May each people weave the threads of their history.
In defense of a State restitutive and guarantor of deliberation in ethnic jurisdiction

(Commentary to the Law Project nº 1057 of 2007 proposed by MP Henrique Alfonso on the practice of infanticide in Indian areas, read in 05/09/2007 at the Public Hearing organized by the Commission of Human Rights of the House of Representatives of Brazil)

Rita Laura Segato
Dept. of Anthropology
University of Brasilia

Dear ladies and gentlemen Members of the House of Representatives, assessors and respected public: It is by the hand of two contrasting scenes that I start my presentation. These two scenes compose a vignette of the nation where we live and depict aptly the role of the State and the meaning of law.

The first scene was taken from the Capital's main newspaper, which I read every morning, though indeed could have been extracted from any Brazilian paper, any day. It is the scene of the State, of public health, public security, and general protection and guarantees for life. Correio Braziliense, Brasilia, Tuesday, August 28th of 2007, page 13: "In five days, 11 babies died in a public maternity of Sergipe State". Correio Braziliense, Brasilia, today, September 5th: "Vera Lúcia Dos Santos [...] had two children assassinated. She was still crying the death of Franklin, 17, when her youngest child, Wellington, 16, was executed with two shots. No one was detained". "According to a survey we carried, none of this year's 41 murders of adolescents aged 13 to 18 years old occurred in the suburbs of the Capital was solved".

The second is the scene of the Indian, and was taken from a book that I recommend: The Slaughter of the Innocents. Children without childhood in Brazil. (A Massacre dos Inocentes. A Criança sem infancia no Brasil) In the introduction, Jose de Souza Martins summarizes with the following moving words the first chapter of the volume: "The Parkatejê Indians 30 years later", written by Iara Ferraz:

[...] It was the White society that, in its voracious and cruel expansion, produced the destruction and death of the Parkatejê Indians of the South of the State of Pará. It not only eliminated physically a great number of people, but it sowed in the interior of the tribe social disaggregation, demoralization, illness, hunger, exploitation - the conditions of unconditional surrender of Indian to "civilized" society. The White led the tribe to demographic disequilibrium, messing with lineages and social organization. The Parkatejê yielded heroically to the need to surrender, delivered their orphaned children to the Whites, so that, at least, they could survive as adoptive children. Later, when they organized their resistance against the Whites and had their society reorganized, they left in search of their dispersed children, now adults widespread even through distant regions, to tell them to come back to their tribe in order to share the Saga of the Parkatejê people. Even those who did not have any knowledge of their Indian origin, because the Whites had denied them this information, were taken by surprise in the middle of a day, in their adoptive home, by the visit of the old chief, who announced them that he had come to call them back, to make them return to their village and to their people, which were waiting for them (São Paulo: Editora Hucitec, 1991: 10).

Facing these two contrasting scenes, confirmed by many others we all know very well, I ask myself and I ask you: What sort of State is this that today intends to legislate upon how Indian peoples should preserve their children? What sort of State is this that today pretends to teach Indian Peoples to take care of them? What authority this State has? What legitimacy and what prerogative? What credibility this State has when tries, by means of a new law, to criminalize the peoples who were already here weaving the threads of their own histories, when were interrupted by the violence and the greed of invaders? In face of the evidences that each day multiply about the absolute failure of this State to fulfill its obligations and to accomplish its own project for the Nation, I feel obliged to conclude that the only prerogative this State counts on is that of being the depositary of the spoils of the conquest, the direct heir of the conquerors' booty.

We may well, instead, criminalize this very State that today intends to legislate, and take it to the accused's stool for defaulter, for omissive, for law breaker, and even for homicidal through the hands of many of its agents invested with State power. If we compare the gravity of the crimes, we will not have alternative that acquitting the peoples who today are placed under suspicion and return the target to those who try to inculpate them: an élite that once again today proofs its incapacity to manage the nation, and sees publicly dismounted its pretension to moral superiority - that most important of all instruments in any domination enterprise.

The force of this initial vignette speaks by itself and I could well finish my exposition here. However, there is much more to be said about the Project of Law that congregates us here today. To begin with, two precisions must be made. The first one relates to the issue we should be dealing with in this Hearing, to make clear that the concern of this debate is not the right to life – already sufficiently guaranteed in the Brazilian Constitution, in the penal code and in Human Rights' legal instruments duly ratified by Brazil - but the role of the State towards the indigenous peoples and their right to life as collective subjects. Our effort should be to envisage how the State could become capable to protect and to promote safer continuity and vitality for them, taking into consideration the fact that they bestow great wealth upon the nation in terms of diversity of solutions for the human experience.

The second precision refers to the meaning of the expression "right to life". This expression may refer to two different types of rights to life, while here, in this law, we see only one of them considered. There is the individual right to life, that is, the protection of the individual subjects' right to life; and the collective subjects' right to life, that is, the right to the safeguard of life of peoples as peoples. While this law enforces the first, strongly undermines the second. However, as this latter is much less elaborated in legal discourse and public policies, we should dedicate more thought to it and put our imagination to work in order to devise better legislative and governmental protection for collective subjects of rights.

Our priority should be to save the community where there still exists community and to save a people where still a people persist. The State needed to turn this end possible is not a state preeminently punitive and interventionist, but a State capable to restitute the material and juridical means to guarantee autonomy to the people in the making of their own history, and freedom at the interior of each collectivity, so that its members are able to discuss their dissensions, deliberate and decide about their customs, and walk their own way towards the necessary dialogue with the international standards of Human Rights.

1. The Punitive State

Several are the authors, sociologists of violence, sociologists of law, jurists and political scientists concerned with the gradual growth of punitive and criminalizing dimensions of

State action in detriment of other kinds of action. Analysts criticize the fact that, while State agencies seem to concentrate more and more their responsibilities upon punitive measures, they relegate sine-die other and more vital obligations. This law we came here to argue fits in precisely within this trend, endorsing the much lamented and condemned profile of the punitive State, a State that reduces its performance to the acts of force on and against the peoples whom it should protect and promote.

In his last book, The Enemy in Criminal Law, the influential Argentine jurist Eugenio Raúl Zaffaroni, today Minister of the Supreme Court, examines the contradiction between the principles of Democracy and the punitive State. Zaffaroni unveils the hidden transcript of the punishing State throughout history and, especially, in the contemporary context. What emerges is that penal juridical discourse unavoidably introduces the idea of an enemy, which unfolds from the category of the hostis in ancient Roman law. While Democracy is supposedly for all, criminal legislation speaks always, in either more hidden or more explicit ways, of the figure of an inimical other, for then to enshrine itself in opposition to it. Though the State belongs to all, it projects (and, as a matter of fact, e-jects), by means of Criminal law discourse, the figure of an other people, to then, as part of the same maneuver, claim it as enemy.

In the case of the law we debate, the enemy in Criminal law is each indigenous people, the radical difference they represent and their right to make their own history. This law criminalizes the village and attempts at punishing the other just for being other. Their authors do not stand the possibility of existence of a collectivity that is not a part of them. Therefore, this law is, above all, anti-historical, since in our days there is increasing concern to preserve difference, to value the plurality of solutions for life, and to promote the rights of collective subjects. This must be so because, despite our constant aggressions during 500 years, these peoples had not only endured the harshest of conditions by means of their own strategies and internal logics, but also because it is possible to imagine that they will go beyond us in their capacity for survival. Many of them sheltered in regions remote from what we presumptuously consider to be "the Civilization", free from our yearn for concentration and accumulation, and free also from the heavy luggage that burdens us, they will have, who knows, a chance we will not have, in a world that plunges each day in what many believe to be its terminal phase.

2. The meaning of laws.
In the article "Truths and lies on the Criminal Justice System", sociologist Julita Lemgruber not only discloses the scarce effectiveness of the law among us, but also in the most policed countries of the world. Using quantitative research on Public Security in countries where such research is carried on with regularity, Julita states that in England and in the country of Wales, in the year of 1997

[...] of each one hundred crimes committed in that year, 45,2 were communicated to the police, 24 were registered, 5,5 were solved, 2,2 resulted in conviction and 0,3 ended in punishment by confinement. That is, in England, with a police force well more efficient than ours and a Judiciary much more agile, only 2.2% of offenses resulted in conviction of the criminals and only a trifle parcel of 0,3% of them received punishment by confinement.

Analogous study was carried in the United States in 1994, but considering only violent crimes (homicide, aggression, rape, robbery etc.), therefore crimes more important to investigate, solve and punish. However

[...] in a country with such rigorous criminal legislation as the U.S., the System of Criminal Justice acts as a true funnel, capturing parcels progressively smaller of crimes perpetrated in the society: for 3.900.000 cases of violence occurred in that year, only 143.000 (3.7%)

resulted in conviction of authors, being 117.000 (3%) punished with confinement.

In the light of these data, the author characterizes as a "First Lie" the statement that the system of criminal justice can be considered an efficient inhibitor of crime.

In the case of Brazil, law's limited power is still more extreme. In the state of Rio de Janeiro (the most monitored by regular researches on violence), during the 90's, homicides that reached conviction were, according to different authors, 10%, 8% or 1% of all the homicides denounced to justice. In Alba Zaluar's words: "In Rio de Janeiro, only 8% of the inquiries become processes and are taken to judgment. Of these, only 1% reach a sentence.

These data impose new questions as regards the motivations legislators could entertain when insisting on a law that criminalizes indigenous peoples and turns more distant their access to an ethnic jurisdiction of their own for the solution of conflicts and dissents inside the communities - a law that, after all, infringes the Convention 169 of the OIT, fully in force in Brazil.

If the law does not produce reality among us, how could construct reality for other peoples? If the law does not make things happen, what would be then the meaning of such insistence on passing this new law even when, in fact, besides breaching the legitimate and legally validated right to difference, it inflates, redundantly and unnecessarily the existing legislation? If, as it is, this law enunciates rights that are already fully guaranteed in more than one article of current and already sufficiently innocuous criminal legislation, where then this legislating fever emanates from?

I can only find one answer to this question: what this law in fact does, and does efficiently, is to assert, to publicize before the Nation, who are the people writing the laws, which groups within national society have access to the chambers where this task is performed. For we shall not forget that the Law speaks, before anything else, about the identity and position of its authors. It contains, beyond doubt, a signature. Thos who want to write a law, want to leave their signature in the most eminent text of the Nation. And certainly this is not a valid or sufficient motivation for all and everyone, especially if we consider that this Congress does not have quotas for indigenous representation that could guarantee participation of the nation's two hundred indigenous peoples in the writing of the laws of their concern.

3. The future of the State; or: how to transcend the dyad relativism versus universalism

Which could be then the work of the State to improve its contribution for the general wellbeing of peoples amidst scenery as doom as the one I have just sketched? It should become a State restitutive and warrantor of ethnic and communitarian jurisdiction. What I mean is that, facing the disorder metropolitan and, later, national élites introduced amidst the first nations of the continent, WE TODAY HAVE AN OPPORTUNITY: the opportunity to allow those who up to this day did not have a chance to rearrange their ethnic order and to retrieve the threading of their own history. Who knows thus will be possible to restore what was destroyed in the cultural, juridical, political, economic and environmental orders of the nation of so many nations. If no perfect law exists, instead of insisting on the each day more remote perfectibilidade of the current criminal law system, we can start opening paths towards other solutions for conviviality. I refer here to ethnic law and the project of juridical pluralism.

It is not case, as it has been the understanding of jurists and anthropologists until today, to oppose the relativity of cultures to the universalism of Human Rights or to the universal

validity of the Constitution within the nation. What the project of a pluralist state and the platform of legal pluralism should propose is the model of a nation as alliance or coalition of peoples. This new national paradigm implies allowing each one of them to solve internal conflicts and elaborate dissent through their idiosyncratic way. For in every human village, even the smallest one, dissent is unavoidable, and when the custom of infanticide is the matter, as the cases told here testify, disagreement always emerge. Facing dissent within the ethnic group as regards a particular custom, the role of State will be to supervise, mediate and intercede to guarantee the internal process of deliberation can to occur freely, without abuses on the part of the most powerful at the interior of the society. This is so because, as proved by the numerous demands for public policies placed to the State by indigenous peoples after the 1988 Constitution, following the intense and pernicious chaos installed by contact with Whites, the State cannot simply be expected to withdraw. It must be available to offer guarantees and protection when convoked by members of the communities, provided that its intervention occur in dialogue between the representatives of the State and the representatives of the people and, above all, intended at promoting dialogue between village's powers and its more fragile members.

This caution when legislating and this commitment to guarantee the freedom of the group to deliberate internally and to self-legislate are gestures particularly wise and sensible in the multicultural globalized world of today, in which there is great danger of having elements of the tradition appropriated by interest groups that adhere to a fundamentalist cultural project to be transformed into identity emblems. That is the case of many cultural practices that, far from diminishing when restrained by a westernizing legislation, get affirmed and enforced as signs of ethnic identity in order to confront an invasive power.

Bearing in mind these cases, we get convinced that this new law criminalizing infanticide and its witnesses in the Indian village is not only impracticable but also dangerous for two reasons we cannot disregard. In the first place, because it can breed reactive attitudes that, on the basis of a fundamentalist stand towards culture and identity may come to transform the practice of infanticide in an emblem of difference. In second place, because the application of a law of this type demands enforcement by police forces completely unprepared to watch and intervene the village space. To leave the responsibility of enforcing this law in the hands of security forces so unprepared to cross the frontiers of difference will certainly bring more harmful consequences than the very problem it intends to solve.

The most adequate and efficient way of thinking about the set of problems we are dealing with must avoid entering the field of insoluble dilemmas posed by the opposition relativism – universalism. When we try to tackle the issue of pluralism, it is better to abandon the issue of culture as set of crystallized customs and ideas, and introduce, instead, the notion of a plurality of histories unfolding in mutual exchange. Every people inhabit the flow of history intertwined with the history of others, and every people contain in its interior the true seed of history that is dissent, so that customs are changed and tradition unfolds in the course of deliberation. It is not tradition what constitutes a people, but joint deliberation of conflicts. Many are the peoples who had already deliberated and decided to abandon the custom of infanticide, as it happened, for example, among many others, with the Kaxuyana-Tyrio people, according to the presentation of Valéria Paye Pereira, who preceded me in this Hearing.

This idea of a people's command upon its own history runs precisely against the direction proposed by this law, because is not aligned with a punitive State that imposes itself on people by means of criminal laws. Much on the opposite, it speaks of a State working to preserve the continuity of each people's historical course flowing free and differentiated. Indeed, the undeniable fact that societies transform themselves, abandon customs and install others is an argument against this law and not in its favor. To say that peoples move

voluntarily as a result of disagreements produced in their interior amounts to affirm that the State is not the agency to impose, by means of threat and coercion, prescribed outcomes for other peoples' own history within the nation that should shelter us all. On the contrary, its role is to protect the unfolding of each idiosyncratic and particular historical path.

In the legal anthropological perspective I presented, the role of the State is, therefore, to restitute to indigenous peoples the material and juridical means for them to regain the usurped capacity to weave the threads of their own history, and to guarantee to them that internal deliberation could take place in freedom, under the form of guarantees for ethnic jurisdiction. This defense of an owned history, in opposition to the relativist outlook that can never fully avoid referring ethnic rights to a crystallized and timeless culture, is the only efficient way to allow justice to advance inside indigenous societies through deliberation and constant production of peoples' own systems of law.