrique Cardoso. The *Ação pela Cidadania* provided first-hand reports, photographs, and video images on the plight of the Yanomami to international groups, who in turn were able to sensitize larger audiences to the problem.

When in 1990, president-elect Fernando Collor de Mello toured Europe and North America, he faced an international public opinion intensely aware of the plight of the Yanomami and critical of Brazilian indigenous policy.<sup>52</sup> Upon his return to Brazil, Collor de Mello mandated the expulsion of the gold miners from the Yanomami area in a theatrical operation that bombed the miners' illegal airstrips. Many interpreted the action as being part of a strategy to show Brazil's commitment to environmental and human rights, thus guaranteeing the selection of the country as host to the 1992 United Nations Conference for Environment and Development (UNCED).<sup>53</sup> On the eve of the Conference, the President signed a decree demarcating the Yanomami land as a continuous territory. The new official policy toward the Yanomami was considered a response to international pressures as well as an illustration of a shift in Brazil's domestic balance of forces. With the promulgation of the new Constitution and the 1989 direct elections for the Presidency, democratic forces reached the peak of their mobilization, whereas the military and conservative forces moved to the back stage.<sup>54</sup>

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51. CEDI, *supra* note 23.

52. See *Vigília nos EUA pede proteção aos Yanomami*, O ESTADO DE SÃO PAULO, 17 Mar. 1990, at 2; *16 Países Fazem Abaixo-Assinado pelos Yanomami*, A CRÍTICA, 23 Mar. 1990, at 2 (publishing information about Survival International's rally in front of the Brazilian Embassy in Wash. D.C. on the day of Collor's arrival and about a petition given to the president-elect in London, which listed 8,000 signatures collected in sixteen countries).

53. See *Governo Espera Lucrar com Explosão de Pistas*, JORNAL DO BRASIL, 26 Apr. 1990, at 3.

54. Stephan Scharzman, Ana Valéria Araújo & Paulo Pankararu, *The Legal Battle Over Indigenous Land Rights*, 24 NACLA REPORT ON THE AMERICAS, n.5 (Mar.-Apr. 1996).

#### IV. INDIGENOUS PEOPLES' RIGHTS AND BRAZIL'S DEMOCRATIC CONSOLIDATION (1990–2000)

The 1988 Constitution not only recognized and guaranteed indigenous rights that were never before acknowledged in previous documents or policies in Brazilian history, but it also encouraged the creation of indigenous peoples' organizations at local and regional levels.<sup>55</sup> Article 232 of the Constitution states that "Indians, their communities, and organizations are legitimate parties to demand juridical protection of their rights and interests."<sup>56</sup> Before the 1988 Constitution, indigenous peoples could only demand their rights in the Brazilian juridical and administrative systems if represented by FUNAI. By recognizing indigenous organizations as legitimate parties to speak for and represent the rights of indigenous peoples, the Constitution created a new arena where indigenous peoples could autonomously articulate their interests and act on their own behalf.

It is no surprise then, that the *Diretório de Associações e Organizações Indígenas no Brasil* (Directory of Indigenous Associations and Organizations in Brazil, published in 1999), lists 290 of such organizations,<sup>57</sup> whereas, at least by one count, until 1986, there were only eight registered indigenous organizations in Brazil.<sup>58</sup> The large majority of indigenous organizations have a local character because of the very nature of Brazilian indigenous populations. Different from other Latin American countries, such as Bolivia, Ecuador, and Guatemala, Brazil does not have large indigenous populations who share the same language and traditions. On the contrary, Brazilian indigenous groups are usually small in numbers, ethnically and culturally diverse, speak 170 different languages,<sup>59</sup> and have established different (local) priorities for their struggles.

The 1990s were marked by the effort of indigenous peoples' organizations to force the Brazilian state and society to respect their rights to land, health, education, and cultural autonomy as determined by the 1988 Constitution. Indigenous peoples have been well aware that the Constitution, in and of itself, is not enough to change either the assimilationist practices of the Brazilian state or the deep-rooted disrespect for indigenous rights cultivated by certain economic and political groups in Brazilian society. By establishing formal entities, indigenous peoples have had several

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55. C.F., art 232.

56. C.F., art. 32 (author's translation).

57. Luis Grupioni, *Diretório de Associações e Organizações Indígenas no Brasil*, Ministério da Educação (MEC) and Grupo de Educação Indígena da USP (Mari) (1999).

58. Carlos A. Ricardo, *Quem Fala em Nome dos Índios?*, in *POVOS INDÍGENAS NO BRASIL 1987/88/89/90* 69–72 (1991).

59. *Id.*

goals: to increase the visibility of their struggles, demands, and proposals; to build alliances with social movements, churches, and other organizations; to find interlocutors within the state and the Brazilian society; and to demand legal protection with the support of the General Attorney's office (Ministério Público).<sup>60</sup> Among the strategies that have been used by indigenous organizations in defense of their interests include, for instance, law suits against logging and mining companies illegally operating within indigenous lands,<sup>61</sup> the organization of congresses and conferences to discuss common problems and propose solutions,<sup>62</sup> the promotion of rallies, sit-ins, and petitions to FUNAI and other governmental agencies to force them to the negotiation table, and the drafting of proposals for legislation on indigenous peoples rights, such as the project for the new indigenous peoples' statute.

Since 1991, there has been an on-going effort among indigenous peoples' organizations and their support entities to create an umbrella organization at the national level, the *Conselho de Articulação dos Povos e Organizações Indígenas do Brasil* (Council of Brazilian Indigenous Peoples and Organizations, CAPOIB). The process has been slow and complex, particularly since a previous initiative failed in 1989.<sup>63</sup> CAPOIB has its origins in two national meetings (1991 and 1992) that brought together indigenous leaders and indigenous organizations from all regions of Brazil, to discuss the proposals for the new statute of indigenous peoples. The participants realized the need to establish an entity that would facilitate the struggle of the different peoples, without representing Brazilian indigenous peoples as a whole. CAPOIB started as an informal council composed of 33 members that have met periodically to facilitate indigenous peoples' positions on a number of issues. Finally, CAPOIB's First General Assembly occurred in April, 1995, bringing together 201 indigenous leaders from seventy-seven nations and forty indigenous organizations. The Assembly has approved CAPOIB's statutes as a national indigenous organization.<sup>64</sup>

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60. CIMI, *Movimento Indígena—Um breve histórico*, available at <<http://www.cimi.org.br>> (visited 28 Feb. 2002) (on file with author).

61. *Justiça Federal interdita estradas ilegais no Pará*, INFORMATIVO NDI NEWSLET. Brasília, DF, Jan.–Feb. 1993, at 1; *TRF Proibe exploração da madeira em área indígena no sul do Pará*, INFORMATIVO NDI NEWSLET., Brasília, DF, Mar.–Apr. 1994, at 4 (on file with author).

62. *Seminário resulta em manual contra roubo de madeira*, INFORMATIVO NDI NEWSLET. Brasília, DF, Mar.–Apr. 1994, at 2; *Semana dos Povos Indígenas—1998*, PORANTIM (CIMI, Brazil), Mar. 1998, at 1–8 (on file with author).

63. The failed attempt aimed at extending the scope of UNI to the national level. Despite UNI's leadership and activism on behalf of indigenous peoples as a whole in the constitutional process, it encountered difficulties in setting roots in local and regional contexts.

64. CIMI, available at <<http://www.cimi.org.br>> (visited 28 Feb. 2002).

Participation in the formulation of a new statute of indigenous peoples was among the highest priority on the agenda of indigenous peoples' organizations and their domestic supporters during the early 1990s. A new statute, once approved as ordinary legislation, would not only regulate the Constitutional articles on indigenous rights. It would also replace the 1973 authoritarian and assimilationist Indian Statute, which still coexists with the progressive principles of the Constitution. Aware of the contradictions created by the concurrent existence of the 1973 Indian Statute and the chapters on indigenous rights of the 1988 Constitution,<sup>65</sup> the Brazilian House of Representatives created, in 1991, a Special Commission for Indians, in charge of drafting a new statute.<sup>66</sup>

Technical assistance and the lobbying skills of the Brazilian organizations committed to indigenous rights were crucial resources for the meaningful participation of indigenous peoples in the discussions of the new statute. Based on the proposals that emerged from the 1991 and 1992 indigenous peoples' national meetings, the Nucleus for Indigenous Rights (NDI) and CIMI presented two separate law projects for the new statute to the Special Commission. A third project was also presented by FUNAI. In 1993, negotiations on the proposals' divergent points began. Some of the issues that the projects addressed differently were the rights of indigenous peoples to the subsoil, the criteria for mining concessions, the creation of new channels outside the control of FUNAI for the provision of health services, and the use of the terms "indigenous societies" and "indigenous peoples," which, according to sectors of the Brazilian government, imply a sovereignty status that challenged Brazil's sovereignty.<sup>67</sup> Finally, in 1994, as a result of successful negotiations, an alternative project emerged and was unanimously approved by the Special Commission. That same year, the project was presented to the House of Representatives, which also approved it. The last stage needed for the project to become law was the approval of the Federal Senate. Yet, before that institution could examine it, the project of the Special Commission for Indians was sent back for further examination by the House of Representatives. This political maneuver was implemented by House Representative Arthur da Távola, who was then the House majority leader. The project's normal course has been paralyzed ever since.<sup>68</sup>

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65. C.F., arts., 231, 232.

66. Gonçalves, *supra* note 7.

67. Law Projects 2,057/91 of 1 Nov. 1991 presented by FUNAI (in the Statute of Indigenous Societies); 2,160/91 of 1 Oct. 1991 presented by Núcleo de Direitos Indígenas (in the Indian Statute), and 2,016/92 of 15 Apr. 1992 presented by CIMI (in the Statute of Indigenous Peoples).

68. In April/May, 2000 the indigenous movement succeeded in breaking the Congress' inertia in the matter. Congressman Pizzatto reinitiated consultations with indigenous

Explanations for Távola's initiative have varied. Some perceived his action as a blatant attempt to create a legal vacuum that favors the continuation of the government's assimilationist policies and the disregard for indigenous rights to land and resources.<sup>69</sup> Others saw it as an attempt by the government to transform the project into an instrument of political bargaining. The "game" involved a type of quid pro quo with the representatives who were committed to indigenous rights. Those representatives would approve constitutional amendments proposed by the Executive, and in return for their support, the law project on indigenous peoples would proceed to the Senate.<sup>70</sup> Finally, some analysts have stressed the fact that the indigenous peoples project, despite being the result of negotiations between the government, indigenous peoples, and advocacy organizations, remains unacceptable to many sectors within the government (namely, the military and the Ministry of External Affairs). In addition, disagreements remain even between CIMI and NDI, the main sponsors of the original law projects, and among the different Indian groups themselves.<sup>71</sup>

The rift between CIMI and NDI/ISA<sup>72</sup> has grown since the interruption of the normal course of the law project on indigenous rights in the Brazilian Congress. NDI/ISA has adopted a pragmatic approach to the controversy and presented a new proposal that specifically addresses the government's original objections. CIMI has refused to compromise on what it considers basic principles guiding indigenous rights. It has criticized the ISA's proposal on several counts, arguing that 1) it represents a reversal of the progress that was to be achieved through the formulation of a new statute; 2) it leaves too many issues to be determined by the Executive power through decrees; 3) it extinguishes FUNAI; and 4) it continues to use the term indigenous "societies" rather than "peoples" (the latter, according to CIMI, is the preferred term within the indigenous movement).<sup>73</sup>

Given the government's resistance to the proposals for a new law on indigenous rights, the permanent opposition of powerful economic sectors

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peoples aiming at revising his original proposal and presenting it immediately to the House of Representatives. *Esatuto do Indio*, OBSERVATORE NEWSLET. NO. 22 (Institute of Social and Economic Studies (INESC), Brazil, May 2000, at 3 (on file with author).

69. *Semana dos Povos Indígenas—1998*, PORANTIM. (CIMI, Brazil), March 1998, at 8–10.
70. Iara Pietricovsky, *A Violência Mostra suas Várias Faces*, INFORMATIVO INESC, n.54, Mar.–Apr. 1995, at 10.
71. Felisberto Damasceno, *Congresso Volta a Discutir Estatuto e Convenção 169*, PORANTIM. (CIMI, Brazil), May 1997, at 6.
72. Since 1995, the NDI has merged its activities with sectors of CEDI and is now named Instituto Socioambiental (Social and Environmental Institute, ISA).
73. CIMI, *Primeiras Considerações Sobre a Proposta Alternativa do ISA ao PL 2,057/91 que dispõe sobre o "Estatuto das Sociedades Indígenas"* (Mar. 1999), available at <<http://www.cimi.org.br/plisa.htm>> (visited 28 Feb. 2002).

with significant representation within the Brazilian Congress,<sup>74</sup> and the rifts between indigenous peoples' main advocacy organizations, the perspectives for a new statute on indigenous peoples are not promising. Of these three obstacles, probably the most significant is the division among indigenous peoples' advocacy organizations. The two main advocacy organizations for indigenous peoples' rights in Brazil, ISA and CIMI, have very different approaches to the responsibility of the Brazilian state vis-à-vis indigenous peoples. ISA criticizes the state's interventionism in indigenous issues. It defends the involvement of NGOs in the provision of health and educational services and the promotion of market-driven alternatives for the economic sustainability of indigenous communities. CIMI, on the contrary, stresses the responsibility of the state vis-à-vis indigenous peoples. As a corollary, it also resists the notion that market-oriented strategies are compatible to indigenous peoples' traditions.<sup>75</sup>

The recent history of indigenous peoples' struggles in Brazil demonstrates, however, that success has been linked to the existence of a working alliance between the key domestic organizations supporting indigenous rights. The indigenous peoples' struggle against the Executive Decree 1775/96,<sup>76</sup> provides yet another example of the importance of a unified network of domestic supporters. The campaign against the decree also illustrates the value of indigenous peoples' alliances with international groups.

In January 1996, the Justice Minister Nelson Jobim enacted the Decree 1775, altering the process of demarcation of indigenous peoples' lands through the inclusion of the right of contradiction, or *contraditório*.<sup>77</sup> That meant that third parties now had the right to question and oppose the demarcation process. This decision not only increased the political content of land demarcation processes, but it also disregarded the constitutional principle that asserted indigenous peoples' original right to their land. The rationale for the decree was that, by not allowing third parties to manifest their opposition, a right guaranteed by the 1988 Constitution in its chapter on individual and collective rights,<sup>78</sup> the previous law regulating demarcations<sup>79</sup> and all indigenous land demarcation processes regulated by it were unconstitutional. In addition, the Decree 1775/96 placed the final decision

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74. Among the best known examples of Congressional representatives committed to anti-indigenous interests are Romero Jucá (Partido Social Democrata Brasileiro (PSDB, Roraima)), Salomao Cruz (PSDB, Roraima), and Elton Rohneit (for the Partido da Frente Liberal (PFL), Roraima), who have proposed law projects that attempt to invalidate most constitutional restrictions to mining in indigenous lands.

75. Interview with ISA staff (anonymous), Brasília (19 May 2000).

76. Decreto No. 1.775, de janeiro de 1996, D.O. de 08.01.1996.

77. *Id.*

78. C.F., art. 50, ¶ LV.

79. Decreto No. 22, de fevereiro de 1991, D.O. de 04.02.1991.

about demarcations in the hands of the Ministry of Justice (ultimately, a political decision), whereas before, it was FUNAI's (whose criteria were technical).<sup>80</sup> Finally, the decree established a ninety day statute of limitations for those parties opposing demarcations to file suits. Third parties could contest not only on-going and future demarcation processes but also those that had already been finalized, unless the area had been officially registered (the final stage of the demarcation process).<sup>81</sup> At the end of the ninety days, FUNAI had received 531 suits, presented by 1,500 individuals, municipalities and states, as well as corporations. These suits challenged the boundaries of 83 indigenous lands.<sup>82</sup>

The political implications of Decree 1775/96, the direct connections of Minister Jobim with anti-indigenous interests in Brazil, and the authoritarian nature of the new demarcation process have been extensively discussed elsewhere.<sup>83</sup> In the paragraphs below, a discussion of how the mobilization of Brazilian indigenous peoples and their domestic and international supporters against the decree affected its implementation is presented. In particular, the democratic avenues that were seized by the Brazilian indigenous movements to assert their interests and confront the threats against their right to land are indicated.

In January 1996, immediately after the decree was issued, CAPOIB organized a march in Brasília that brought together over 300 indigenous leaders. The march contributed to educate the Brazilian society about the implications of the decree and how it could be used by the government as a political bargaining tool. In July of that same year, CAPOIB organized a national meeting to evaluate the initial consequences of the decree. Finally, it issued a series of public statements in the Brazilian media and through Internet channels rejecting the government's initiative.<sup>84</sup> CAPOIB received strong support from domestic groups committed to indigenous peoples'

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80. See Decreto No. 1.775, *supra* note 76.

81. The demarcation of indigenous lands in Brazil occurs in four stages: identification, demarcation, ratification, and registration.

82. Instituto Socioambiental, ISA, *Um ano com o decreto 1775: Ambiguidade, juridicismo e manipulação política na demarcação das terras indígenas no Brasil*, 20 Jan. 1997 (on file with author).

83. See Scharzman, Araújo & Pankararu, *supra* note 35; Sara G. Moore & Maria Carmen Lemos, *Indigenous Policy in Brazil: The Development of Decree 1775 and the Proposed Raposa/Serra do Sol Reserve, Roraima Brazil*, 21 Hum. Rts. Q. 444-43 (1999); Georgia Carvalho, Formation and Implementation of Indigenist Policy in Brazil Since 1988: Demarcation of Indigenous Lands in the Carajás Area, Paper presented at the Annual Fall Meeting of the New England Conference of Latin American Studies, Mount Holyoke College, 18 Oct. 1997, *supra* note 17 (on file with author).

84. CAPOIB Manifesto, *Indigenous Peoples in Brazil Do Not Accept Review of Their Land Areas*, Brasília, 10 July 1996, reprinted in CIMI NEWSLET. NO. 218 (Conselho Indigenista Missionário, San Paulo), 18 July 1996, available at <<http://www.oneworld.org/sejup/236.htm>> (visited 28 Feb. 2002).

rights. CIMI and ISA initiated a media campaign criticizing the government for the enactment of Decree 1775/96.<sup>85</sup> These organizations also lobbied Congress to promote an open discussion on the main issues raised by the document. As a result, the *Comissão De Minorias e Meio Ambiente* (Commission on Minorities and the Environment) of the House of Representatives organized the seminar *O Estado e os Povos Indígenas* (The State and Indigenous Peoples) 11–12 June 1996. Among the participants in the event were congressional representatives identified with indigenous rights as well as those linked to anti-indigenous interests, judges, anthropologists, and indigenous rights activists from CIMI and the Comissão ProÍndio, scholars, and CAPOIB's representatives. One of the conclusions of the seminar was that although the decree's intention was to weaken indigenous communities while benefiting anti-indigenous interests, such an objective was not accomplished thanks to the pressure exerted by domestic and international entities committed to indigenous rights.<sup>86</sup>

Although it seems possible that the government had anticipated the level of protests against the Decree 1775/96 from the Brazilian indigenous movement, it was clearly less prepared to face the intensity of the international reaction. Carvalho briefly describes some of the protest initiatives undertaken by the international community.<sup>87</sup> Survival International and Oxfam requested that the European countries suspend the disbursement of funds for indigenous projects devised within the context of the Rainforest Trust Fund; several organizations, among them the US-based Amanak's Network and the Environmental Defense Fund (EDF) sent protest letters to Brazilian authorities; and Amnesty International, Survival International, and Oxfam organized a protest visit to the Brazilian Ambassador in London. The Brazilian newspaper *Folha de São Paulo* reported that forty-three US House Representatives sent a letter to the president of the World Bank indicating their concern with the consequences of the decree.<sup>88</sup> The European Parliament eventually passed a resolution condemning the decree and so did the Pope. In a futile attempt to address the concerns of the international community, the Brazilian Ministry of Justice traveled to Europe in March 1996. Jobin's trip was the last effort in trying to establish some level of legitimacy for the decree. With its failure, the only option left to the

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85. Carvalho, *supra* note 83.

86. Lêda Cavalcante, *Cresce o repúdio ao Decreto 1755/96*, PORANTIM, June–July, 1996, at 4; *Árduas Lutas Frente ao Estado*, PORANTIM, Dec. 1996, at 2.

87. Carvalho, *supra* note 83.

88. *Deputados Americanos Pedem Manutenção da Área*, FOLHA DE SÃO PAULO, 23 July 1996, at 4.

Ministry of Justice was to accept FUNAI's recommendation to reject all the 531 suits contesting land demarcations.<sup>89</sup>

The political objectives of the Decree 1775/96 became evident when Jobim, against FUNAI's recommendations, required the revision of eight indigenous areas, precisely those that have been the object of interest of powerful politicians in the Brazilian Congress. The case of the Indigenous Area Raposa Serra do Sol (RSS), in the Amazon state of Roraima best illustrates the extent to which the Decree 1775/96 was used by the government to please powerful political forces, and possibly to guarantee the approval of Cardoso's reelection amendment. Roraima's entire delegation in the Brazilian Congress opposes the demarcation of the RSS as recommended by FUNAI. Gold miners invaded the area in the early 1990s, with the encouragement of local politicians and have since greatly disrupted the lives of local indigenous communities.<sup>90</sup>

The legal and political strategies used by the government, local politicians, and mining interests to reduce the area of the RSS have been very similar to those that, in the 1980s, challenged the Yanomami territory. Miners have been encouraged to create villages within the indigenous areas. Once these villages were recognized as municipalities they would be legally outside the limits of the indigenous area, thus creating "islands" within the RSS that would permanently serve as springboards for further invasions. In addition, the presence of mining villages within the indigenous territory constituted a direct and permanent threat to the physical and cultural preservation of indigenous groups in the territory.<sup>91</sup>

The plight of the indigenous groups living within the limits of the RSS became of particular concern for international organizations. In part this was due to the similarities that existed between the challenges faced by the

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89. FUNAI's rejection of third parties' claims over indigenous lands illustrates the process of institutional change that the agency has undergone since the end of the military rule. From its inception until 1991, FUNAI's eighteen presidents were either military officers or had direct ties to the military government. In 1991, Sydney Ponssuelo became the first of FUNAI's presidents whose professional history indicated a sincere commitment to indigenous rights. Since then, three of FUNAI's six presidents have held previous positions in major indigenous rights advocacy organizations (Márcio Santilli (1994–1995), Márcio Lacerda (1999–2000), and Carlos Marés (Present)). Unfortunately, the political liberalization of FUNAI's administration has been accompanied by a weakening of its position vis-à-vis other governmental agencies in charge of indigenous policies (namely the Ministry of Justice).
90. The first to encourage the miners' invasion of RSS was, once again, Romero Jucá, Governor of Roraima between 1988 and 1992 and currently Senator for the state.
91. Five different populations live within the indigenous area Raposa Serra do Sol: the Macuxi, Ingariko, Wapixana, Taurepang, and Patoma.

Yanomami in the 1980s and those affecting the groups in the RSS area.<sup>92</sup> The Environmental Defense Fund in the US and Survival International in the United Kingdom took the lead in mobilizing international support for the demarcation of the indigenous area RSS in its entirety. EDF lobbied the US Congress and supported Tom Lantos' (Democrat, California) and John Porter's (Republican, Illinois) letter to the Brazilian president, co-signed by fifteen other representatives, urging the demarcation of the RSS.<sup>93</sup> Survival International organized a petition to the Brazilian government also calling for the demarcation. The petition contained more than 50,000 signatures.<sup>94</sup> The same organization helped to persuade the United Nations and the European Parliament to position themselves against the reduction of the area and against the creation of mining villages within it.<sup>95</sup>

As a result of the intense domestic and international campaign against the reduction of the indigenous area RSS, and of the determination of the affected indigenous populations,<sup>96</sup> the Brazilian president issued a decree on 11 December 1998 demarcating the area in its entirety.<sup>97</sup> The fact that in January 2000 the indigenous populations within the RSS were anticipating the immediate registration of their land should be seen as an indication of the (comparative) political strength that the Brazilian indigenous movement and its domestic and international supporters have acquired over the years *vis-à-vis* the Brazilian government and opposition interests. Unfortunately, the other seven indigenous areas affected by the Decree 1775/96 have not attracted the same level of international attention as has the RSS. Their territorial integrity remains threatened by the revisions ordered by Jobim.

The demarcation of the RSS is all the more significant in light of the fact

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92. Both indigenous areas are among the largest ever demarcated in Brazil. Indigenous groups face the same coalition of antagonistic interests, i.e. Roraima politicians and mining corporations and cooperatives, and the legal strategies to reduce the size of the areas and transform them in discontinuous areas interrupted by non-indigenous villages were very similar.
  93. Environmental Defense Fund, *Members of Congress Urge Indian Land Protection in Brazilian Amazon*, 7 Oct. 1996, available at <[http://www.environmentaldefense.org/pubs/NewsReleases/1996/Oct/b\\_amazon.html](http://www.environmentaldefense.org/pubs/NewsReleases/1996/Oct/b_amazon.html)>.
  94. *Theft of Indian Land/Raposa Serra do Sol, Brazil*, URGENT ACTION (Survival International, England) Dec. 1996.
  95. *Resolution of the European Parliament Has Repercussions in Brazil*, SEJUP NEWLET., No. 218 (Serviço Brasileiro de Justiça e Paz, Brazil), 29 Feb. 1996 (on file with author).
  96. One of the strategies used by the Macuxi group during the period of dispute over the boundaries of the RSS was to start, themselves, the physical demarcation of the area. This was a novel strategy as efficient as it was dangerous due to its potential for direct confrontation between indigenous peoples, gold miners and ranchers.
  97. Minister of Justice Renan Calheiros, *Portaria (administrative ruling) n. 820 recognizing the permanent possession by the Indians Macuxi and Wapixana of the area Raposa Serra do Sol*, DIÁRIO OFICIAL, 11 Dec. 1998.

**TABLE 1**  
**Demarcation of Indigenous Areas in Brazil**

<i>Period</i>	<i>Number of Areas Demarcated and Registered</i>	<i>Total Size of Areas Demarcated and Registered (hectares)</i>
Before 1990	282 *	44,547,665
From 1990–99	243	63,182,232
From 1990–94	128	31,837,656
From 1995–99	115	31,344,576

Source: IBGE (1993) and <[www.isa.org.br/provind/ondestao/placar.html](http://www.isa.org.br/provind/ondestao/placar.html)>

\*(information available only for demarcated lands)

that the anti-indigenous coalition opposed to it remains mobilized and active.<sup>98</sup> The campaign for the RSS thus marks a new phase in the indigenous peoples' struggle for their land rights. Between 1990 and 1999 (despite the paralysis entailed by the polemic Decree 1775/96), 243 indigenous areas were demarcated in Brazil. In terms of hectares demarcated, this means a 140 percent increase over the total area demarcated prior to 1990 (see table 1). With the demarcation process practically completed, as it was mandated by the 1988 Constitution, the challenge that indigenous peoples now face is protecting their lands from invaders and from exploitation by economic interests.

## V. CONCLUSIONS

This study has shown that the capacity of the Brazilian indigenous movement to successfully participate in the democratic process, to overcome the challenges imposed by opposition interests, and to assert indigenous rights is affected by three factors: indigenous peoples' understanding of and willingness to participate in Brazilian politics, the strength of the domestic coalition committed to indigenous rights, and the level of support provided by the international environmental and human rights community. In the period of Brazil's transition to democracy (1985–1990), these three factors combined to enhance the political position of the

98. The latest strategy devised by the Roraima politicians as of 1999 was to force the establishment of a *Comissão Parlamentar de Inquérito* (Congressional Investigative Commission) to investigate FUNAI's operations. According to CIMI, this strategy aims at pressuring FUNAI so that the agency agrees in revising the demarcation of the RSS area in return for the dismissal of charges and extinction of the Investigative Commission (Cong. Investigation Comm. Andre Vasconcelos), *CPI Chega Tarde em Maturuca*, Oct. 1999, available at <<http://www.cimi.org.br>> (visited 28 Feb. 2002).

indigenous movement *vis-à-vis* anti-indigenous interests inside and outside the government bureaucracy. Indigenous peoples' active participation in the 1987–1988 constitutional process guaranteed that the country's Constitution recognized their most vital rights—the rights to their lands and to cultural autonomy. The 1988 Constitution, by recognizing indigenous peoples' organizations, also opened up pluralist avenues for their political representation and for the pursuit of their rights. As a consequence, indigenous organizations proliferated at the local and regional levels, their demands and strategies fully reflecting the diversity of Brazilian indigenous peoples.

In the period of Brazil's democratic consolidation (1990–2000) however, the political capacity of the indigenous movement has been, on occasion, negatively affected by cleavages in the domestic coalition for indigenous rights and by a relative decrease in the level of international interest in environmental and indigenous issues in Brazil (when compared to the 1980s). As a result, the balance of the period mixes successes and setbacks for the Brazilian indigenous movement. On the one hand, indigenous peoples have been able to expand their avenues of participation in Brazilian politics through the creation of CAPOIB. The organization played an important catalyst role in the struggle against the Decree 1775/96, although it is too soon to assess how resilient, responsive, and effective it will remain in the long term. In addition, the Brazilian indigenous movement, with the support of Brazilian and international indigenous rights organizations, was able to minimize the detrimental effects of the Decree 1775/96 and, in particular, to guarantee the demarcation of the Raposa Serra do Sol Indigenous Area. Since 1997, indigenous land demarcations in Brazil have been expedited.

On the other hand, indigenous peoples have been unable to break the political stalemate that has led to the paralysis of the process of formulating a new statute on indigenous peoples. Disagreements among indigenous peoples, often reflected in the approaches of their main support organizations, ISA and CIMI, have weakened the ability of the indigenous movement to pressure for the enactment of new legislation. In addition, international groups committed to indigenous rights have avoided any involvement in the issue. Their decision is appropriate because one of the most contentious points addressed by the new law is mining in indigenous lands, a topic that in the past motivated nationalistic charges against international supporters for indigenous rights in Brazil.

Without a new law, the 1988 constitutional principles guaranteeing indigenous rights remain unregulated. The grievances of specific groups and communities (land invasions, illegal logging and mining activities, violence against individuals, and health needs) continue to be addressed on a case-by-case manner, usually by local organizations or directly through the

FUNAI. Political and material resources available for these struggles vary, and so do their outcomes. In the absence of a new statute, the Brazilian indigenous movement remains limited in its ability to develop long-term strategies to address the structural threats to indigenous rights.

Brazil's redemocratization process has opened a new chapter in the relationship between indigenous peoples, the state, and the dominant society. Indigenous peoples' political gains in the period have no parallel in Brazilian history. Yet, the consolidation of such gains greatly depends on the existence of ordinary law that would make the constitutional principles operational. The struggle for indigenous rights in Brazil has thus come to a crossroad. The enactment of a new statute on indigenous rights has the potential to affirm the position of indigenous peoples as full participants in and beneficiaries of Brazilian democracy. Conversely, the delay in enacting such legislation creates a permissive environment in which anti-indigenous interests are free to use all available means to revert the gains obtained by the Brazilian indigenous movement in the past fifteen years.