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STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final Report (first part) submitted by the Special Rapporteur Mr. José R. Martínez Cobo

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VII. Basic principles

A. Introductory remarks

1. In many countries, the words "basic principles" make reference to measures adopted for the establishment of adequate machinery to take charge of indigenous affairs and implement the official State policy as concerns the indigenous populations. In other countries measures to eliminate discrimination against indigenous populations, either in general terms or in special areas, may have been taken as fundamental ingredients of action to overcome unsatisfactory institutions or practices. Some provisions deemed to be of permanent relevance in this field may have been enshrined in the Constitution or other fundamental laws. Special legislative enactments, administrative rulings, executive decrees and judicial decisions may have come to form a mass of legal pronouncements seeking to solve the legal and practical problems arising from the application of the officially adopted outlook vis-à-vis indigenous populations, and to bring State action to take due account of the desires and preferences of the indigenous populations themselves. A body of law may exclusively contemplate indigenous populations in all relevant aspects of state action.

2. It is not possible to deal in this chapter with all these matters, many of which will be discussed under the appropriate headings further on as part of the respective areas of study. Thus, for example, questions of policy will be discussed under the "fundamental policy" chapter, while another chapter will deal with "administrative arrangements", grouping all the material on machinery created for action in this field. Each of the substantive chapters discussing matters relating to "health", "housing", "education", "language", "culture", "occupation", "employment", "land tenure", "political rights", "religious rights and practices" and "legal assistance and fair administration of justice" will deal with the most important decisions and action taken in the particular area of action enunciated in the corresponding tables.

3. The present chapter, then, will have the limited function of indicating what questions concerning indigenous populations may have been dealt with in constitutional provisions or other fundamental laws, and the fundamental juridical status attributed to those populations. It will also mention the special basic legal provisions dealing with indigenous populations and the measures taken or contemplated to put an end to discrimination against such populations in general terms, or in areas not specifically covered in the chapters dealing with the ten areas of study mentioned above. In preparing the final report, when it is hoped that confirmed data will be available, treaties concluded between a few States and some indigenous nations and peoples will be mentioned as basic provisions in those systems, regardless of whatever discussion may be included later under each particular area where the existence and effects of these treaties may be relevant.

B. Fundamental provisions concerning indigenous populations

4. In some countries there is no systematic set of legal provisions (laws, regulations, administrative and executive decisions or judicial rulings) that constitute a legal régime applicable to the indigenous populations. These countries have isolated provisions dealing with specific aspects which remain ad hoc provisions, unrelated to others unless they are amendments to them. Other countries have moved from a system of isolated provisions to a systematic body of laws. In still others, by contrast, a broad and comprehensive legal régime has disappeared in the course of time and all that is now left is a number of measures and provisions relating to particular subjects.

5. Although it is clear that State action can in theory be better directed in a systematic and coherent way through clear and co-ordinated legal channels within a specific body of law, the fact of indicating that a special legal régime does or does not exist in particular countries is not intended to give the impression that the lack of such a régime makes effective and methodical action impossible. Such action can be carried out with or without legal rules of this kind, while conversely, the lack of action does not necessarily result from the absence of such a régime. Attention is simply being drawn to a situation in which legal development has been either diffuse or concentrated, these being discernible characteristics, in order to constitute groups for the sole purpose of organizing the description given in this chapter. It must be emphasized that reference is made to the available data concerning basic provisions as presented by the material that serves as the basis and support for this study, especially the relevant country monographs in the form in which they were communicated to the Governments concerned for their observations and comments. Naturally, where replies have been received, the observations and data provided have been duly taken into consideration.

6. In this connection, the available information on Nicaragua appears to show that between 1880 and 1935 a series of legal texts were promulgated in connection with the sale and leasing of land belonging to indigenous communities, the restitution and gift of land to those communities and legal personality for them. A number of these texts relate to the status of the Miskito Indians. For example, a decree of 28 February 1893 provided that the Indians concerned were to remain under the protection of the Republic and that all income derived from the Miskito territory along the coast would be invested for their benefit. On 5 October 1903 it was provided that each of the indigenous families established in the villages and settlements within what had formerly been the Miskito reserve would be assigned ownership of four manzanas of land. In pursuance of the treaty concluded in 1905 between Great Britain and Nicaragua with respect to the territory of that reserve, a decree dated 21 August 1905 provided for the establishment of an ad hoc committee responsible for legalizing the title of the Indians to such land as they had acquired and for awarding plots of land to those who did not possess any. By a decree of 24 May 1934 it was decided to donate 40,000 hectares of land to the creole/indigenous community of Bluefields. Decree No. 293 of 26 November 1945 established the National Indigenous Institute of Nicaragua.

7. According to the available information on Paraguay, Supreme Decree No. 81 was issued over 100 years ago, on 7 October 1843; this has been described as the first basic text dealing with certain aspects of the activities and properties of the indigenous groups of that time. 1/ Subsequently there was a multitude of isolated provisions dealing with specific aspects, but they were never compiled or recast in the form of a consolidated and systematic legal text. Indeed, it was reported in 1975 that in Paraguay there is no specific indigenist body of laws. The indigenous population is mentioned in laws, decrees and resolutions concerning land property and labour contracts. The most specific is Resolution No. 1689, 5 October 1973, of the Instituto de Bienestar Rural, the government office for questions of land distribution. It recommends that all indigenes be inscribed in the birth register in order to obtain full civil rights, but this recommendation comes from an office without legal authority for this matter. 2/

1/ Ramón César Bejarano, "Solucionemos el Problema Indígena" (Protección de sus Derechos), article published in the daily newspaper ABC Color on 24 December 1972.

2/ Information supplied by the Anti-Slavery Society on 3 September 1976.

8. As concerns the Achó, Resolution No. 391, 13 June 1957, of the Minister of the Interior, states that the killing, injuring or kidnapping of Achó "of any age or sex" is a crime that must be punished "with all severity of law". This is completed by Circular No. 1 (5 September 1957) of the Supreme Court of Justice, stating (with reference to all indigenes, but meaning especially the Achó case) that "the Indians are as much human beings as the other inhabitants of the national territory". 3/

9. In the case of some other countries, all that is available is a specific body of data relating to a particular subject or to certain matters in particular.

10. In some of the latter countries, stress is placed on the creation of agencies and other machinery as basic provisions for the establishment of effective services to the indigenous populations.

11. Thus, in Venezuela, Decree No. 20 of 6 March 1958 set up the National Indigenous Commission, whose functions are set forth in article 3 of that Decree. 4/ The Commission is the body called upon to promote the policy adopted towards the country's indigenous population in furtherance of the constitutional provision concerning "the exceptional system required for the protection of the indigenous communities and their gradual incorporation into the life of the nation" (article 77 of the Constitution). 5/

12. In the Philippines, the creation of the Commission on National Integration was hailed as the institution of the agency needed to achieve the goals proclaimed in the Constitution concerning the National Cultural Communities, on which the Philippines Government, making reference to Article XV Section II of the Constitution, has stated that the laws of the country officially recognise through special provisions and exceptions for the benefit of the members of the groups collectively referred to as National Cultural Minorities recently changed to National Cultural Communities by the New Constitution. The Bill of Rights of the Constitution guarantees expressly the fundamental constitutional rights to every citizen without any distinction as to any ethnic, religious or linguistic classification or groupings. 6/

13. The Bill of Rights embodied in the old and new Constitution guarantees the right of all persons to enjoy their own culture in the manner not contrary to the laws of the land, and according to the Government:

> "the provisions of the new Constitution are the culmination of the recognized right of the minorities to autonomous cultural development. There is no law abridging or stultifying such natural right of the individual. The Philippines specifically prohibits class legislation and any law found to be of such nature is declared unconstitutional and hence, null and void."

3/ Ibid.

4/ See the section on administrative arrangements, which will be submitted at a later stage.

5/ See section C below on specific constitutional provisions relating to indigenous populations.

6/ Sinsuat, Datu Hama S. National Integration, The Key to a New Society. Preface to Commission on National Integration Report, 1973, separate pagination, p.1.

14. In the preface to the 1975 Report of the Commission on National Integration the then Chairman of the Commission Mr. Sinsuat stated that "the Government agency commonly known as CNI (Commission on National Integration) was organized by an act of Congress, R.A. 1888 on 22 June 1957 ... This agency has the task of working for the political, social, moral and economic uplift of the National Cultural Communities (Minorities) and hence, speeding their integration into the body politic". He added that "... The legal fiction does not contemplate a dominating culture of groups since equal status is recognized and the numerical minority is protected and given special attention."

15. As regards the native Muslim inhabitants, the same author has stated:

> "The Filipinio Muslims together with the other ethnic minority groups of the country have now been guaranteed recognition in the fundamental law of the land (see article XV of the Constitution).
>
> "The great attention and massive thrusts of socio-economic development of the Muslim areas of Mindanao and Sulu by the present administration has given proof of the sincerity in the implementation of this vital provision in the new Constitution. Now the ethnic cultural minorities could feel secure that they will not lose their identity and culture. For it is when the minority groups feel that it is not possible to merge into a larger political and national community as an integral but distinguishable part of it that they will sulk into dejection and perhaps demand self-determination in their own right." 7/

16. In Laos, it would appear that emphasis is placed on certain aspects of education. According to a Government statement on legal matters, article 3 of Royal Ordinance No. 248 of 30 July 1972 relating to the reform of the education system stipulates that a special effort will be made to ensure women, villagers and ethnic groups real equality of access to education. In all possible cases, ethnic groups will receive primary education in their mother tongue at the same time as education in the national language. The application of the principle of equality of education has, however, encountered innumerable problems in the case of heterogeneous nomad minorities comprising several subgroups and speaking very different dialects among themselves. In this case, in an effort to reduce de facto inequality, the Ministry of Education has decided to draw up for their benefit special lists of admission to the normal schools, and hopes in that way to be able to extend education further to the children of these minorities through the use of teachers with the same ethnic background. 8/

7/ Sinsuat, Datu Homa S., The Filipino Muslim, Speech delivered on 24 September 1975, at the Symposium-Discussion Series on National Development, sponsored by the Department of Foreign Affairs and Department of Public Information. Asian Institute of Management Building, Makati, Rizal, p.5.

8/ Information provided by the Government on 15 March 1975.

17. Information available on Australia in connection with basic provisions does not show the existence of any systematic body of law on Aboriginals, except in the State of Queensland. More will be said later in connection with the Queensland Statutes and Regulations regarding Aboriginals and Torres Strait Islanders (see paragraph 149 below).

18. The Australian Constitution no longer makes any special provision for Aboriginals. In May 1967 a referendum resulted in a massive vote in favour of two changes in the Constitution: section 127, providing that Aboriginals should not be counted in censuses, was repealed; and the words "other than the Aboriginal race in any State" were deleted from Section 51 (xxvi), which had formerly read:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
>
> "... (xxvi) the people of any race other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws."

19. The result was to confer upon the Commonwealth a concurrent power to make special laws for people of the Aboriginal race in any State if the Parliament considered it desirable or necessary.

20. Previously, the State Governments had exercised sole legislative power and responsibility for the Aboriginals resident within their boundaries, responsibility for Aboriginals in the Northern Territory being vested in the department of the Commonwealth Government which administered the Northern Territory. The State departments responsible for Aboriginal affairs functioned under various State Acts. Most of the protective and restrictive provisions of State and Territory legislation had been removed in the 1960s though the process of repealing such provisions is only now being finally completed.

21. Since the 1967 referendum above-mentioned, the Commonwealth has not introduced fundamental national legislation in respect of Aboriginals, although it has repealed sections of Commonwealth laws and encouraged the repeal of State legislation that might be regarded as discriminatory.

22. Legislation in Peru does not refer to the Indian as an isolated individual but to the Indian as part of an indigenous community. There is a special legal régime for the traditional indigenous communities, and special laws or decrees have been promulgated protecting the Indian in such areas as wages, the organization of producers' co-operatives, personal services, domestic work by minors, internal migration and schools. Once he is considered as a worker, the Indian comes within the framework of the general legal system whereas as a member of a traditional community he is subject to special provisions of the Constitution, or of the Civil Code as far as the system of land tenure is concerned.

23. Articles 207 to 212 of the Peruvian Constitution are quoted below in the section on specific constitutional provisions relating to indigenous populations. 9/ Title IV of the Civil Code of 1936 provides as follows:

9/ See para. 72 below.

"Art. 70. The indigenous communities shall be subject to the relevant provisions of the Constitution and of legislation enacted in accordance with the requirements of the Constitution.

"Art. 71. It shall be mandatory for these communities to be entered in their own special registers. It shall also be obligatory to keep community land registers and to conduct a census review once every five years.

"Art. 72. The communities shall be represented by persons elected from among the individuals of full age forming the community; individual members of the group who can read and write and who have obtained an absolute majority of the valid votes shall be elected.

"Art. 73. The indigenous communities cannot rent or transfer the use of their land to the owners of adjoining estates.

"Art. 74. Pending the enactment of the legislation referred to in article 70, the indigenous communities shall continue to be subject to their specific laws, to the ownership régime laid down in this Code in so far as it is consistent with the indivisibility of their land, and to provisions issued by the Executive Power.".

24. Act No. 14,669, relating to the election of Municipal Councils, establishes the right of the indigenous communities to elect their representatives to speak and vote in the District Municipal Councils. The communities may replace these representatives one year after their original appointment, or as vacancies occur (articles 65 to 68).

25. Decree-Law No. 20,653 issued in June 1974 deals separately with the native communities of the forest and forest-bordering regions. The preamble states that a basic requirement for the regions in question is the introduction of an orderly system governing the rights to own, use and work the land. The following articles of the operative part of the Decree-Law are of interest here:

"Article 1. The object of this Decree-Law is to establish an agrarian structure contributing to the over-all development of the forest and forest-bordering regions so as to enable their population to attain levels of living compatible with the equality of human beings.

"...

"Article 6. The State recognizes the legal existence and the juridical personality of the native communities."

26. Decree-Law No. 21,156 of 27 May 1975 recognized Quechua as an official language of Peru on an equal footing with Castilian Spanish, and certain legal provisions intended to give practical effect to that declaration were adopted. 10/ Peru's Criminal Code contains provisions for determining the applicable penalty in certain cases where an Indian is the perpetrator or victim of an offence, with a view to affording special protection to the Indian (article 45, in connection with articles 42 and 90, and articles 225 to 227)." 11/

10/ See the chapter on language (E/CN.4/Sub.2/476/Add ...).

11/ See the chapter on legal assistance and fair administration of justice.

27. In Ecuador, the legislation adopted in connection with the indigenous communities includes Supreme Decree No. 23 of 7 December 1937 (Legal Status of Peasant Communities) which recognizes the legal personality of such communities and provides for efforts to be made to convert them into producers' co-operatives. It is stated that customs and "the present situation" determine the status of members of the community. Participation in the use of community land is determined by the number of members of each family and the benefits they derive, and is in proportion to the work performed by each individual, except in the case of work carried out for the collective benefit (articles 1 to 5). Title II of this Supreme Decree contains the following provisions for the protection of the indigenous communities:

"Article 7. The State shall provide effective protection and tutelage to the peasant communities, in particular through the Minister for Social Security, who shall have the following functions and duties in their regard:

(a) regulating the use of community capital goods, taking into account the conditions and ways of life of the various communities;

(b) assigning officials to visit the communities at least once a year, to ascertain whether they are complying with the relevant laws and regulations and to report on their requirements, in order that these can be duly met;

(c) keeping the register of communities;

(d) arranging for a topographical survey to be made of the community settlements and for a census to be carried out of each community; and

(e) expropriating water and land that are essential to the maintenance of the communities.

"Article 8. Should the communities require capital for the purpose of productive investment in agriculture, they may, with the authorization of the Minister for Social Security, mortgage community property and banking institutions.

Any mortgages constituted in this form shall have all the effects indicated in the ordinary laws.

"Article 9. The State or the municipalities shall found at least one primary school in each community."

28. The following has been written about the effects of the foregoing Decree:

"In 1937 the Law of Communities established the legal status of Indian communities and provided for a new system of local government. However well-intentioned, this law began with the assumption that communal lands were more extensive than they actually were, and therefore the law had little effect." 12/

12/ Weil, Thomas E, and others, Area Handbook for Ecuador, Foreign Area Studies, American University, Washington D.C., p.79.

28A. Finally, with regard to language, article 1 paragraph 3 of the Ecuadorian Constitution states that "The official language is Castilian Spanish. Quechua and other indigenous languages are recognized as forming part of the national culture."

29. In many countries there is a group of texts or a single fundamental text, sometimes with supplementary stipulations, purporting to deal systematically with basic issues affecting indigenous populations. Information on these aspects varies from the bare mention of the relevant texts (often starting with concurrent ad hoc texts or measures that have come to be incorporated into a body of law applicable to indigenous populations), to a discussion in historical perspective of the process of integration of the pertinent texts into a body of law and/or the disintegration of that body of law into separate texts.

30. In Burma, the aborigines, and particularly the forest-dwelling populations, are governed by special regulations applicable to the hill tracts of the Kachin, Shan and Kayah States and the frontier areas. The aims of the Chin Special Division Act of 1948 are to make the aborigines in that area self-governing and to assist them to improve their standards of public health and education (including technical and vocational training), and their economic conditions.

31. In Norway the first part of the Act of 12 May 1933 contains provisions granting the exclusive right of reindeer husbandry to the Lapps. According to the Act of 13 June 1969 concerning the Basic School (section 41, subsection 7), children of parents who use Lappish as their daily spoken language shall be provided with teaching in Lappish if their parents so demand. Among relevant Royal Decrees (decisions by the King in Council), the following may be mentioned: the Royal Decree of 28 November 1962 containing specific measures of an economic and cultural nature to make it possible for the Lapps to improve their skills and realize their potentialities within the framework of society; the Royal Decree of 19 June 1970 concerning measures for improving housing conditions for the Lapp population in Inner Finnmark; and the Royal Decree of 28 June 1974 concerning a plan of action aimed at strengthening the economic base and ensuring the pattern of settlement of the Lapp population in Inner Finnmark.

32. In Malaysia, the legal position of the Orang Asli is entrenched in a fundamental law, the Aboriginal Peoples (Amendment) Act 1967. This Act defines the Orang Asli, allocates responsibility for the administration of their affairs and their general well-being and advancement, and contains a statement of Government policy with regard to these matters (see also paragraph 79 below).

33. In Indonesia members of all isolated groups are nominally Indonesian citizens and are thus subject to the basic provisions of the 1945 Constitution. Supplementary to that Constitution is the Law on the Basic Stipulation of Social Welfare (No. 6 of 1974) which, inter alia, imposes on the State the obligation to handle the problems of isolated communities and to bring development to them. The Law does not define rights or obligations of such isolated communities but is rather a general act laying down broad guidelines for the State to follow in its dealings with them.

34. In Guyana, in addition to the constitutional provisions quoted in another part of this report, 13/ basic provisions relating to Amerindians are contained in the Amerindian Ordinance and the State Lands (Amerindian) Regulations. Provisions of these fundamental texts are quoted in several parts of the present study. The Government states that provisions on the protection of fundamental rights and freedoms apply to every person in Guyana "including the indigenous populations".

35. In Brazil there is a special law, the Indian Statute, Act No. 6001 of 19 December 1973, incorporating all basic provisions on the indigenous populations of Brazil, among which the following may be cited here. */

"Art. 1. This law regulates the juridical situation of the Indians or forest-dwellers and native communities for the purpose of preserving their culture and integrating them progressively and harmoniously in the national communion.

"Sole Paragraph. The protection of the laws of the country is extended to the Indians and native communities in the same terms as it applies to other Brazilians, safeguarding native usages, customs and traditions, as well as the particular conditions recognized in this Law.

"Art. 2. It is the duty of the Union, the States and the Counties (municipios), as well as the agencies of the respective indirect administrations, within the limits of their competence, for protection of the native communities and preservation of their rights, to:

"I - Extend to the Indians the benefits of common legislation, whenever application thereof is possible.

"II - Furnish assistance to the Indians and native communities, even though they are not integrated in the national communion.

"III - Respect, while providing the Indians with means for their development, the peculiarities inherent to their condition.

"IV - Assure the Indians of free choice of their way of living and means of subsistence.

"V - Guarantee the Indians the right to remain, if they so wish, permanently in their habitat, providing them with resources there for their development and progress.

"VI - Respect, in the process of integrating the Indian in the national communion, the cohesion of the native communities, and their cultural values, traditions, usages and customs.

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*/ English text supplied by the Government of Brazil.

13/ See Section C below, "Specific Constitutional Provisions dealing with Indigenous Populations".

"VII - Carry out, whenever possible with the co-operation of the Indians, programs and projects tending to benefit the native communities.

"VIII - Utilize the co-operation, spirit of initiative and personal qualities of the Indian, with a view to improving his living conditions and integrating him in the development process.

"IX - Guarantee the Indians and native communities, in the terms of the Constitution, permanent possession of the land they inhabit, recognizing their right to exclusive usufruct of the natural wealth and all the utilities existing on that land.

"X - Guarantee the Indians full exercise of the civil and political rights to which they are entitled by law.

"...

"Art. 4. The Indians are considered:

"I - Isolated - when living in unknown groups, or groups of which only a little vague information is forthcoming from fortuitous contacts with elements of the national community.

"II - Integrating - when in intermittent or permanent contact with alien groups, living to a greater or lesser extent in the conditions of their native existence, but accepting certain practices and ways of life common to the other sectors of the national community, of which they stand progressively more in need for their very subsistence.

"III - Integrated - when incorporated in the national community and recognizedly in full enjoyment of their civil rights, even while retaining practices, customs and traditions that are characteristic of their own culture."

36. The information relating to some countries contains references to the process of gradual integration of the basic instruments now governing State action in indigenous affairs.

37. In this respect, the following statements relating to Chile may serve as an example of the gradual process of consolidation of legislation which typifies some phases of the process noted in many countries:

"A large number of decrees and laws have been passed in stages with the aim of providing legal protection for land ownership in the Araucanian reserves.

"A chronological list of those instruments is omitted in view of the fact that they are all now consolidated in a single text: the Act on the Division of Communities, the Repayment of Loans and the Settlement of Indigenous Persons (No. 4.11), adopted on 12 June 1931." 14/

14/ Information supplied by the Government in 1974.

38. In information supplied in 1975, the Government also mentioned Act No. 14,511 of 3 January 1961 and "the present Act No. 17,729".

39. The Special Rapporteur recently learned of a Decree-Law signed by the President of the Republic of Chile on 21 May 1979; it contains provisions concerning the indigenous population of that country.

40. The process of elaboration of legislative provisions in this matter in Colombia has been described as follows:

"Subsequent provisions amending and supplementing Act No. 89 did not alter its character as an instrument aimed exclusively at regulating land tenure among the communities placed in reserves (reducidas) which had still not lost all they received under the Spanish crown. The Indigenous Statute was supplemented by Act No. 30 of 1921, which provided that 'The indigenous populations dealt with in Act No. 89 of 1890 may not be assigned to any service by individuals or authorities of any kind unless they are paid the appropriate wage, stipulated in advance'. Since that time, the best-known modification of this legal system lay in two provisions of Act No. 135 of 1961, or social agrarian reform. The first empowered the Colombian Agrarian Reform Institute (INCORA) to restructure the indigenous properties and, where necessary, 'to provide them with additional areas of land or facilitate the settlement of the surplus population'; the second authorizes it to divide up the remains of the communities already placed in reserves. Most of the 70 surviving reserves, whose native population has more or less merged with the peasant smallholders of the Colombian Andes, are in this situation. However, the good intentions which appear to underlie these regulations are in practice counteracted by the obligation imposed on indigenous persons to pay for the new land assigned to them, often on ridiculous terms. Such is the case of the tribes of the Sibundo Valley: once the expropriation of their lands had been publicly announced by the Capuchin-Catalan community of Putumayo, INCORA proceeded to purchase the lands occupied by the religious communities in order to divide them up among the natives, after a major drainage operation had been carried out which put up the price (according to the original calculations) to over 20,000 pesos ($US 1,000) per hectare.

"Let us pass over the ineffectiveness of the limited legislation protecting the work of the indigenous minorities most assimilated into the life of the nation, in order to see how extensive it is in comparison with that enacted for the benefit of the "savages", which were under the jurisdiction of the missionaries. For these only a short piece of national legislation was found (Act No. 60 of 1916), which provided that settlers could not be allocated land 'in territories occupied by Indians'. This was subsequently restricted by the above-mentioned Act No. 135 under the favourable attitude towards the Division of Indigenous Affairs', but was supplemented by the following: 'The Institute (INCORA), after consultation with the Ministry of the Interior, shall set up reserves of land for the benefit of the indigenous groups or tribes which do not possess them'.

This piece of legislation is totally ineffective, since: (a) no settler has ever been refused a plot of land, because when land has been allocated to a settler the natives have disappeared; (b) during the 10 years when Act No. 135 was in force, not even one reserve for indigenous peoples was set up, despite the fact that the number of groups which were compulsorily displaced ran into the hundreds." 15/

41. Furthermore, the effects of this legislation:

"... are evident in bizarre situations [to which it gives rise] and in the permanent infringement of the most elementary human rights.

For example: the Supreme Court of Justice recently ruled that since the natives who were not culturally assimilated were outside the range of national legislation, there was no legal penal system applicable to them. This does not, however, prevent many of these natives accused of more or less serious offences from spending months and years in prison awaiting a judgement that never arrives." 16/

42. On the subject of present efforts to update legislation concerning the indigenous populations, the Government of Colombia states that intensive work is proceeding on matters connected with the preparation of a statute modernizing the concepts of integration and cultural exchange, to replace the anachronistic and obsolete legal system based on Act No. 89 of 1890. At present, priority is being given to implementing regulations for Act No. 81 of 1967 approving the ILO Convention on Indigenous and Tribal Populations, which will become the most effective instrument for protecting the land, lives and assets of those [illegible]. The National Indigenous Policy Council has also been restructured recently in order to make it more effective. Agencies working at the level of the indigenous communities, on which genuine representatives of these ethnic minorities will hold seats, are to participate in its work.

43. The following text, containing a list of legislative instruments relating to the indigenous populations of Costa Rica and some information on the National Commission for Indigenous Affairs, has been supplied by the Government of that country:

Act No. 124 (21 August 1943) authorized the Executive to sign the instrument of accession to the Convention establishing the Inter-American Indian Institute, with headquarters in Mexico City.

Decree No. 45 (3 December 1945) established the Board for the Protection of the Aboriginal Races of the Nation and established territorial reserves for the indigenous tribes.

Decree Law No. 346 (14 January 1949) granted legal status to the Board for the Protection of the Aboriginal Races of the Nation.

Decree No. 11 (3 January 1950) identified the indigenous schools within the reserves.

Decree No. 34 (15 November 1956) defined the territory of certain indigenous reserves.

15/ Víctor Daniel Bonilla, "La destrucción de los grupos indígenas colombianos" in La situación del indígena en América del Sur, published under the auspices of the World Council of Churches and the Ethnology Institute of the University of Berne-Geneva, Editorial Nueva Tierra, Montevideo, Uruguay, 1972, pp. 65-68.

16/ V.D. Bonilla, loc.cit.

Act No. 2825 (14 October 1961) established the Institute of Lands and Settlement (ITCO) to initiate agrarian reform in Costa Rica. This Act clearly provides that the so-called Indigenous Reserves are in future to be considered national reserves and that ITCO is to be responsible for their administration. This means that the Protection Board no longer performs this function.

44. In 1971 a movement developed with the objective of combining in a single entity the voluntary pro-indigenous groups and the Board for the Protection of the Aboriginal Races of the Nation. This resulted in the creation of the National Commission for Indigenous Affairs (CONAI), but it was not until 11 July 1973, under Act No. 5251 that this body was granted legal status as an autonomous agency under public law and financed from public funds. The composition of this Commission and its Executive Board, and details of their respective functions and the funds required for the performance of their important tasks, will be discussed in the section on administrative arrangements.

45. Since the establishment of CONAI, important legislation, prepared with the Commission's active participation, has been passed. This includes:

Executive Decree No. 5904-G (14 March 1976), which established a number of indigenous reserves, defined their boundaries, and took a number of extremely important measures in connection with the indigenous communities of Costa Rica.

Executive Decree No. 5905-G (26 March 1976), which declared some indigenous reserves to be national emergency areas, in view of the constant invasion of these lands by non-indigenous persons. This Decree also provided that the National Emergency Commission and the Executive should co-operate with CONAI in protecting these reserves and guaranteeing the safety of their inhabitants.

Executive Decree No. 6036-G (26 May 1976), which recognized other indigenous communities, declared the territories they occupied to be "indigenous reserves", made minor alterations to the boundaries of the reserves, and corrected errors and omissions in the earlier texts.

Executive Decree No. 6037-G (26 May 1976), which extended to other indigenous reserves certain provisions of Executive Decree 5904-G and entrusted CONAI with a number of important functions;

Executive Decree No. 6066-G (14 March 1977), which rectified omissions in previous decrees relating to the land registration procedure for Indigenous Reserves.

46. Act No. 6172, the Indigenous Affairs Act of 20 December 1977 17/ deserves special mention. It is the culmination of a successful promotion and co-ordination process on CONAI's part, under the provisions of article 4 of Executive Decree No. 6037-G. This act consolidates all the legal provisions referred to above that were in force in December 1977.

47. Also worth noting are the regulations issued under the Indigenous Affairs Act, Executive Decree No. 8407-G of 26 April 1978, 18/ which embody the necessary provisions for the implementation of Act No. 6172.

17/ La Gaceta; Diario Oficial, 20 December 1977

18/ Ibid., 10 May 1978.

48. Basic provisions made for the indigenous peoples of Canada have been summarized by the Government in historical perspective as set out in the following paragraphs.

"Special legal and constitutional provisions relating to the native people of Canada extend back to colonial administration: most such references have to do with the protection of Indians on lands reserved for them. Thus, at the capitulation of Montreal to the British in 1760, the document of surrender stipulated:

'Article 40. The savage or Indian allies of his Most Christian Majesty shall be maintained in the lands they occupy if they wish to remain there; they shall not be disturbed on any pretext whatsoever ...'

"The British administration in 1763 established its policy toward native people in North America in a Proclamation of His Majesty George III, forbidding private purchase of land set aside for Indians and requiring the licensing of anyone who wished to trade with the Indians. It said in part that Indians 'should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them, as their hunting grounds ...' This early royal proclamation has the force of a statute in Canada and has never been repealed.

"At Confederation in 1867, the new constitution of Canada, the British North America Act, made clear in the sections dividing the jurisdictions between provincial governments and the federal government that the federal government assumed responsibility 'for Indians and lands reserved for the Indians' (91(24)).

"In a decision of the Canadian Supreme Court in 1939, Section 91(24) of the BNA Act was said to include 'Eskimos' in the term 'Indians'.

"In subsequent legislation establishing new provinces or extending their boundaries, provisions were explicitly made retaining federal responsibility for Indians and Indian lands. In a particular case, the transfer of the northern Ungava region to the province of Quebec in 1912 included the stipulation that the provincial government 'will recognize the rights of Indian inhabitants in the territory ... to the same extent and will obtain surrender of such rights in the same manner as the government of Canada has heretofore recognized such rights and has obtained surrender thereof'. The provincial government has not subsequently acted to reach agreement with the Indians resident in the area.

"The first post-Confederation Act dealing with 'Indians and lands reserved for Indians' was passed in 1868, entitled 'An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands'. This Act provided, inter alia, that the Secretary of State would be the Superintendent General of Indian Affairs who would have the control and management of the lands and property of Indians in Canada. This Act was amended in 1869 and 1874.

"In 1876 the first act to be entitled the 'Indian Act' was passed for the purpose of amending and consolidating the laws respecting Indians (the 1868 Act and its amendments). This Act (1876) was the first Federal legislation which clearly defined a 'reserve' and what classes of people would be 'Indians' for the purposes of the Act.

"Native people are encompassed by the Canadian Citizenship Act (1946), and this inclusion is made specific in a 1956 amendment which states that the Act shall apply to Indians and Eskimos.

"The Canadian Bill of Rights (1960) setting forth civil rights, equality before the law, freedom of religion, speech, assembly and the press, is assumed to apply to native people in that it states there shall be no discrimination 'by reason of race, national origin, colour, sex ...'.

"An important legal decision in 1969, Regina v Joseph Drybones, ruled that the Canadian Bill of Rights supersedes the Indian Act where adverse discrimination appears to exist in the Indian Act. The reasons of the Court as stated by Mr. Justice Ritchie were: '... an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty'.

"However a distinction may be seen in that 'positive discrimination' in the Indian Act is acceptable: a judgement to this effect was handed down in 1962 by Mr. Justice Tysoe in Regina v. Gonzales: 'The Indian Act is legislation which applied to a particular group of citizens, namely native Indians, a group which Parliament feels that for the good of its own members and for society as a whole ought to have particular rights and privileges and particular disabilities'.

"Indians and Eskimos are also assumed to be covered by provincial Human Rights Acts, which contain the same provision as that in the Canadian Bill of Rights against discrimination on the basis of 'race, national origin, and colour' in regard to matters under provincial jurisdiction, such as employment and education.

"A number of treaties between the Executive authority of Canada and various Indian bands or tribes set forth terms pertaining to the relinquishment of Indian territorial rights in exchange for specific land reserves and certain privileges. They apply only to about half of Canada and most date from the 19th century. These treaties have a particular status since they originated primarily with the executive arm of government, representing the Crown. Their particular value in the eyes of the Indian population is that they establish a relationship between the aborigines and the federal government, bypassing provincial jurisdictions.

"The case law developed in Canadian courts in dealing with Indian treaties is exceptionally sparse. The courts have ruled that the provisions of the treaties may be overridden by federal legislation but not by provincial legislation. The cases which have interpreted and applied treaty provisions make it clear that the Indian treaties constitute legally enforceable obligations. Unfortunate y, the extent to which treaty obligations are enforceable, and the extent of compensation which would be accorded breaches of treaty obligations is unclear.

"A recent decision by the federal government in regard to Treaty No. 7 is considered significant, however, The Treaty was signed in 1877. Indian tribes claimed that money in lieu of ammunition, promised in the Treaty, had never been paid. In March 1975 the federal government recognized the obligation and agreed to a settlement of $250,000. Several bands in southern Alberta will benefit from the settlement, which they regard as setting a precedent."

49. In New Zealand, in fulfilment of the Treaty of Waitangi (1840) and other agreements, many acts were included in the statute book to deal exclusively with Maoris or making a difference between Maoris and Pakehas. The Government has, however, been gradually removing such acts from the statute book. Thus, restrictions on the sale of liquor to Maoris were abolished in 1948 and separate registration of births and deaths in 1961; Maoris became eligible for jury service in 1961.

50. The New Zealand Government states that the greatest body of statute law still extant that applies specifically to Maoris is concerned with Maori (or ancestral) land. There are two underlying reasons for the laws specifically regarding this land. The first is that most Maori land is owned in common by families or sub-tribes, sometimes running into many hundreds or even thousands of people. This fact requires special provisions. Secondly the Maori land law includes protective provisions to safeguard the rights of Maoris to their ancestral lands.

51. In addition to the Maori land law, which is more fully dealt with later,[19] the specialized enactments still in force are designed to remove difficulties and handicaps peculiar to, or more common amongst, Maoris than non-Maoris. Examples of such enactments are the Maori Housing Act, the Maori Welfare Act, the Maori Education Foundation Act and the New Zealand Maori Arts and Crafts Institute Act. These will be referred to in their appropriate places.

52. The Citizens' Association for Racial Equality states in this regard:

"The whole tenor of the law, as indicated above, has been to bring Maoris as rapidly as possible within the general framework of British law as applied to New Zealand. They have been granted special status only for limited periods or in limited ways. English criminal and civil law were applied as fully as the forces of government would allow, though in fact Maoris in certain districts remained beyond the pale of British law for some time, and subject to their own law and custom (often modified by Christianity). One of the most significant exceptions has been in the franchise: since 1867 Maoris have voted separately for four members of the lower house (which has always had some 80 European seats), a concession which, with the increase in Maori population, has come progressively to under-represent the Maori people, but which is jealously guarded by them as it preserves a Maori voice in Parliament.

19/ See the chapter on land, to be submitted later.

"There are few other legal exceptions as far as Maoris are concerned - these were listed in the Report on Maori Affairs (The Hunn Report) of 1960 - but they have been progressively eliminated since then. Most of these exceptions were discriminations in favour of Maoris but so strong has been the European pressure for conformity (and legal equality) that special Maori legislation has been largely eliminated. It has been assumed that Maoris have become so assimilated that they no longer need protection."

53. In connection with the suppression of legal exceptions in favour of Maoris the Government comments:

"The fact also is that since that time there has been a tremendous increase in special programmes for the benefit of the Maori people ...". 20/

54. As far as other countries are concerned, there is information only concerning draft legislation. The Special Rapporteur does not know what is the current status of the bills concerned, despite his having requested more specific information on important aspects.

55. Data available in connection with the United States, whether Government or non-Governmental information, is of a different character. Thus the information made available by the Government of the United States in connection with the present study under the topic of basic principles reads as follows:

"Although many Indians had been made citizens prior to 1924, on that date all Indians and Alaska Natives became citizens of the United States and of all the respective States in which they resided. Thus they are subject to the basic provisions of the United States Constitution, the State Constitutions, and local city and county ordinances unless they are on a reservation, in which case Federal jurisdiction is retained." 21/

56. With respect to the question of citizenship it has been written that:

"Citizenship was not sought by the Indians as a group; indeed, many leaders objected to the measures when they learned about it fearing that it might somehow impair their tribal relationship. Their experiences in dealing with the government had been such that citizenship was not a possession of great promise. Relatively few individuals made use of the franchise in the first years after the passage of the citizenship act." 22/

20/ These special programmes will be discussed in the pertinent chapters of the Study.

21/ The Government makes reference to educational and law-and-order services illustrated in a table it provided and which is reproduced elsewhere in the present report. The Government also mentions here that "more Indian children in so-called federally recognised reservations attended public schools than Federal schools maintained by Indians." Finally, the Government made reference to jurisdiction for Indians in the several States "for law and order functions", as appearing in the table above mentioned.

22/ D'Arcy McNickle, Native American Tribalism, Oxford University Press, New York (1973), p. 91.

57. Further, it has been stated that:

> "In the United States, Indians are citizens, and have the same rights, duties, and responsibilities to local, state and federal governments as do all citizens. Nonetheless, several conditions may modify an Indian citizen's relationship to the government: (1) the current existence of a reservation, generally established before the territory became a State; (2) still applicable provisions of treaties; (3) special federal and State statutes applying to Indians as an ethnic group, such as substantive statutes relating to Indian education and administration of trust land and statutes appropriating funds specifically for Indian programs or services; (4) recognition of some Indians as eligible for 'Indians only' federal services, usually based on (1), (2) and (3) above and generally related to Indian land held in trust by the federal government." 23/

58. In an article developed by the staff of the Institute for the Indian Tribal Curriculum and Training Program, it has been written:

> "... the Constitution does not actually give the federal government any authority to govern Indian people in Indian territory. Yet it is often said that Congress has 'plenary' power (meaning complete authority) to govern Indians and Indian land, based upon one or more of these provisions in the Constitution. The United States courts, for the most part, refuse to say whether this is legal or not. The courts say that the legal status of Indian nations is a 'political question' which they cannot decide. As a result Congress, as well as the Executive Branch, has been largely free to infringe on Indian jurisdiction and sovereignty even without any clear constitutional power to do so". 24/

59. Commenting upon the constitutional provisions contained in Section 8(1) and (3) of the United States Constitution regarding Congressional power to regulate commerce with the Indian tribes and on the Government information contributed to the study and quoted above, it has been written:

> "Instead of holding forth the basic constitutional recognition of Indian tribes as an example for the world - which indeed it could well be - the United States response construes the question to launch what amounts to an attack on the legal status of Indians within the federal system. The Commerce Clause of the Constitution, along with the Treaty and War powers, provide the basis for all federal Indian programs and policies. The recognition of a tribe based upon these constitution, along with the Treaty and War powers, provide the basis for all federal Indian programs and policies. The recognition of a tribe based upon these constitutional powers is the basic provision which justified federal services and federal supervision long before the passage of the Citizenship Act of 1924." 25/

23/ Theodore W. Taylor, "American Indians and Their Governments" in Current History, December 1977, p.254.

24/ "A History of Indian Jurisdiction", in American Indian Journal, Vol.2, No. 4 April 1976, p.4.

25/ American Indian Law Newsletter, Vol. 7 No. 11, p.13.

C. Specific constitutional provisions relating to indigenous populations

60. The information on some countries does not indicate whether the relevant constitution contains provisions regarding indigenous populations. 26/

61. Some Governments on the other hand have provided specific information on this point. For example, the Government of Finland states that "The Constitution Act does not contain any provision dealing specifically with the Lapps ...", and the Government of Norway states that "there are no relevant provisions in the Constitution ...".

62. The statements of some other Governments may be interpreted in the same way. Thus, the Government of Indonesia states that "the Constitution does not recognise any distinction between citizens" and the Government of the Philippines states that "the present Constitution does not distinguish them (non-Christian tribes) from other citizens".

63. New Zealand reports that "unlike many countries, New Zealand does not have a separate body of written constitutional law. The basic human rights are guaranteed by a number of different enactments, and by common law. These apply equally to all citizens ...".

64. In a number of countries, on the other hand, questions relating to the indigenous population have been considered to be so basic that provisions regarding them have been included in their constitutions. 27/

65. Some of these constitutional texts contain only a few very brief and abstract provisions. For example, the Constitution of the United States of America, 17 September 1787, as amended up to 1967, provides that "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes (Section 8(1) and (3))." Similarly the Constitution of Argentina of 1 May 1853, as amended in 1860, 1866 and 1957, provides that "Congress shall have power to maintain peaceful relations with the Indians and to promote their conversion to Catholicism (article 67 (15)). Under article 91 of the British North America Act of 29 March 1867, which is the basic constitutional document of Canada, Parliament has legislative jurisdiction over the Indians and the land reserved for Indians (see para. 40 above). The Constitution of Venezuela of 23 January 1961 provides that the law shall establish an exceptional system required for the protection of the indigenous communities and their gradual incorporation into the life of the nation" (article 77, second paragraph)(see paragraph 11 above).

66. Other constitutional texts contain provisions which contemplate, in a more explicit form, the need to take special measures in favour of indigenous populations.

26/ These countries are Bolivia, Chile, Colombia, Costa Rica, El Salvador, Finland, France (French Guyana), Honduras, Japan, Laos, Mexico, Nicaragua, Norway, Paraguay, Philippines, Sri Lanka, Suriname and Sweden.

27/ These countries are Argentina, Bangladesh, Brazil, Burma, Canada, Ecuador, Guatemala, Guyana, India, Malaysia, Panama, Pakistan, Peru, the United States of America and Venezuela.

67. Thus, some constitutions contain principles providing for equality before the law, coupled with stipulations allowing or making provision for the special protection, well-being, development and advancement of certain groups as not being inconsistent with or contrary to the established basic equality. The groups on whose behalf these measures may be taken have been variedly described and include: "the backward sections of citizens" 28/ "the weaker and less advanced sections of the people" 29/ "members of under-privileged castes, tribes and groups" scheduled as "under-privileged classes" 30/ "backward classes of citizens" and "the scheduled castes and scheduled tribes". 31/ From other data available on those countries it becomes clear that the populations which are the object of study in this report are included among the groups for which these provisions are meant.

68. Among the groups on whose behalf these special measures may be taken the indigenous populations of some countries are, however, more explicitly mentioned as "the aboriginal peoples of the Malay Peninsula" 32/ "the Amerindians of Guyana" 33/, "the indigenous population" 34/, "the indigenous communities" 35/, "the communities of indigenous peoples" 36/, "the indigenous groups" 37/, "the indigenes". 38/

69. Some of these constitutional provisions are examined in greater detail in the following paragraphs, with examples of the specific wording used.

28/ Bangladesh (art. 28 (4) and 29 (3-a))

29/ Burma (art. 35)

30/ Pakistan (Section 5, on Principles of Policy)

31/ India (arts. 16 (4), 341 and 342)

32/ Malaysia, Section 8 (5 - c)

33/ Guyana, Section 15 (6 - c)

34/ Guatemala, article 133, third paragraph; and article 189 (23)

35/ Guatemala, article 133, third paragraph; Panama, articles 83, 85, 110, 115 and 116; Peru, 20

36/ Peru, articles 207 and 211

37/ Guatemala, article 133, third paragraph; Panama, article 102

38/ Peru, article 212

70. Article 1(3) of the Constitution of Ecuador states that:

"the official language is Castilian Spanish. Quechua and other indigenous languages are recognized as forming part of the national culture". (see para. 28A above).

Article 50 provides that:

"the State shall assist the organization and moral, cultural, economic and social development of the various public sectors, particularly the rural sector, so as to enable those groups to play their part in community development. The State shall encourage programmes for sanitary low-cost housing".

71. The Constitution of Brazil of 24 January 1967, as amended on 17 October 1969, provides:

"Article 4. The patrimony of the Union includes:

" ...

"IV. The lands occupied by forest-dwelling aborigines;

" ...

"Article 8. The Union shall have the power to:

" ...

"XVII. Legislate upon:

" ...

"o. Nationality, citizenship, and naturalization; incorporation of the forest-dwelling aborigines into the national community;

" ...

"Article 198. Lands inhabited by forest-dwelling aborigines are inalienable under the terms that federal law may establish; they shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of all useful things therein existing is recognized.

"Paragraph 1. Legal effects of any nature whose purpose is the ownership, possession, or occupation of lands inhabited by forest-dwelling aborigines are declared null and void.

"Paragraph 2. The nullity and voidness mentioned in the preceding paragraph shall not give the occupants the right to any action against, or indemnity from, the Union or the National Indian Foundation."
(English text provided by the Government of Brazil)

72. The Constitution of Peru of 29 May 1933, as amended, contains provisions which recognize the legal status of the indigenous communities and are designed to protect their land. The indigenous communities have a legal existence and juridical personality (article 207). The State guarantees the integrity of the property of the communities. The law shall organize the corresponding register of real property (article 208). The property of the communities is imprescriptible and inalienable, except in the case of expropriation on account of public utility, on payment of compensation. It is, moreover, not attachable (article 209). Neither the municipal councils nor any corporation or authority shall intervene in the collection or administration of the income and property of the communities (article 210). The State shall endeavour to provide by preference lands for indigenous communities which do not possess them in sufficient quantity for their needs, and may expropriate lands in private ownership for this purpose, on payment of compensation (article 211). The State shall enact civil, penal, economic, educational and administrative legislation which the peculiar conditions of the indigenes demand (article 212).

73. In Guatemala the Constitution of 15 September 1965 contains various provisions relating to the indigenous population, including one whereby one of the functions of the President of the Republic is to establish and maintain a directing and co-ordinating institution and the necessary subordinate offices to organize and develop plans and programmes designed to achieve effective and practical integration of the indigenous population into the national culture (article 189(23)). Similarly, article 11 of the Constitution provides that the State shall promote a policy of social and economic development for indigenous groups so that they may be integrated into the national culture. The Constitution states that one of the fundamental principles of the agrarian reform laws is to give preferential protection to farm workers and to small and medium farmers under a rural policy designed to give them lands, housing, education, health and anything that will permit them to raise their standard of living and that of their families (article 126(9)). The Constitution also establishes that municipal lands and the property of communities shall enjoy special protection by the State, which shall supervise the exploitation and utilization thereof. The property and the administration of the assets of indigenous communities and groups, as well as other rural communities, shall be governed by special tutelary laws (article 133, first and third paragraphs). The constitutional provisions declare the literacy campaign aimed at giving basic education to the people to be a matter of national urgency. It is a social obligation to contribute to the literacy campaign. The functions of the authorities of the State, especially the President of the Republic, include that of organizing, developing and intensifying related activities with all the necessary resources (articles 96 and 189(22)).

74. In Panama, the Constitution of 11 October 1972 provides that the State shall give special attention to rural and Indian communities in order to foster their economic, social and political participation in national life (article 113).

75. The Constitution further provides that the policy established for the implementation of Chapter 7 on the agrarian system shall be applicable to indigenous communities in accordance with scientific methods of cultural change. To fulfil the objectives of the agrarian policy, the State shall carry out the following activities:

(i) grant the necessary farm lands to rural dwellers and regulate the use of waters; a special system of collective ownership may be established for rural communities which so request;

(ii) organize credit assistance to meet the financing needs of agricultural operations, particularly those of low-income persons and groups, and give special attention to small and medium producers;

(iii) take measures to ensure stable markets and fair prices for products and foster the establishment of agencies, corporations and co-operatives for production, processing, distribution and consumption;

(iv) establish means of communication and transport to link rural and indigenous communities with centres of storage, distribution and consumption;

(v) settle new lands and regulate the tenure and use of such lands and of lands incorporated in the economy as a result of the construction of new highways;

(vi) foster the development of the agrarian sector by means of technical assistance and promotion of organization, training, protection, mechanization and other activities determined by law; and

(vii) conduct soil studies in order to establish a classification of Panamanian land.

The State guarantees to indigenous communities the reservation of necessary lands and the collective ownership thereof, to ensure their economic and social well-being. The law shall regulate the procedures to be followed for this purpose, and the boundaries within which the private appropriation of land is prohibited (article 116).

76. As far as culture, indigenous languages and general guidelines for education programmes for indigenous groups are concerned, the Constitution stipulates that the State recognizes and respects the ethnic identity of national indigenous communities, and shall carry out programmes to develop the material, social and spiritual values of each of their cultures. It shall establish an institution for the study, preservation and dissemination of indigenous cultures and languages, and for promotion of the comprehensive development of Indian groups (article 85). The Constitution also stipulates that the indigenous languages shall be the subject of special study, preservation and dissemination and that the State shall promote bilingual literacy programmes in the indigenous communities (article 83). The Constitution further provides that the State shall develop educational and advancement programmes for indigenous groups with their own cultural patterns, in order to ensure their active participation in civic life (article 102).

77. The Constitution of Burma of 24 September 1947 as amended in 1959 and in 1961, provides for minorities and the weaker and less advanced sections of the people, inter alia in the following manner:

> "22. No minority, religious, racial or linguistic [group] shall be discriminated against in regard to admission into state educational institutions nor shall any religious instruction be compulsorily imposed on it."
>
> "35. The State shall promote with special care the educational and economic interests of the weaker and less advanced sections of the people and shall protect them from social injustice and all forms of exploitation."

78. Other texts combine recognition of equality before the law and the right to equal protection by the law with provisions designed to cover particular sectors of the population, which they identify and in whose favour special measures may be taken.

79. The Constitution of Malaysia, of 1957, as adopted by Part IV of the Malaysia Act No. 26 of 1963, with amendments, provides for equality before the law and equal protection of the law, and for the special protection, well-being and advancement of the Orang Asli of the Malay Peninsula, in the following terms:

> "8. Equality.
>
> "(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> " ...
>
> "(5) This Article does not invalidate or prohibit -
>
> " ...
>
> "(l) Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service."

80. The Constitution of Guyana of 16 May 1966, in addition to stipulating that one minister shall be charged with responsibility for Amerindian Affairs (article 56, first paragraph, in fine), provides (in a way very similar to that of the Malaysian Constitution just quoted) that it shall not be considered discriminatory to make statutory provisions for the protection, well-being and advancement of the Amerindians of Guyana (article 15 (6) (c)). 39/

81. The Constitution of Bangladesh of 4 November 1972, provides for equality before the law (article 27), prohibits discrimination on stated grounds, and makes special provision for, inter alia, backward sections of citizens as follows:

> "28. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.
>
> " ...
>
> " (4) Nothing in this article shall prevent the State from making special provision ... for the advancement of any backward section of citizens.

39/ The Guyanese Constitution also contains provision for the appointment of Parliamentary Secretaries (Section 45 (1) and this has resulted in the appointment of a Parliamentary Secretary for Amerindian Affairs. In this connection, see the chapter on administrative arrangements, below.

"29. (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

" ...

"(3) Nothing in this article shall prevent the State from:

"(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic.

82. The Constitution of Pakistan of 13 April 1973, 40/ contains the following provisions: In Part II, Chapter 1, dealing with Fundamental Rights and Chapter 2, dealing with Principles of Policy:

"28. Subject to article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and, subject to law, establish institutions for that purpose. 41/

"36. The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.

"37. The State shall -

"(a) promote with special care the educational and economic interest of backward classes or areas".

83. In Part XI, Chapter 3, dealing with Tribal Areas:

"246. In the Constitution -

"(a) 'Tribal Areas' means the areas in Pakistan which, immediately before the commencing day, were Tribal Areas, and includes:

(i) the Tribal Areas of Baluchistan and the North-West Frontier Province; and

(ii) the former States of Amb, Chitral, Dir and Swat.

"(b) 'Provincially Administered Tribal Areas' means:

(i) the districts of Chitral, Dir and Swat (which includes Kalam), Malakand Protected Area, the Tribal Area adjoining Hazara district and the former State of Amb; and

---

40/ The Constitution was passed by the National Assembly of Pakistan on 10 April 1973 and authenticated by the President of National Assembly on 12 April 1973.

41/ Article 251 of the Constitution deals with the national language and use of languages for official purposes.

(ii) Cheb district, Loralai district (excluding Duki Tehsil), Dalbandin Tehsil of Chagai district and Marri and Bugti Tribal territories of Sibi district; and

"(c) 'Federally Administered Tribal Areas' include:

(i) Tribal Areas adjoining Peshawar district;
(ii) Tribal Areas adjoining Kohat district;
(iii) Tribal Areas adjoining Bannu district;
(iv) Tribal Areas adjoining Dera Ismail Khan district;
(v) Dajaur in Malakand Agency;
(vi) Mohmand Agency;
(vii) Khyber Agency;
(viii) Kurram Agency;
(ix) North Wasiristan Agency; and
(x) South Wasiristan Agency.

"247. (1) Subject to the Constitution, the executive authority of the Federation shall extend to the Federally Administered Tribal Areas, and the executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein.

"(2) The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of a Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

"(3) No Act of Parliament shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Parliament or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

"(4) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter within the legislative competence of Parliament, and the Governor of a Province, with the prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for the peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province.

"(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof.

"(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be a Tribal Area, and such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper;

"Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in tribal jirga.

"(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Parliament by law otherwise provides;

"Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day."

84. The Constitution of India of 26 November 1949, with amendments, contains special entrenched and particularly detailed provisions for the advancement of socially and educationally backward classes of citizens and for the Scheduled Castes and Scheduled Tribes. Concentrating on the latter groups, the main provisions are as follows:

85. Part III of the Constitution deals with "Fundamental Rights" and, under "Right of Equality", it contains the following relevant provisions:

"14. Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

" ...

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

"16. Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

" ...

"(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

86. In Part IV the Constitution provides for Directive Principles of State Policy from which the following may be quoted here as basic principles in this matter:

"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

87. Articles 330 and 332 provide for the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and in the Legislative Assembly of the States, respectively; article 334 stipulates that these arrangements shall cease after 30 years, and article 335 provides for the claims of Scheduled Castes and Scheduled Tribes to services and posts.

"330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. (1) Seats shall be reserved in the House of the People for -

"(a) the Scheduled Castes:

"(b) the Scheduled Tribes except the Scheduled Tribes -

(i) in the tribal areas of Assam;
(ii) in Nagaland;
(iii) in Meghalaya;
(iv) in Arunachal Pradesh;
(v) in Misoram; and

"(c) the Scheduled Tribes in the autonomous districts of Assam.

"(2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

"(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts, bears to the total population of the State.

"Explanation. In this article and in article 332, the expression "population" means the population as ascertained in the last preceding census of which the relevant figures have been published:

"Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census.

"332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in Nagaland and in Maghalaya, in the Legislative Assembly of every State.

"(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

"(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

"(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

"(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

"(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district.

" ...

"334. Reservation of seats and special representation to cease after thirty years. Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to -

"(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the State; and

"(b) ...

shall cease to have effect on the expiration of a period of thirty years from the commencement of this Constitution.

"Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

"335. Claims of Scheduled Castes and Scheduled Tribes to services and posts. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

88. Articles 338, 339 and 340 provide, respectively, for a special officer for Scheduled Castes and Scheduled Tribes (338); the control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes (339) and the appointment of a Commission to investigate the conditions of backward classes (340).

"338. Special Officer for Scheduled Castes, Scheduled Tribes, etc. (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

"(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

"(3) In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

"339. Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States.

"The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

"(2) The executive power of the Union shall extend to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

"340. Appointment of a Commission to investigate the conditions of backward classes. (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made and the order appointing such Commission shall define the procedure to be followed by the Commission.

"(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

"(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament."

89. Articles 341 and 342 empower the President to specify, under certain circumstances, the castes, races, tribes or parts thereof which shall be deemed to be Scheduled Castes, and the tribes or tribal communities which shall be deemed to be Scheduled Tribes in the respectively pertinent States or Union Territories.

> "341. Scheduled Castes. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.
>
> "(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.
>
> "342. Scheduled Tribes. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.
>
> "(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

D. Basic legal status

1. Introductory remarks

90. The countries covered by this study have had to adopt a basic approach towards the indigenous inhabitants who make up a considerable part of their population. This basic approach has, in principle, found expression in a decision of substance concerning the fundamental legal status to be conferred upon the indigenous populations concerned. In such decisions the indigenous populations are, or are not, considered as having all the rights and obligations of the country's other nationals. If the latter is the case, a special legal status has to be created for them which resembles capitis diminutio in certain specific areas, since they neither enjoy all the rights nor have all the obligations enumerated. In the former case, account is generally taken of the special circumstances of these population groups and, as in the case of other groups in similar conditions, measures are taken to cater for their special needs so as to place them on a more equal footing with the other population groups.

91. The Special Rapporteur was not able to obtain explicit information for some countries on this matter 42/ although from other information available concerning the countries in question it may be assumed that the positive approach described in the previous paragraph has been adopted, despite the fact that the special measures in favour of indigenous persons 43/ have not always been clearly spelled out.

92. In respect of other countries, information from governmental and/or non-governmental sources was available regarding the basic status conferred on indigenous populations under the national legal system. Most of this information is in the form of governmental declarations or governmental or non-governmental conclusions drawn from the constitutional provisions relating to "theoretical" equality in law and the "actual" equality to which more specific attention is devoted under some of these systems.

93. The countries for which analysable information was available may be divided into at least two groups which largely correspond to the criteria set out above; some countries have created a special legal status which seeks to protect indigenous persons and relieve them of some obligations while at the same time limiting their exercise of certain rights until they reach the level of development which is deemed necessary for them to be placed on an equal footing with the rest of the population. Other countries recognize that indigenous persons have all the rights and obligations of citizens, but, because such persons have a weaker position in society, their countries have adopted special measures in their favour which they enjoy as long as they remain in that weaker position.

94. It should be noted that in many cases, the information at the Special Rapporteur's disposal in respect of the countries concerned does not make it entirely clear whether or not there is in fact a special legal status for indigenous populations. Since the information may often be interpreted in either way, the Special Rapporteur has been obliged to draw up an ad hoc classification and, in some cases, to include information concerning the same country under both headings.

95. The first of the two groups mentioned in paragraph 93 above is made up of the countries in which indigenous populations appear to have special legal status, at least in certain circumstances. 44/

2. Special legal status

96. In Paraguay interpretations are contradictory and seem to depend on particular situations, as no general law on indigenous peoples exists. On 22 July 1957, the Minister of Education and religion issued Note 492, stating:

> "In our legislation now in force, no distinction at all exists between indigenous and civilized ... In our civil legislation, the Indians are not even included among the incapable persons".

42/ These countries are Bolivia, Burma, Chile, Denmark (Greenland), Ecuador, El Salvador, France (French Guyana), Honduras, Nicaragua, Pakistan, Panama, Peru, Sri Lanka, Suriname and Venezuela.

43/ For example in Argentina, Honduras and Nicaragua.

44/ For example in Brazil, Canada, Colombia and Paraguay.

97. This view was confirmed by Circular No. 1 of 3 September 1957 of the Supreme Court of Justice:

> "All indigenes, in their quality of inhabitants of the national territory, enjoy, to the same degree as civilized persons, the rights and guarantees which the laws recognize for the latter".

98. Nevertheless, in 1968 Mr. J.A. Borgognon, then Vice-Director of the Indigenous Affairs Department of the Ministry of Defence, the office which in fact decides the policy towards the indigenous population of Paraguay, expressed the following opinion:

> "They are not inscribed in the Birth Register, which means that they have no legal civil personality. They are beings without political, social or economic obligations. They do not vote. They pay no taxes".

99. This opinion is correlative to the practice that indigenes cannot denounce, quarrel or testify in law courts. In a 1965 case at Villarica 45/ the judge decided that the defendant could not be punished for homicide, because of "unsurmountable ignorance". It was stated, as regards indigenous people, that:

> "Although in our country they belong to the category of citizens with rights and duties, the state of civilization they live in, and the natural misery caused by the lack of an education that would be necessary to develop their activities within the civilized social group, make useless the constitutional declaration, if the necessary aid is not given to these human groups in order to attract them to the active life of society. The Indian does not reach the text of Law. He does not understand it".

100. In recent years, especially since 1974, a number of adult indigenous persons were inscribed in the Birth Register, thus obtaining full citizenship. In this way, the difference established by Borgognon becomes temporary and can be overcome. Yet the authorities seem sometimes reluctant to permit this procedure, inscribing an indigene in the Birth Register usually only if this is requested by an influential non-indigene. The process remains limited to individual cases, although it is spreading. Literacy in Spanish is usually a necessary condition - not fulfilled by many non-indigenous citizens (more than 50 per cent of Paraguayans speak only Paraguayan Guaraní). Of the total indigenous population, the great majority has not yet attained full citizenship.

101. The Western Guaraní, numbering some 1200 persons, are an exception, since full citizenship was expressly granted to the entire group in 1955. However, the fact that it was thought necessary to make an explicit statement to that effect implies that full citizenship is not normally granted to indigenous groups. It is pertinent to observe also that although one of the important duties of citizenship is military service, only some of the Western Guaraní fulfil this obligation, and many of them refuse to serve on the ground that they are indigenes. The fact that such refusals are readily accepted tends to show that even in the case of the Western Guaraní, legal equality has not yet been fully achieved. 46/

45/ Case of the indigene Angel Santacruz.

46/ Information furnished by the Anti-Slavery Society on 3 September 1976.

102. In Brazil, the Indian is the subject of special legislation which protects him for as long as he leads a primitive existence. The Civil Code of 1916, modified in 1942, places such protected persons on the same level as the relatively incapable, such as minors. A special decree (Decree No. 5484 of 27 June 1928) places forest-dwellers under the special tutelary jurisdiction of the Federal State and provides for their gradual transition from tutelage to full integration into the Brazilian community.

103. Moreover, as can be seen from paragraph 35 above, the Indian Statute embodied in Act No. 6001 defines three kinds of status - isolated, integrating, integrated - which Indians may possess.

104. Act No. 6001 also provides that, although Indians are Brazilians in accordance with the Constitution, their enjoyment of civil and political rights depends on the fulfilment of certain special conditions. Thus, the Act states that:

> "Art. 5. The norms of Articles 145 and 146 of the Federal Constitution relating to nationality and citizenship, apply to the Indians or forest-dwellers.
>
> "Sole paragraph. Enjoyment of civil and political rights by the Indian depends on verification of the special conditions established in this Law and in the pertinent legislation.
>
> "Art. 6. The usages, customs and traditions of native communities and their effects shall be respected as regards kinship, order of succession, distribution of property and deeds or business among Indians, unless they opt for application of common law.
>
> "Sole paragraph. Common law norms apply to relations between non-integrated Indians and persons alien to the native community, except insofar as they are less favourable to the former with due exception of the provisions of this Law." */

105. In Title II on "Civil and Political Rights", Chapter II on "Assistance or Tutelage", provides:

> "Art. 7. The Indians and native communities not yet integrated in the national communion are subject to the tutelary regime established by this Law.
>
> "1. The principles and norms of common law tutelage apply, where appropriate, to the tutelary regime established by this law, irrespective, however, of tutelage in the special branch of legally mortgaged real estate, as well as that of real or fidejussionary suretyship [real or personal guarantees].
>
> "2. Tutelage is assigned to the Union, which shall exercise it through the competent Federal agency of assistance to the forest-dwellers.
>
> "Art. 8. Acts practiced between the non-integrated Indian and any person alien to the native community are null and void, when unassisted by the competent tutelary agency.
>
> "Sole paragraph. The ruling of this article does not apply to the case when the Indian shows an awareness and knowledge of the act practised so long as it is not detrimental to him, and of the extent of the effects thereof. */

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*/ English text supplied by the Government of Brazil.

106. The legal status of indigenous persons may also be affected in other ways. For example, under article 147 of the Constitution all illiterates and those who do not know how to express themselves in the national language (Portuguese) are excluded from the right to vote. This, together with the requirements of article 9 of the Indian Statute, would eliminate most indigenous persons from the exercise of political rights.

107. On the other hand, indigenous offenders would receive penalties according to their degree of integration. According to the Indian Statute sanctions may be imposed in accordance with tribal institutions if not cruel or degrading (art. 57). Prison terms shall be served as far as possible under a regime of semi-liberty and in premises as close as possible to the dwelling place of the sentenced person (art. 56).

108. In the same Title II and Chapter II mentioned above, the Indian Statute provides that exceptions to the tutelary regime may be granted under conditions specified in articles 9, 10, and 11, wherein emancipation on an individual or communal basis are contemplated. These provisions will be discussed later on, as emancipated individuals or communities would not have any capitis diminutio and would enjoy fully all civil and political rights under constitutional or statutory provisions in Brazil.

109. Before describing the various aspects of the legal status of indigenous persons in Colombia, it should be pointed out that the existing regulations provide for two major categories of Indians, each subject to a different legal régime. Law 89 of 1890 mentioned earlier (see paragraphs 40-42 above) distinguishes between those indigenous persons who have not been brought into civilized life and those who have.

110. With regard to the former, article 1 of Law 89 lays down that "the general legislation of the Republic will not apply to the savages who are being brought to civilized life by means of missions". Consequently, the Government, in agreement with the ecclesiastical authorities, will determine the way in which these incipient societies are to be governed.

111. This rule is in keeping with the Missions Agreement concluded between the Holy See and the Colombian Government in 1888, in respect of which the following comments have been made.

> "... the Roman Church obtained the monopoly of the evangelization and acculturation of the unbelieving aborigines. The remote regions inhabited by them now became "mission territories" (vicariates and apostolic prefectures), the actual administration of which largely remained in the hands of the missionaries in virtue of the Law (72 of 1892) according to which the State could - as it did - delegate to them "extraordinary powers to exercise civil, penal and judicial authority over the catechumens ... until, leaving the savage state, in the judgement of the government they are in a state to be governed by them". This also established the legal status of the aborigines as that of minors.

"Historically, the setting up of this theocratic regime over the native non-acculturated groups had its origin not only in the Catholic ideals of political government of that time but also in the practical and economic inability of the Colombian State to deal with the vast, sparsely inhabited forest territories of the Pacific coast and of eastern Colombia. However, the survival of this juridical infrastructure down to our time is itself an indication of the indifference of the governing classes to the lot of the aboriginal groups". 47/

112. It is further observed that the Government is "satisfied with having accepted the recommendations of the International Convention on Native and Tribal populations. These norms do not apply to Colombian aborigines who have not been 'brought into civil life', as long as these natives remain, from the legal point of view, on the margin of State authority." 48/

113. Information is given below about indigenous persons who have been "integrated into civilization". 49/

114. Indigenous persons in Canada have a special legal status that differs from that of other citizens. According to information provided by the Government, Parliament has approved protective legislation - the Indian Act - which is administered by the Department of Indian Affairs and Northern Development. This law establishes inter alia certain advantages and controls in respect of matters such as the sale or mortgage of land reserved for Indians, the testamentary capacity of Indians (for example, there is special protective legislation covering the distribution of property when Indians die intestate), the possession and use of intoxicants, the administration of Indian money and assets, and the education of Indian children.

115. The Government states that the concept of "wardship" in relation to native people was prevalent until about the time of the Second World War, but judicial opinion seems now to have established that native people are British subjects resident in Canada, subject to the jurisdiction of Canadian Legislatures, as provided in the British North America Act. Their special status is confirmed in the provisions of the Indian Act. They are exempt from certain forms of taxation relating to property rights or income earned on the reserve. They are under the special protection of the Crown in ways that limit their local self-government and their control of bank funds, and the Federal Government assumes an obligation toward their health, education and economic development. The provisions of the Indian Act permit a progression toward more independent bank management.

116. The Government also states that the law is revised from time to time in order to take account of the changing conditions of Canadian society and the new stages of development and autonomy of the Indian tribes, and that various programmes have been

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47/ Victor Daniel Bonilla, op. cit.

48/ Ibid.

49/ See paragraphs 136 and 137 below.

established for the indigenous populations of Canada 50/ with a view to accelerating their full participation in Canadian society on the same conditions as other citizens.

117. According to a source:

> "By the time of Confederation, Canada had a fully developed Indian policy inherited from the British Imperial and Colonial Governments and already administered by the Crown Lands Department (which became the Department of the Interior and was the predecessor of the present Department of Indian Affairs and Northern Development). The basis of this policy, which gave the Federal Government legislative jurisdiction over "Indians and Land Reserved for Indians", were: alienation of Indian interest in land through treaties, reservation of lands, and a government department charged with managing the affairs of Indians. The policy's aim was to effect a transition from the native way of life to that of the white majority (assimilation), and the basic assumption was that the Indian required both assistance and protection in making this transition." 51/

118. On the question of the fundamental status attributed to the indigenous populations in the United States, statements from the Government and from indigenous groups differ as to the significance of certain arrangements. The Special Rapporteur decided to place this information in this part of the study, quoting first the government information which would justify its placement here, subsequently reproducing the indigenous groups' statements as regards the particular points on which they disagree with the Government's view.

119. As regards this question of the fundamental legal status of the indigenous populations, the Government reports:

> "Federally recognized Indians who have organized Indian governments and who live on trust land (land held in trust for them by the Federal Government) have special rights and privileges not available to other citizens of the United States. For example, they are not subject to real property taxes on trust land, nor is their income from such land subject to taxation. They are subject to tribal policy and tribal courts and they make their own ordinances to govern their domestic relations. The United States Attorney and the Federal Courts are available to them for defending themselves against non-Indians and for cases concerning certain major crimes - murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, carnal knowledge, assault with intent to commit rape and assault resulting in serious bodily injury.
>
> "Many Federal agencies have allocated specific sums of money for programs for the betterment of the indigenous minority. These include efforts to improve housing, grants for economic development, grants to businesses that will be owned and operated by minority business people, small business loans, and the like. Some programs provide for direct allocation of funds from the Federal Government to Indian people. All other citizens receive federal grant funds through the State and local governments.

50/ The programmes mentioned by the Government include various health, welfare and community development programmes and a number of educational activities. The information was provided in connection with the Study on Racial Discrimination.

51/ Joanne Hoople; And What About Canada's Native People. Published by the Canadian Council for International Co-operation, Ottawa, Canada, p.7.

"Although the indigenous population has certain special privileges, such as those cited, they have no corresponding obligations or responsibilities. Thus an Indian on an Indian reservation is subject to tribal law and order and tribal government, in many cases, but may vote in a county, State, or Federal election, the results of which will affect all United States citizens. The non-Indians in the county, State, and the Nation have no corresponding right or opportunity to exercise control over that same Indian community.

"Thus there is a privilege of voting in affairs affecting non-Indians without the reverse being possible, except through Congressional action concerning Federal reservations with residual tribal government and involving trust land.

"The special relationship of trust land and funds held in trust and the special programs for the indigenous population are provided because the indigenous minority has been in a relatively weak position and it is anticipated that they will remain in effect for as long as such groups need support in order to adjust to the non-indigenous culture surrounding them."

120. Disagreeing with the information quoted in the preceding paragraph it has been written that:

"It is true that all that flows to Indians from the fact of tribal recognition is not available to non-Indian citizens, but that fact is inherent in the relationship and in the concept of dual citizenship. The U.S. response seems to suggest that Indians are a privileged class in the United States - an assertion which the objective indicia of poverty will easily disprove.

"It also treats Indian property tax exemption as if there were no other tax exemptions within the entire state and federal tax structure of the United States. Certainly there are compelling policy reasons to support continued (and even expanded) tax exemption for Indians, and its constitutional basis is clear. But those advantages are not available to the rest of the population in the same sense that the sacred oil depletion allowance is not available to those Americans who are not fortunate enough to be in the oil business, and the vast business exemptions are not available to wage-earners.

"It is absolutely untrue to say that Indians "have no corresponding obligations or responsibilities". The Indians have the obligations of any citizen with respect to their state, county and local (non-Indian) governments to the extent that those governments have jurisdiction. In addition, Indians have responsibilities toward their tribal governments. But vastly more important is an obligation which virtually every Indian feels and which is no less an obligation simply because it is not imposed by the federal government. Individual Indians have the enormous responsibility of being the custodians of the most fragile of human creations - a culture. As a part of that responsibility they have a relationship to the few remaining acres of land which is in Indian hands and which they hold in trust for their future generations. It is unfortunately typical of the attitude of many federal employees to characterize Indians as irresponsible, privileged people who have an unfair advantage over the non-Indian taxpayers.

"As a final note in this regard ... concerning the disabilities that accompany Indian status, ... [the] restriction on alienation of trust property is well-known. However, there are many other restrictions on the activities of

Indians. The average community has virtually full control of its schools, for example. It is only recently that the Bureau of Indian Affairs could even begin to accommodate advisory school boards at BIA schools, and those boards even today do not have real power in the policy-making of the schools that serve their community and their children. In addition, federal power over the lives of Indians is traditionally vast. In fact, there is virtually a presumption that Indian homes are inadequate to raise Indian children, and the power of bureaucrats to remove Indian children from their homes to be placed in foster homes, adoptive homes, or boarding schools is vast. On some reservations 40% or more of the Indian children have been removed from their homes on a more or less permanent basis.

"Indian votes in state and local elections are for the most part meaningless because of their relatively small proportion of the population, although in a few cases the Indian vote can be conclusive in a close election. But the power of the non-Indian voter, contrary to the suggestion in the U.S. response is vast. Congress has asserted and the courts have upheld the plenary power of the United States over Indian tribes. Thus the actual situation is the reverse of that described in the U.S. response. The present inability of non-Indians to vote in tribal elections does not significantly reduce the power of the non-Indian segment of American society over the affairs of the Indian tribes, and to suggest that it does is one of the gross distortions that unfortunately characterize the U.S. response.

"It is not true that all non-Indian citizens receive federal grant funds through their state and local governments. Some programs, of course, provide direct federal benefits to eligible citizens, and these benefits may come to Indians or non-Indians depending upon the program. Some programs are federally funded but administered through state and local governments. And in a few cases, federal programs are administered through Indian tribes rather than through the states. This is a necessary consequence of the recognition of tribal government. To the extent that tribal governments are not the administrative vehicle for federal programs, it could be said that the states have a special legal arrangement not available to Indian governments. Those who prepared the U.S. response appear again to be arguing against the policy of the United States in its recognition of tribal government.

"The United States also suggests that U.S. Attorneys are available to represent Indian tribes and individuals for their protection. There is, of course, a famous statute in the United States Code, 25 U.S.C. 175 which does, in fact, state in mandatory language that the United States Attorney shall represent Indians in court. This mandatory statute, however, has been interpreted to be discretionary. The United States Attorney rarely represents Indians in court in cases involving the trust responsibility and there is even a tremendous backlog of such cases upon which the United States Attorneys have failed to act. If they are not representing Indians, then the U.S. should not claim before the world community that they are. President Nixon has said as much in his 1970 Message and in his package of proposed Indian legislation which includes the Indian Trust Counsel Authority bill. He has recognized the serious conflict of interest between the government's duties toward the Indians and its public responsibilities. It is puzzling that the United States now tells the world that this conflict does not exist.

"Finally, the United States ... [states] that the basis for the special relationship between the United States and the Indian tribes is the relatively weak position of the tribes economically, and ... that once the tribes attain economic parity the special relationship will cease to exist. In fact, the courts have repeatedly recognized that Indian tribes will exist as long as there are Indian societies. The relationship between the Indian tribes and the United States is based partly upon the treaties and other indications of federal recognition and has been recognized repeatedly in the U.S. Supreme Court as a quasi-international protectorate relationship. When the tribes attain economic parity some of the economic facts surrounding the relationship will naturally change but the nature of the relationship will persist into the indefinite future. President Nixon himself, presumably speaking for his own administration, promised the tribe the exact opposite of the U.S. response in his concept of "self-determination with termination", which holds that the tribes will not jeopardize their existence by entering more and more into the management of their own affairs and by adjusting to the demands of the modern American economy.

"In seeking to establish the favored position of Indians within the American system, the United States contradicts its own studies. It suggests that, although some tribes receive few federal services, "others receive the full gamut". In a recent study conducted by the government itself and since suppressed, it was revealed that only about 10% of federal domestic assistance programs are now serving even one of the 275-odd Indian tribes. Around 2½-3% of the federal domestic assistance programs are serving a variety of tribes." 52/

3. General legal status

121. Within the second of the two groups into which the Special Rapporteur divided the countries under study (see paragraphs 93 to 95 above), and on which he has based his analysis of the available data regarding the basic approach adopted by countries in reviewing their fundamental position vis-à-vis their indigenous populations, two subgroups may now be distinguished. The first of these, which we may call the "explicit" subgroup, comprises a number of countries which have stated in general terms that "indigenous persons have the same status as non-indigenous persons", or that "no special status is accorded to indigenous persons".

122. The other subgroup, which will be called the "implicit" subgroup, comprises a number of countries 53/ which have been included in the subgroup even though, with the exception of Laos, no specific information was available (hence the term "implicit").

123. To deal with this second (implicit) subgroup first it appears, for instance, from the information obtained by the Special Rapporteur that no special legal status is attributed to indigenous ethnic groups by Lao legislation. In the preamble to the Constitution it is stated that the Constitution recognizes as the fundamental principles of the rights of the Lao people: equality before the law, the legal protection of the means of subsistence, freedom of conscience and other democratic freedoms in the conditions defined by law; the Constitution imposes upon the people as duties: public service, respect for conscience, the practice of solidarity, the fulfilment of family obligations, zeal in work and learning, integrity, and respect for the law.

52/ American Indian Law Newsletter, loc. cit., pp.15 to 17.

53/ In addition to Laos, there are Bolivia, Burma, Chile, Denmark (Greenland), Ecuador, El Salvador, France (French Guyana), Honduras, Nicaragua, Pakistan, Panama, Peru, Sri Lanka, Suriname and Venezuela.

124. Article 4 of the Constitution states that all persons who belong to races that are definitively established on Lao territory and do not already possess another nationality are citizens of Laos.

125. The information available seems to indicate that there are also some special provisions in favour of certain groups, particularly in the field of education.

126. The Code of Civil Procedure (article 53(2)) embodies special provisions concerning certain indigenous groups. One of these provisions stipulates that before the end of court proceedings in cases involving members of hill tribes with no written language, the court must hear in an advisory capacity one or more chiefs of the tribes concerned, so as to be informed of any special customs or usages of those tribes. The judgement must contain a reference to the hearing of this advice.

127. Turning now to the other (explicit) subgroup, it is necessary to differentiate between countries in which the general legal status applies to all the indigenous inhabitants without distinctions of any kind and those in which it is applicable only to certain indigenous communities which fulfil the necessary conditions.

128. As indicated earlier, 54/ there are legal systems in which certain indigenous inhabitants come within the group that has a special legal status, while others form part of the group to which the general legal status applies, (Brazil, Colombia and Paraguay are cases in point). In these countries, the indigenous inhabitants who meet certain legal requirements will enjoy the same general legal status as the people as a whole, whereas those who do not will continue to have a limited legal status, as was explained when the first group (with special legal status) was considered.

129. Thus it seems clear that in Paraguay, once an indigenous person is registered in the Civil Register, there could no longer be any doubt as to his or her legal status, which would be that of full citizenship with all rights and duties attaching to it. Groups that, as in the case of the Western Guaraní discussed above, 55/ may have been granted citizenship collectively, would also clearly enjoy full citizenship, thus falling under the second system established above, namely that of persons enjoying the general legal status attributed to all citizens, without any difference whatsoever.

130. As already mentioned above (see para. 108 above), in Brazil, fully integrated Indians may apply for their individual emancipation from the tutelary regime established in articles 7 and 8 of Act 6001 (19 December 1961). The same Act provides, to that end, that:

> "Art. 9. Any Indian can petition the competent Court of Justice to release him from the tutelage provided in this Law, vesting him with full civil capacity, so long as he fulfils the following requisites:
>
> "I - Minimal age of 21 years.
>
> "II - Knowledge of the Portuguese language.

54/ See paras. 96 to 113 above.

55/ See para. 101 above.

"III - Possession of the necessary skill to perform a useful activity in the national communion.

"IV - Reasonable comprehension of the usages and customs of the national community.

"Sole paragraph. The Court shall decide after summary investigation, in the light of the opinion of the agency of Indian assistance and the Public Prosecutor, and the sentence granting the petition be transcribed in the civil register.

"Art. 10. Upon fulfilment of requirements of the preceding paragraph, and at the written request of the interested party, the assistance agency can recognise the Indian's integrated condition by formal declaration, all restrictions as to capacity being thereby removed, so long as, the decision being, judicially ratified, it is entered in the civil register.

"Art. 11. By decree of the President of the Republic, emancipation of the native community and its members from the tutelary regime established by law can be declared, when applied for by the majority of the members of the group and proof has been furnished, by an inquiry made by the competent Federal agency, of their full integration in the national communion.

"Sole paragraph. For purposes of the provisions of this article, the requirements established in Article 9 must be met by the applicants. */

151. Individuals who have fulfilled all these conditions, although they may have retained practices, customs and traditions that are characteristic of their own culture, would be considered to be "integrated Indians" under the terms of article 4 (III) of the Indian Statute.

152. The Special Rapporteur has learnt that a Presidential Decree in Brazil which, inter alia, envisaged further rules for the implementation of individual and communal emancipation, has been left in abeyance.

153. Public opinion, indigenous organizations, native leaders, universities and church organisations are said to have rejected this proposed decree as harmful to the indigenous populations of Brazil. Among them, one author, discussing the impact of this proposed Bill dealing with the "emancipation" of the indigenous peoples of Brazil, has written the following:

"Perhaps the crowning example of self-contradiction of Brazilian indigenist policy was the attempt this year to change the provisions of the Indian Statute for the "emancipation" of the Indian from the tutelage of FUNAI, representing the State, under which, as a minor, he is considered "relatively incapable" and has the State's protection. Clearly, the denial of ordinary civil rights to the Indian, which in fact, contravenes the Geneva Convention of 1957, to which Brazil was a signatory, is wrong and absurd and patently racist, and provisions should be made for this situation to be changed.

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*/ English text supplied by the Government of Brazil.

"But the "Emancipation Decree" sent to the President of the Republic on the 30th October 1978, by the Minister of the Interior, Rangel Reis, had other objectives in view, and these, in the context of present Brazilian development and its implications for the indigenous population, were sufficiently obvious to alarm the national and international community of supporters of the Indians' cause. Thanks to an extremely effective publicity campaign organized by the leading Brazilian universities, the Church, journalists and countless individuals who had worked with Indians, the "Rangel Reis Decree" was brought to the forum of public debate and criticism, where the voice of the Indian joined with those of his supporters in a universal condemnation of the decree.

"The controversial provisions of the decree were that "Emancipation" could henceforth be conferred on an individual Indian on the initiative of FUNAI, whereas the 1973 Statute only allowed for emancipation to be granted on the request of the Indian; that the minimum age to qualify for emancipation be reduced to 16 years; and that Indian territory could be donated to the community emancipated and would thus lose State protection. This decree, the third and final version, had already suffered one significant change as the result of the furore which greeted the first versions, which provided for the division of communally-held territory into separate lots for the emancipated Indian.

"Nevertheless, the decree represents, as it stands, serious dangers, for it has appeared precisely at the time of greatest land pressure in Brazil, when it would eminently suit those economic groups who have not yet gained access to Indian lands, to see State protection removed from them, and also at a time when Indians are beginning to make themselves heard, in a new political awareness. There are several very articulate Indian leaders who are beginning to inconvenience the government with their candid denouncing of the violence suffered by their people: tutelage protects them, but once emancipated, they could be prosecuted under ordinary penal law.

"In one of the culminating events of the anti-emancipation campaign, a "Public Act" which took place with an audience of 2,500 people on the 8th November in São Paulo, a Parecí Indian declared:

> "'The struggle for emancipation will be carried out neither by the government, nor the Minister of the Interior, nor by anyone else. This emancipation will be carried out by ourselves, we, the Indians. In the same way in which the oppressed classes are forming their awareness, so we are beginning to form our awareness in order to demand our rights.
>
> "'This emancipation is a lethal weapon which will simply take from us all chance and every weapon we have to protest the infringement of our rights. Perhaps we will be prevented from realising the assemblies which have so helped us, for if this emancipation is approved, we will also be marked along with those who are called subversive.'

"Finally, on the 19th of December, 1978, 24 representatives of Indian tribes from Amapá, Amazonas, Mato Grosso, Santa Caterina, Rio Grande de Sul and Espirito Santo, Indians of the Karipuna, Palikur, Galibi, Dessana, Apuriná, Jamamedi, Tapirapé, Xavante, Rikbaktsa, Parecí, Kaiwá, Kaingang and Guarani tribes, gathered in Brasilia. The day was the expiry date of the five-year term established by article 65 of the Indian Statute of 1973 for the demarcation

of all Indian territories hitherto undemarcated. The Indians presented a document, composed at an assembly during the preceding three days, signed by all of them on behalf of the indigenous population of Brazil, requesting that the emancipation decree be "torn up" and that in spite of the term having expired, the land be demarcated according to the law, to the President of the Republic, the Minister of the Interior and the President of FUNAI."56/

134. The participants in the gathering on 19 December 1978 of twenty-four representatives of Indian tribes issued a letter-declaration containing statements and demands, some of which were quoted in the preceding paragraph. It is deemed useful to quote from that letter what refers to the proposed emancipation:

"As we are on the verge of seeing the new draft for the Decree for Emancipation which will "regularize" the Statutes respecting the Indian signed by Your Excellency, we would inform the President of the problems which have been raised, studied and resolved in this Assembly:

"Having sent to Your Excellency the Draft Decree for Emancipation, we are hereby setting forth our opinion -- the opinion of the Indian, the only individual who was not invited to give his opinion with regard to the emancipation which he is about to attain.

"In the first place, we would like to call to mind a passage from the letter by Andila Inacio Kaingang, with which Your Excellency must be acquainted. We have in this Assembly today repeated the same things and have merely adopted some of his thoughts as our own.

"We are taking the liberty of sending this Document in the name of the Indians who inhabit the immense territory of Brazil.

"Mr. President, it would not perhaps be possible for our people merely to speak and understand their mother tongue without their understanding these cries for peace, love and understanding. No, Mr. President, we are sure that our people will understand this message, even though it be in other languages, as it has understood the word "patience" which has up to now been shouted in our ears - a patience which has now reached its limits, as would happen with any nation whatever might be the stage of its civilization.

"Mr. President, Your Excellency, you must agree that the passions of our people can no longer be contained within limits when they look at the lands remaining to them in comparison with the vast territories of Brazil over which we used in the past to have full dominion and which have been unlawfully taken from us by the White Man.

"What puzzles us most is that it is in these conditions that the Draft Decree for Emancipation is being launched, when we know that various Articles of our Law, the Statutes respecting the Indian, have not been included.

" ...

56/ Anna Presland, "Reconquest. An Account of the Contemporary Fight for Survival of the Amerindian Peoples of Brazil", in Survival International Review, Spring of 1979, Vol. 4 No. 1 (25), pp.14-40. The passages quoted appear on pages 27 and 28.

"Mr. President, we are not seeking to lay down regulations and laws because we are neither pedagogues, jurists nor theologians, but we simply wish clearly to state our immediate demands, as guaranteed to us by the Statutes respecting the Indian.

"We are not impressed by the statements made by the Minister on behalf of the President of the FUNAI, in the Press in defence of the emancipation, because we, who are the victims of this policy, are the only ones who can give a sincere opinion as to what this emancipation represents; for if fine words could solve our problem, we should not today be in a situation which is so different from that which the Statutes respecting the Indian upholds, since the emancipation desired by the Minister will bring about the destruction of the tribal system for the Native Communities, and consequently to the collective and individual destruction of its elements, in as much as the Indian must live in his own community, with the full liberty to continue his cultural traditions and with the freedom to own his own land.

" ...

"Just as public opinion condemned this emancipation, so we, in the name of the Native Brazilian Community, reject this emancipation. May it be dismissed by your Council and may our demands be taken into consideration. May that article of the Law be fulfilled, that article appearing to be one of the vital points which the new Law avoids. May the Indian be acknowledged as the heir to and lawful owner of his own lands and may the reservations be recognized as the collective property of the Native Communities. Any omission or lack of concern regarding this aspect of the matter will constitute an attitude which will lead us to conclude that the emancipation proclaimed by the Minister of the Interior forms nothing more or less than a hostile attitude and ill-intentioned as regards the Native Communities, and therefore worthy of censure." 57/

135. The writer quoted in paragraph 133 above in connection with the "Emancipation Decree" comments further:

"The Decree had not yet been signed by the President, and two days later, on the 21st of December, the Jornal do Brasil, in an editorial entitled "The Dialogue of the Deaf" announced:

"'In a belated demonstration of good sense, the Minister of the Interior has requested that the President of the Republic shelve the project of the regulation of the Statute of the Indian, which includes the so greatly disputed question of "emancipation".

"In the case of the "Emancipation Decree" the tensions set up by the self-contradiction in Brazilian indiginist policy reached breaking point, and had public pressure not forced the authorities to retract the protest, a big step would have been taken in the direction of rapid integration of the Indian into the national society. The first article of the decree makes the governments intentions clear, when it provides for the creation of a "support committee" for the Indians, comprising representatives of the Ministries of Education and Culture, of Agriculture, of Social Welfare, of Labour, of Health and the Secretariat of Planning of the President, which would promote the designing and execution of an "Integrated Plan of action for the development of the Indigenous Communities", to permit "greater technical, economic and social

57/ Survival International Review, Vol. 4, No. 1, page 29 et seq.

assistance to these communities and to the Indians, with the aim of incorporating them, gradually, into the national community, through integration or emancipation, in order to assure them consequently the full exercise of their civil rights." (emphasis mine)

"That the Indians themselves reject emancipation is not a form of racism or dependency: it is based on the realisation that integration means no more than joining the already swollen numbers of landless exploited peasants and urban slum-dwellers of Brazil, who have always enjoyed, theoretically, the "full exercise of their civil rights." The tendency of official policy to try to enforce or speed up integration - which also contravenes the Geneva Convention referred to earlier - is, with the land issue, the greatest threat the Brazilian Indian faces today, and his survival depends on the extent to which he is able to withstand it.

"To sum up this section, we look at the three main categories of reasons for the apparently incomprehensible pressures the government is applying to the Indian community. In the past, the Indian has been referred to as an "ethnic boil" by the ex-president of FUNAI, and an "obstacle to progress" by the ex-minister of the Interior. Is it reasonable to suppose that this tiny handful of people who would not fill a Brazilian Football Stadium, mostly inhabiting the most inaccessible areas of Brazil, and amounting to .1% of the country's population, could really hold back the development of the other 99.9% of the population? Is it not patently absurd that this group of a mere 200,000 people, who have no arms, only the most simple and rudimentary technology, no material wealth, no common language, virtually no means of inter-communication, and who are largely illiterate, should pose such a threat to a huge and growing country with nuclear power and the fastest growing city in the world?" 58/

136. In Colombia, Act No. 89 of 1890 specifies that the indigenous inhabitants "integrated into civilized society" shall be subject to the general laws of the Republic except in matters concerning the reservations, to which the special provisions established by that Act shall apply (art. 2).

137. With regard to the legal capacity of those persons as established by the Act in question and other legal instruments, the only provision to be found in the legislation applicable to the indigenous people which represents an exception is to be found in Act No. 89 of 1890, which specifies that they are to be accorded the status of minors in so far as their share of the reservation land is concerned (art. 36 of the Act). The logical conclusion therefore is that they are legally capable, except in the matter of disposing of their share of land in a reservation; to be entitled to do this they must comply with the same formalities as those applicable to minors. In line with this, article 29 of Act No. 19 of 23 September 1937 provides that "when an indigenous reservation has been divided up, the members of the community owning land in the reservation acquire the ordinary status of Colombian nationals with respect to both person and property". It should be pointed out that there is no apparent justification for the reference to "person" in this article, since the limitation on the capacity of the indigenous persons relates solely to their power to dispose of their rights in the reservation.

58/ Anna Presland, loc. cit., pp. 27 and 28.

138. The following statement by the Argentine Government is illustrative of the explicit subgroup, whose members have a legal status generally applicable to all:

> "In accordance with article 16 of the National Constitution, which establishes the principle of equality before the law, the indigenous inhabitants are citizens who enjoy the same rights and have the same obligations as the other inhabitants of the territory of Argentina and, among other things, are registered for the purpose of the exercise of their civic rights and the performance of military service."

139. The Government of Guatemala states that the legal status of the indigenous people is based on article 43 of the Constitution "which embodies the principle that all human beings are free and equal in dignity and rights, and establishes that no one may be subjected to servitude or to any other condition that is prejudicial to his dignity and the respect due to him. Discrimination on the grounds of race, colour, sex, religion, birth, economic or social position or political opinion is prohibited. The Government maintains the aforesaid principle intact, hence the indigenous population of Guatemala is not exposed to discrimination of any kind".

140. Although not expressly mentioned, it will be noted from other information on some of these countries that a number of special measures have been adopted with respect to the indigenous people.

141. On the other hand, the information relating to other countries does refer explicitly to the main reasons for the adoption of special measures favouring the indigenous populations. Either it is specifically stated that such measures have been taken, or it can be deduced from the institutionalization of the measures that they are intended to ensure that the indigenous people are able to exercise their rights more effectively and to give full effect to their obligations and responsibilities as citizens within the institutional system concerned.

142. Thus, for example in Indonesia, the Constitution does not recognize any distinction in legal status between citizens, so that any exemptions from obligations imposed by law tend to be on a de facto basis in that country. Moreover, as there is no legal status for members of isolated groups or communities of autochthonous peoples, there is consequently no hard-and-fast rule that may be applicable when outside authority becomes involved.

143. The Government of Finland states that in that country, "the legal status is the same for all citizens, including the Lapps". Certain special provisions have been made, however, the effects of which would directly or indirectly benefit the Lapp population.

144. More specific reference is made in certain cases to some of the special measures taken for the benefit of the indigenous people.

145. Thus, for example it has been stated that citizenship rights and obligations are largely the same for the Lapps as for nationals. This applies to all the Finnoscandian Countries. In Sweden, however, the Lapps also have the privilege of exclusive reindeer herding rights; moreover, the practising herdsmen are in time of peace exempt from military service. The Swedish Government has stated that "there is a provision stating that in principle peoples of Lappish origin have an exclusive right to reindeer breeding".

146. In 1973 the Government of the Philippines stated that in that country "between 1918 and 1935, the non-Christian tribes were governed by special laws under the supervision of the Bureau of Non-Christian Tribes. The present Constitution does not distinguish them from other citizens, although the Civil Code contains special provisions relating to their marriage". That situation still seems to obtain today.

147. In Japan the Ainu have no special status and in law are simply Japanese citizens. In the late 1920s they were granted legal citizenship with the concomitant obligation of army service. Various protective and educational programmes were carried out by the Japanese Government at all times in their history for the Ainus in Hokkaido. The consequences of these measures are said to have been varied and are described in the appropriate parts of this study.

148. In the information available in other countries there is, as indicated above, a specific mention of the need to take these special measures. It is deemed useful to quote here some of the statements available on these aspects.

149. On the fundamental status attributed to aborigines and Torres Strait Islanders in Australia the Government states that the Commonwealth has developed a national policy which clearly recognises that Aboriginals have the same rights and obligations as other citizens and, in addition, may choose to benefit from certain special provisions established in their favour. Most such measures are designed to overcome the disabilities now being experienced by many Aboriginals and should therefore be regarded as temporary, but some special provisions, such as those pertaining to land rights, might more properly be regarded as permanent. The federated States have developed broadly similar policies with the exception of the State of Queensland.

150. According to the replies received, the indigenous populations do not have a special legal status in any of the other countries whose Governments have provided information. The realization that these people face special problems because of their cultural and social differences with respect to the rest of the population has led the Governments to institute special measures in an effort to compensate them to some extent for the problems they confront. Some statements made in this connection are reproduced below.

151. The Government of Bangladesh has stated:

> "In Bangladesh, there being no discrimination against any citizen on ground of religion, race, caste, sex or place of birth, the question of any special legal status for any group or individual will not be relevant.
>
> " ...
>
> "However, for development purposes, some regions or groups have been identified as "backward". Special treatment is given to these groups or regions".

152. In Norway, although as pointed out by the Government "no special legal status has been established in respect of the Lapps", mention is made also of particular provisions that have been effectively drawn up, specifically in order to give the Lapps special facilities which they need in order to enjoy certain rights.

153. In a broader sense, the Government of India emphasizes that the Scheduled Castes and Scheduled Tribes, which have been described as the weaker sections of the population, enjoy all the rights open to other citizens of India, but, additionally, they have certain special privileges, such as reservation in public services and in legislatures. The grant of these additional privileges does not debar them from obtaining employment or seeking election outside the quotas reserved for them.

154. In Pakistan the "underprivileged castes, tribes and groups" that have been identified by the Governments of the respective provinces and entered in a schedule of "underprivileged classes" enjoy the same rights and duties as other citizens. In addition, and in order to bring them to terms of equality with other persons, they are granted special representation in the higher cadres of the administration. Among other things, tribal candidates for public office enjoy favourable consideration in certain districts.

155. In Costa Rica, where the indigenous people are regarded as inhabitants of the country and Costa Rican citizens under the Constitution, all the rights and obligations of citizens have been attributed to them by law and executive decrees, and they are also entitled to benefit from any provision especially concerned with the land which is interpreted in their favour on the grounds that they are in a weaker position in society. Furthermore, they are exempt from certain obligations, particularly with regard to land taxes, without this restricting their rights as citizens.

156. From the material made available to the Special Rapporteur, it appears that there is no restriction on the exercise of any right except the right to dispose freely of the community reservations, which are inalienable and cannot be ceded but only negotiated with other indigenous persons. Restrictions are also placed on the right of non-indigenous persons to lease, rent, purchase or in any other way acquire land or farms within reservations. Sales of land in indigenous reservations to non-indigenous persons are declared null and void with the appropriate legal consequences (article 6 of Executive Decree No. 5904-G, as amended by article 14 of Executive Decree No. 6036-C).

157. The information concerning certain countries contains, in varying degrees of clarity, the idea that the special measures adopted in connection with the indigenous populations will be continued only so long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits to which they should be entitled under the general laws of the country, and only to the extent that they are deemed necessary.

158. For example, the Government of New Zealand has stated that:

> "The Maori population is recognized as having all the rights and obligations of citizenship. There are, in addition, enactments which confer special rights and privileges on Maoris for the express purpose of ensuring that their position in society is equal to that of the rest of the community. These special provisions are reviewed continuously and those that are no longer required are repealed ...".

159. Somewhat more explicitly, the Government of Guyana has stated that the indigenous populations have all the rights and obligations of citizens and in addition benefit from special provisions established in their favour and considered necessary because of the fact that they have a relatively weak position in society, such provisions to remain in force as long as they continue to be in such a position. These special provisions are contained in the Amerindian Ordinance, Chapter 58.

160. According to an official statement of policy which spells this out to a much clearer degree, in Malaysia the Orang Asli have been recognized as having all the rights and obligations of citizens and, in addition, benefit from certain special provisions established in their favour and considered necessary because of the fact that they have a relatively weak position in society, such provision to remain in force as long as they continue to be in such a position. The following are among the basic principles adopted in this respect, as transmitted by the Government:

"(a) The aborigines, being one of the ethnic minorities of the Federation must be allowed to benefit on an equal footing from the rights and opportunities which the law grants to the other section of community. In so far as their social, economic and cultural conditions prevent them from enjoying the benefits of the laws of the country, special measures should be adopted for the protection of the institutions, customs, mode of life, persons, property and labour of the aborigine peoples. However, such measures of protection should not be used as a means of creating or prolonging a state of segregation and should be continued only so long as there is need for special protection and only to the extent that protection is necessary.

"(b) In order to assist in providing the aborigines with opportunities for the full development of their initiative, special training facilities should be introduced so that they can receive the training necessary for occupations for which they have traditionally shown aptitude. However, such special facilities should be provided only so long as the stage of cultural development of the communities concerned requires them. With the advance of the process of integration they should be replaced by the facilities provided for other citizens."