THE EXISTENTIAL SUBJECT OF RIGHTS AND PRIVATE LAW: THE EXAMPLE OF THE INDIAN ISSUE IN BRAZIL*

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I. INTRODUCTION

The issue of the juridical subject has been a topic of discussion as part of the rethinking of the classical jurisprudential concepts in Brazil. In particular, some authors have written about the "repersonalization of private law."[1] This has opened a promising path of inquiry regarding the legal subject for at least four major reasons. First, continental private law is the classical field to discuss the subject of rights. Second, the focus of private law remains the concept

* This Article is part of my larger research project, "The Human Person and Subject of Rights in Private Jural Relations: Identity and Alterity," which was funded by Universidade do Vale do Rio dos Sinos (UNISINOS).

This Article is a revised and amplified translation of José Carlos Moreira da Silva Filho, *A Repersonalização do Direito Civil em uma sociedade de indivíduos: o exemplo da questão indígena no Brasil*, *in* CONSTITUIÇÃO, SISTEMAS SOCIAIS E HERMENÊUTICA [THE CONSTITUTION, SOCIAL SYSTEMS AND HERMENEUTIC] 277-94 (Lenio Luiz Streck & José Luiz Bolzan de Morais eds., 2008). I want to thank Professor Francis J. Mootz III of The William S. Boyd School of Law at the University of Nevada, Las Vegas for his very helpful comments and revising of my initial translation of the published Article, and so the current Article likely is substantially different in form (but not in substance) from the original.

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[1] In order to explain the concept, Paulo Luiz Neto Lobo argues that,

> the patrimonialization of the private relations in the Codes is incompatible with the dignity of the human person, which has been recognized by the modern constitutions, including that of Brazilian(art. 1, III). Repersonalization is a step in the long history of human emancipation by putting the human person at the core of private law. Patrimony plays a second-order role which is not always needed. . . . The challenge to private law scholars is to achieve the ability to see all persons in their ontological dimension, and to see their patrimony through this dimension as well. It is necessary to materialize the subjects of rights, who are more than just property owners. The recovery of the primacy of the human person in private relations is the first step in adjusting law to reality and to the ground of constitutionalism.

Paulo Luiz Netto Lôbo, *Constitucionalização do direito civil* [*Private Law Constitutionalization*], 141 REVISTA DE INFORMAÇÃO LEGISLATIVA [R.I.L.] 99, 103 (1999) (Braz.) (translated for this Article by Moreira da Silva Filho). For more details and explanations concerning the theme of repersonalization of private Law in the legal context, *see* José Carlos Moreira da Silva Filho, *The Human Person and Objective Good Faith in Contract Relations*, 25 PENN ST. INT'L L. REV. 405 (2006).

of the person, opening an important space to recover the moral philosophy in law. Third, the repersonalization of private law demonstrates the necessity of going further than modern natural law theorists in the discussion of the concept of person, and philosophical hermeneutics provides guidance for contemplating the human person's concrete, historical and relational dimension. Finally, this direction has affinities with the new constitutional law that seeks to change society and improve the republican and communal features of civic life.

This Article discusses these four aspects, guided by a specific and peculiar Brazilian issue: the rights of indigenous persons. This issue provides a privileged point of view to discuss juridical subjectivity. The analysis will draw from the theoretical approach of Martin Heidegger's philosophical hermeneutics to frame a discussion of the interpretation of the Brazilian Constitution regarding indigenous rights.

This discussion will demonstrate that modern developments in the Brazilian Constitution have changed the paradigm for analyzing indigenous rights, and that individuals should understand and further develop this paradigm in order to recognize and respect the alterity of the indigenous peoples.

II. THE VALLADOLID DEBATE ABOUT THE HUMANITY OF INDIANS

Regarded from within "the white and civilized western man" paradigm, indigenous Indians in Brazil are less than real subjects. They are incapable of being the protagonists of their own history. From this point of view, there are two possibilities: (1) the Indians are not human beings; or (2) they are like children and need guardianship. As to the first case, it is helpful to recall the Valladolid debate in 1550 between Juan Ginés de Sepúlveda and Bartolomé de Las Casas, which is usually neglected in the narratives and studies about the appearance and development of the modern subject.[2] According to Todorov,

[2] Enrique Dussel argues that a history of the modern subject that does not consider its outlying context is, at best, partial and incomplete. The Argentinean philosopher accuses Charles Taylor of making this error in THE SOURCES OF THE SELF. Dussel claims that the book,

> [I]s written with mastery, with great knowledge and a creative way to obtain new results, but it is only an intraphilosophical journey. There is a lack of a history, an economy and a political perspective. This methodological limitation prevents the author from reaching more critical results. It seems that capitalism, colonialism, and the continuous utilization of violence or military aggression don't have any importance.

ENRIQUE DUSSEL, ÉTICA DA LIBERTAÇÃO NA IDADE DA GLOBALIZAÇÃO E DA EXCLUSÃO [LIBERATION ETHICS–IN THE AGE OF GLOBALIZATION AND EXCLUSION] 67 (Ephraim Ferreira et al. trans., 2000) (translated for this Article by Moreira da Silva Filho). By considering only the European context and the principal European thinkers in order to identify the sources of the modern subject, Taylor engaged in "eurocentrism." Dussel says:

> The 'eurocentrism' consists exactly in constituting as a *human abstract universality in general* moments of the European *particularity*, which is the first world particularity indeed (in other words, the first human concrete universality). Culture, civilization, philosophy, subjectivity, etc. from *modern* Europe have been taken as the culture, the civilization, the philosophy, the subjectivity, etc., *with no other* [human universal abstract]. A great portion of the benefits of modernity didn't come exclusively from European exclusive creativity. They came from a continuous dialetic (impact and counter-impact) between Europe and its periphery, even in the constitution of the modern subjectivity as itself.

Id. at 69. However, one must concede that Taylor does not sustain this kind of eurocentrism. His main argument is precisely to make clear that the modern self is a product of the modern

this debate occurred because Ginés de Sepúlveda, a well-know scholar at the time, did not obtain permission to publish his treatise favoring the waging of a "just war" against the Indians.[3] Sepúlveda asked for a hearing before a board of jurists, theologians, and experts. Bartolomé de Las Casas, a Dominican friar, offered to support the opposite thesis. He is now well-known for his strong and vehement defense of the Indian cause throughout his whole life. Las Casas' vehemence is clear in his writings[4] and is the direct result of his own experience as the chaplain of Spanish expeditions (at the time of the debate, he had been in America for almost half a century), in which he testified about the massacre and extermination of amazed and defenseless villages.

It took a mere three hours to read Sepúlveda's treatise, but the Las Casas reading[5] lasted approximately five days! Sepúlveda argued that the Indians were inferior and cited to Aristotle's arguments about the nature of slaves.[6] Sepúlveda was an expert on Aristotle's philosophy, and had translated several of Aristotle's works into Latin, including THE POLITICS. He sustained the "nat-

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European context rather than an abstract and universal concept. Dussel's claim must be credited with recognizing the determinant role of a new world periphery (the "New World") with regard to Europe just as, before that, as Dussel argues, Europe was a periphery of the leadership of the Muslim world.

Some of the topics that characterize modern European thought were engendered by the relationship between Europeans and Indigenous peoples. Lewis Hanke observes, writing about Spanish America, that,

> [t]he Laws of Burgos in 1512, and their clarification in 1513, were the first fruits of the 1511 sermons of Montesinos. But they were only a beginning. Other Spanish thinkers, now that the problem had been brought to their attention, began to wonder whether Spain, after all, held just title to the Indies. These thinkers wrote treatises in which they went far beyond the dispute at Burgos on the proper laws to be drawn up for the benefit of the Indians. They concerned themselves with basic political issues precipitated by the discovery of America, and thereby helped to work out fundamental laws governing the relationships between nations, over a century before Grotius published his study *On the Freedom of the Seas*.

LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 25 (Southern Methodist Univ. Press 2002) (1949). Similarly, Dussel observes that the instrumental domain of nature in Cartesian philosophy had already been preceded by the conquest of the New World. He writes,

> the *ego cogito*, as we saw, already says something about a previous history from the sixteenth century, which expresses itself in Descartes' ontology, but did not come from nowhere. The *ego conquiro* (I conquer), as a "practical self," came before it. Hernân Cortês, in 1521, preceded *The Discourse of the Method* (1636) by more than one century. Descartes studied in *La Fléche*, a Jesuit school, a religious order that was widely implanted in America, Asia and Africa at this time. Additionally, Descartes was in Amsterdam since 1629. However, the "barbarian" was not considered as the proper context for thinking about subjectivity, reason, *cogito*.

DUSSEL, *supra* note 2, at 69.

[3] TZVETAN TODOROV, THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER 151-52 (Richard Howard trans., Harper Perennial 1992) (1982).

[4] For example, see the impressive reports contained in a pamphlet written by Las Casas and published for the first time in 1552 in Seville: BARTOLOMÉ DE LAS CASAS, THE DEVASTATION OF THE INDIES: A BRIEF ACCOUNT (Johns Hopkins Univ. Press 1992).

[5] The 550 pages in Latin, distributed in 63 chapters, were called *Argumentum Apologiae*. HANKE, *supra* note 2, at 118.

[6] Hanke pointedly argues that the claim that a social group deserves to be subjugated through war and violence on account of its barbarity is always presented as part of imperialist and colonizing actions. *Id.* at 121-22.

ural" inferiority of the Indians when compared to the "rationality" of the Spanish.[7]

Sepulveda anticipated by more than a century John Locke's argument that there could be a legitimate divestiture of indigenous lands. According to Locke, the North-American Indians did not use their lands in a rational way; they did not obey God's natural law, which had forbidden the waste of private property (since they did not "use" all their lands). By persisting in this disobedience, the Indians thereby authorized the English conqueror to usurp their property.[8] Sepúlveda recommended the usurpation of indigenous properties by applying just war theory, given their crudeness and inferiority. The fact that the Indians did not embrace Western notions of ownership and property was regarded as a sign of their inferiority. They did not have private property and they did not manage the goods in an autonomous and free way; instead, they submitted everything to their king.[9]

Las Casas, on the other hand, boldly asserted that Sepulveda, despite his notoriety as an expert on Aristotle, had misunderstood Aristotle's theory of slavery. Las Casas argued that, for Aristotle, there were three types of barbarians: those who had strange attitudes and opinions, but had a decent way of life and were capable of ruling themselves; those who had no writing; and those who were rude, primitive, lived without rules and were like wild beasts. Only

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[7] In Sepúlveda's words:

> And then, in only one man one can see the soul's empire over body, the civil and royal power that understanding and reason have over the appetite. One can see clearly that it is natural and fair that the soul dominates the body, that reason presides over instinct. If the priority were reversed it would be pernicious. There is a rule of order based on this principle, which is why beasts are domesticated under men's empire, why men rule over women, adult over child, the father over his children, the powerful and the more perfect over the weak and the imperfect. One can verify this principle even between men; there are some men that are master by nature and others that are servant by nature.

JUAN GINÉS DE SEPÚLVEDA, DEMÓCRATES SEGUNDO, O, DE LAS JUSTAS CAUSAS DE LA GUERRA CONTRA LOS INDIOS (2d ed. 1984) (translated for this Article by Moreira da Silva Filho).

[8] This argument is developed in greater detail in Franz J. Hinkelammert, *La inversión de los derechos humanos: el caso de John Locke* [*The inversion of human rights: the case of John Locke*], *in* JOAQUÍN HERRERA FLORES ET AL., EL VUELO DE ANTEO: DERECHOS HUMANOS Y CRÍTICA DE LA RAZÓN LIBERAL [THE FLY OF ANTEO—HUMAN RIGHTS AND THE CRITICS OF LIBERAL REASON] 79-113 (2000); José Carlos Moreira da Silva Filho, *John Locke*, *in* DICIONÁRIO DE FILOSOFIA DO DIREITO [DICTIONARY OF LEGAL PHILOSOPHY] 541-45 (Vicente de Paulo Barretto ed., 2006).

[9] Sepúlveda wrote:

> Some have said that the inhabitants from New Spain and Mexico Province are the most civilized of all. They boast of their public institutions, because they have cities built rationally and kings are elected by popular vote rather than hereditary, and they have modern trade. But I disagree with this assessment, seeing in those institutions the proof of the rudeness, barbarism and innate slavery of those men. Having houses, a rational way of living, and some kind of trade have naturally developed and only serve to prove that they are not bears, or monkeys, and not totally devoid of reason. But, on the other hand, they have established their republic such that no individual owns anything, because everything is under the power and control of their so-called kings, under whose discretion they live, attentive to their will and whim, and not to their own liberty. That this has been achieved not by the power of weapons but by a voluntary and spontaneous resignation is a certain sign of the servile and depressed mood of those barbarians.

Sepúlveda, *supra* note 7.

barbarians from the third type were slaves by nature, and Las Casas insisted that the Indians were not barbaric in this way.[10] Las Casas provided extended reports about the Indians' clothing and various aspects of their lives. In these reports he emphasizes the virtuous and rational characteristics of their society: beauty, good government, housekeeping, good feelings, religiousness, etc. Such features were superior even among the ancient people: the temples of Yucatã were more admirable than the pyramids of Egypt; religiousness was deeper than among the Greeks and Romans; and they educated and raised their children in a better manner.

Although the Board never rendered a judgment, Las Casas published and spoke as he wished during his life. Sepulveda, however, never obtained permission to publish his treatise, which only appeared in print in 1892. Nevertheless, after a brief interruption, the Spanish conquests continued and the proper application of just war theory even today has never been properly resolved.[11]

III. Francisco de Vitoria and the Thesis of Indigenous Infantility

In addition to Las Casas, there are other great defenders of indigenous rights, who tried to stop Spanish greed and violence with their words. Among them, the Dominican Francisco de Vitoria is well-known, although he died some years before the notorious debate of Valladolid. In his writings he argued that war against Indians could not be waged indiscriminately. Neither the pope nor the emperor could impose their laws and dominion without fair grounds. Vitoria rejected the argument that, because the emperor is the lord of all lands, or because the pope holds temporal power, that either could authorize a just war against the Indians.

Vitoria is one of the early precursors of the theory of international law. His conception of international law regarded it as unlawful for indigenous peoples to impede free access to their land by the Spanish, unless the Spanish caused harm to them. It was necessary to maintain an international law of reciprocity that would facilitate the trade between different nations.[12] On the other hand, the Spanish could also legitimately wage war against indigenous

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[10] As Hanke well observes, it is incorrect to assume that Las Casas admitted the possibility that some men were slaves by nature. Las Casas, indeed, searched for a strategic line of argument that would not contradict Aristotle's undisputed authority at that time. It was also a great strategy to fight the opposite arguments on their own terms. Hanke, *supra* note 2, at 123-25.

[11] Despite continuation of the "just war" justification, there is an important consequence that one can take from the episode of Valladolid:

> [W]hen Las Casas spoke at Valladolid for the American Indians his argumentation had another usefulness: it strengthened the hands of all those who in his time and in the centuries to follow worked in the belief that all the peoples of the world are human beings with the potential and responsibilities of men.

Id. at 132.

[12] In his first two propositions on the justification of the war against the indigenous peoples, published in his famous work, De Indis et de Ivre Belli Relectiones, Vitória writes the following:

> [I]t was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity

peoples to save the ones who were condemned to human sacrifices or cannibal rituals and, also, to protect those who had been converted to the Christian faith and now required protection against their own kings.

The most significant aspect of Vitoria's arguments is that he does not regard the Indians as wild and inhumane beasts, but rather as men with little education and who are trapped in an infantile stage of social development. It would be a matter of Christian charity to instruct them, to govern them and to impose on them a Guardianship for their own good.[13] It was this perspective

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> and common user which prevailed among men, and indeed in the days of Noah it would have been inhumane to do so.
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> . . .
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> The Spaniards may carry on trade among the native Indians, so long as they do no harm to their country, as, for instance, by importing the goods which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives.

Francisco de Vitori, DE INDIS ET DE IVRE BELLI RELECTIONES [INDIANS AND LAW OF WAR]*: Os índios e o direito da guerra* 94-96 (2006) (translated for this Article by Moreira da Silva Filho).

[13] In DE INDIS ET DE IVRE BELLI RELECTIONES, Vitoria describes what would be the last justification or title by which the Spanish claimed to wage war legitimately against the native Indians. Vitoria did not wholly support this position, but, in any event, he contributed to the dissemination of the idea. In addition, his conviction regarding the Indians' inferiority is revealed in other passages throughout the text. His proposition is as follows:

> There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely condemn it. It is this: Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even than the wild beasts, for their food is not more pleasant and hardly better than that of beasts. Therefore their governance should in the same way be entrusted to people of intelligence. There is clear confirmation hereof, for if by some accident of fortune all their adults were to perish and there were to be left boys and youths in enjoyment, indeed, of a certain amount of reason, but of tender years and under the age of puberty, our sovereigns would certainly be justified in taking charge of them and governing them so long as they were in that condition. Now, this being admitted, it appears undeniable that the same could be done in the case of their barbarian parents, if they be supposed to be of that dullness of mind which is attributed to them by those who have been among them and which is reported to be more marked among them than even among the boys and youths of other nations. And surely this might be founded on the precept of charity, they being our neighbors and we being bound to look after their welfare. Let this, however, as I have already said, be put forward without dogmatism and subject also to the limitation that any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards.

Id. at 94-96.

that spread and ultimately largely dictated the way in which western civilization understood and dealt with the indigenous peoples.

Vitoria's thesis provided the legal basis for the wars against the indigenous peoples,[14] but his conception of Indians as infants produced the broader idea that Indians do not possess the full capacity to exercise the acts of civilian life, that they require the Guardianship of the State because of their relative or total incapacity, and that they will reach full legal capacity and become the subjects of right only when they are fully integrated to (Western) civilization.

IV. The Theme of Guardianship in the History of Brazilian Policy Regarding Indigenous Persons

Until the Constitution of 1988, the main characteristic of Brazilian policy toward indigenous persons was to regard them as infants who required guardianship. Rosane Freire Lacerda[15] indicates that this policy began in 1750, when Pombal's administration initiated the transition of indigenous workers from slavery to wage earner status.

The legislation of the time purported to prohibit indigenous slavery, but it established a series of restrictions on Indians' legal capacity.[16] This approach grew stronger after Brazil became independent.[17] The imperial government persisted in its anti-miscegenation policy, land dispossession, and the constant presence of non-indigenous peoples in the *aldeamentos* (a spanish word which indicates a territorial area established and ruled by the government in order to gather and keep the natives under control). The government also seized tradi-

[14] Todorov highlights this point: "We are accustomed to seeing Vitoria as a defender of Indians; but if we question, not the subject's intentions, but the impact of his discourse, it is clear that his role is quite different: under cover of an international law based on reciprocity, he in reality supplies a legal basis to the wars of colonization which had hitherto had none (none which, in any case, might withstand serious consideration)." Todorov, *supra* note 3, at 150.

[15] In her brilliant master's dissertation, Rosane Freire Lacerda highlights, through documentary and historical research, that this policy was the main orientation, although not the only one, for public policies since the colonial period throughout the periods of Tomé de Souza, Men de Sá, Felipe III, Marquês de Pombal, D. Maria I, José Bonifácio de Andrada e Silva, D. Pedro I, imperial regency, D. Pedro II, and even during the Republican period. As we will see, this direction changes with the Brazilian Constitution of 1988. Rosane Freire Lacerda, Diferença não é incapacidade – o mito da tutela indígena (Apr. 9, 2007) (unpublished M.A. dissertation, University of Brasilia) (on file with author).

[16] A law from June 6, 1755 prohibited the enslavement of Indians, but also, "determined a punishment for those who, abusing the *imbecility* of the Indians, violated their territorial rights. In order to be successful with their civilization, they would be assimilated to agricultural practices, in the expectation that their relations with *the inhabitants of seafaring places* for the trade of such products would contribute to the abandonment of their *barbaric habits*. In addition, the Governor and the General Captain had to take care of their civilian instruction, and, at the same time, *preserve their freedom and their goods and trade*." Lacerda, *supra* note 15, at 42.

[17] Rosane Freire Lacerda clarifies that the imperial legislation makes a distinction between Indians who were capable and integrated to civilization and Indians who lived in a "primitive" stage. Only the latter would be a target for guardianship. However, these distinctions were very nebulous in practice, and there were no established criterions for engaging in this type of guardianship. The consequence was that guardianship reached all Indians indistinctly. *Id.* at 50.

tional indigenous lands as soon as they became empty with the forced migration of their original inhabitants. These policies led to the extermination of several native peoples and caused huge territorial losses to the survivors of other indigenous communities.

The republican Constitution of 1891, as well as the imperial Constitution, did not mention indigenous peoples. In this silence, the path of assimilation and guardianship continued to be the practice. Decrees and laws were enacted with the purpose of promoting the "catechesis and civilization of indians." This spirit sustained the "Serviço de Proteção aos Índios e Localização de Trabalhadores Nacionais – SPILTN" (Indian Protection and National Worker Localization Service), created in 1910 and commanded by General Cândido Mariano Rondon.

The Brazilian Civil Code of 1916 confirmed the policy of guardianship of indigenous peoples by putting them in a kind of permanent limbo concerning their juridical subjectivity. The Code determined in its sixth article that the forester [indigenous people] are relatively incapable of certain acts and some practices. The single paragraph of this article also provides that the "forester will be subjected to guardianship, established by especial laws and regulations, which will cease as soon as they became adapted to the civilization of the country."[18]

The especial regulation came in 1928 with Decree 5.484, which established a public policy of protection and *incorporation* of indigenous peoples to society. The assimilation ideal was clear, as well, in the successive Brazilian Constitutions: 1934, 1946, 1967 and 1969. As a culmination of this process, in 1973 the legislature enacted Law Nº 6001, well known as the "Indian Statute," which regulated the guardianship prescribed in the civil code for indigenous peoples. At this point, the Indian National Foundation (FUNAI) was the public agency responsible for the implementation of guardianship. The agency was established in 1967 to be in charge of the administration of indigenous properties and of their juridical representation, juridical assistance and education in order to assimilate them to national society. The goal of assimilation was reinforced in the first article of the Indian Statute, which provided that the statute "regulates the juridical situation of Indians or foresters and the indigenous communities, with the purpose of preserving their culture and integrating them progressively and harmoniously into the national community."[19] Once this integration occurred, the statute provides that the land occupied by indigenous peoples would be given to the State.

This brief overview of Brazilian indigenous policy makes clear that indigenous peoples were always considered in an assimilative way. This account, which is part of the ethnocentric trend in Western culture, does not pay attention to the alterity of indigenous people, and instead considers them as inferior (undeveloped) persons. Law, as a result of this same culture, seeks to speak in universal, standardized and abstract concepts, which makes it very difficult to

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[18] Código Civil [C.C.] art. 6(III) (1916) (Braz.).

[19] Lei No. 6.001, de 19 de dezembro de 1973 Artigo 1º [The Indian Statute] (Braz.) (translated for this Article by Moreira da Silva Filho).

deal with plurality and difference. Against this historical backdrop we can now consider the issues relating to the classical concept of the subject of legal rights.

V. A Brief Itinerary of the Emergence of the Modern meaning of the concept of subject of rights

Modern western law is premised on an abstract, universal, and rational human person who bears legal rights and therefore is a subject. This category emerges from modern natural law theory, which clearly distinguished the human person as a moral being, who is the bearer of rights and obligations, and who is not solely a bio-physiological individual.[20] According to a well-known thesis by Michel Villey, this thesis precedes modern natural law, and is rooted in the thought of William of Ockham.[21]

Villey explains that the great dispute to which Ockham directed his efforts was the result of Pope John XXII's thesis that the Franciscans, guided by their vow of poverty, could not relinquish property rights by claiming that they merely held possessions for the maintenance of the religious order, but not as an assertion of the right of property over them. The pope, a jurist with an education in classical Roman law, attributed to the Latin word *jus* its traditional meaning, that is, the fair share of possessions, departing from the idea of a natural order rationally established. This reasoning led to the conclusion that the Franciscan friars, who made use of the church's possessions, held rights of property over these possessions.

Ockham, who had no formal studies in law and knew very little about classical Roman law, altered the traditional meaning of the word *jus.* Instead of relating it to an impersonal order, from which a fair rational share belongs to each human being, he associated it to the notion of *potestas.* Thus, from the absolute power of God derives, through his delegation, the power of each individual. Such power indicates a modern notion of *subjective right*, revealing, in the first place, a faculty of each individual through which she can use this power or not. In addition to granting such power of individual ownership, God also has conceded to human persons the power of electing leaders who determine the limits for the exercising property rights within society, leading to the origination of the state, and with it, the creation of human laws (the objective law), which essentially guarantee that property holders may access justice. The Franciscans renounced this last type of right, based on their individual *potestas*. Villey argues that this initiates the saga of modern Western law, structured on the notion of subjective right and the subject of rights.[22] The Christian roots of

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[20] Yves Charles Zarka, L'autre Voie de la Subjectivité: Six Études Sur le Sujet et le Droit Naturel au XVIIe Siècle [The Other Route for Subjectivity: Six Studies About the Subject and Natural Law in the 17th Century] 5-31 (2000).

[21] Michel Villey, A Formação do Pensamento Jurídico Moderno [The Formation of Modern Legal Thought] 265-88 (2005).

[22] Commenting on the semantic reversal in Ockham's philosophy, Villey observes that,

> adding the cultivated latin term *jur* to the vulgar, medieval, Christian notion of power of the individual elevated that notion to the world of the scholars (starting with philosophers and theologians), and then transmitted to the science of Civil Law, foreshadowing the immense work of modern Roman law which, on this basis, would twist law upside down and turn it into a system of subjective rights. . . . We are in a "Copernican" moment of the history of the science of Law,

this development also highlight a universalizing trend of thought regarding the human person and its consequent legal projection as a member of universal citizenship.

Yves Charles Zarka surveyed his pre-modern antecessors, and concluded that the concept of subject of rights was an invention of the jusnaturalistic modern thought as developed by Hugo Grotius, Samuel Pufendorf, John Locke and Gottfried Wilhelm Leibniz.[23] It is especially through Hugo Grotius that the sedimentation of a notion of right, based on the idea of subject of rights and on the predominance of a laic universalism, becomes more visible. For Zarka, Grotius takes a decisive step when, in the context of rational[24] natural law, he conceives the right as a moral quality of human persons. Such quality, in turn, indicates a *facultas* or a power,[25] a notion that reinforces the central concept of subjective right, founded on the human person and her autonomy.

However, if Grotius highlights the moral quality of law, he does not concentrate his attention on those who have this quality, that is, the *person*. It is John Locke who attends to the moral condition of a person. In his famous work, *Essay on Human Understanding*, one of the crucial issues he addresses is the delimitation of personal identity. This identity is not solely the identification of a physical individual; it is the demarcation of a relation between her with herself based on the conscience formed by the memory and the thought. In other words, the identity of a person is delimited by her acts and thoughts, which are unified by the memory of a conscience in relation to herself. Even in the farthest past, in which one can extend her memory over her own thoughts and actions, it is possible to acknowledge her identity. Such conscience is what constitutes the *person*, a thinking being that is conscious of her acts and thoughts, and that, due to this fact can be liable, punished or rewarded according to the context.[26] The instrumental character of the person is, in this case, perceptible,[27] since the person makes use of rationality in seeking higher goods

on the border of two worlds: A new social order from which the individual right will be the ultimate touchpoint, and which will be entirely constituted on the notion of *potestas*, lifted into the dignified level of rights.

Id. at 287-88.

[23] ZARKA, *supra* note 20, at 5-30.

[24] It is important to recall the famous saying by the Dutch jurist, Grotius, according to whom the Natural Law, which is founded on reasoning, would be true even if God did not exist. It is also important to acknowledge that, similar to Francisco de Vitória, Grotius is considered one of the founders of international law and the theory of just war.

[25] ZARKA, *supra* note 20, at 9-11.

[26] Zarka calls our attention to this point in Chapter XXVII, § 26 of Locke's, AN ESSAY CONCERNING HUMAN UNDERSTANDING: "Person, as I take it, is the name for this self. Wherever a man finds what he calls himself, there, I think, another may say is the same person. It is a forensic term, appropriating actions and their merit; and so belongs only to intelligent agents, capable of a law, and happiness, and misery. This personality extends itself beyond present existence to what is past, only by consciousness–whereby it becomes concerned and accountable; owns and imputes to itself past actions, just upon the same ground and for the same reason as it does the present." 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 466-67 (1959).

[27] Charles Taylor points out this aspect in the notion of *self* in Locke, identifying in it what he calls the "*punctual self*":

[T]he detachment of the activities of thought as well as of our desires and irreflective tastes allow us to view ourselves as objects of profound changes. . . . The subject which can adopt this kind

as a reward for the best deeds according to some law (mainly the natural law).[28]

Zarka argues that Leibniz registers the term as well as the concept of *subject of rights* when he corrects a flaw in the notion of person proposed by Locke. Following the same path as Grotius, Leibniz identifies the right as something related to the moral quality of the agent, stressing, however, that the subject of this quality is a *person*, a rational substance. Leibniz examines this *person* closely in order to correct Locke. He demonstrates the continuity of personal identity, even in the intervals of time in which the person is not conscious of herself or of her acts and thoughts, or simply does not remember them. Such moments of emptiness can be filled by the testimony of others, with the possibility of ascribing to the agent the responsibility for her conduct, even if that agent does not remember it. With this development, Leibniz adds a critical inter-subjective focus to the notion of the subject of rights.[29]

The invention and systematization of the notion of the subject of rights was a remarkable step in the construction of modern law. However, it is necessary to go beyond this concept because it is very much linked to a rational and abstract approach to the person as legal subject and does not address the anthropological diversity of actual persons. What is missing, then, is an emphasis on the existential dimension of the subject.

VI. The Existential Dimension of the Subject

Martin Heidegger's fundamental ontology *steps back* from the rational and manipulating subject that became the protagonist of modern thought to retrieve the existential dimension of the subject. This is a *step back* because there is a change in the focus of the starting point from a rational subject to the existence of the human person. Before the formation of thought and self-conscience, there is something that claims priority of analysis, something so fundamental that it cannot even be totally delimited and described by the logos. This *something* is, at the same time, the limit and the condition of possibility of a human person as such, and, consequently, of her rationality.

First, consider the evidence that we are not totally responsible for who we are, given that we do not decide, in a voluntary manner, our initial references of

> of radical posture of detachment with him/herself, looking forward to a change, is what I call "*punctual" self*. To adopt this attitude is to identify with the power of objectifying and redoing and, through this, to move away from all individual characteristics, which are objects of potential changes. What we essentially are is none of what was mentioned, but the thing which is able to fix and elaborate them. That is what the image of the point intends to communicate based on the geometric experience: the real self 'does not have dimension', it is not anywhere other than in this capacity of fixing things as objects.

Charles Taylor et al., As Fontes do Self: A Construção da Identidade Moderna [The Sources of the Self: The Construction of Modern Identity] 223 (1997) (translated for this Article by Moreira da Silva Filho).

[28] As pointed out previously, the model of this rational and moral subject is the proprietor subject.

[29] Zarka, *supra* note 20, at 24-30. This otherness, however, has as its main focus the moral subject, individually considered with her rational capacities. It is not really pointed to the other in her alterity. The other has the role of fixing the lapses caused by the discontinuity of memory or personal identity, reestablishing, therefore, the unity lost in these intervals.

meanings, moods and values. We are already thrown into our own existence before we can rationally assess it. *Understandings*[30] and *moods*[31] are never the result of our own choice; they come before and constitute the condition of the possibility of the consciousness.[32] The human being is thrown into a horizon of meanings that is not chosen or controlled by her, and she is immersed in temporality, which delimits the possibilities of meaning. The human being does not exist before these foundations, rather, she is constituted from them.

The manner in which we conduct our life, the search for purpose that characterizes human experience, the projecting character of *Dasein*,[33] that is to say, the *project* of human existence, always lies behind choices that are made from a horizon of meanings that constitutes each subjectivity. From the world that constitutes her, innumerable possibilities of actions and life projects are available, such that the character of the person is *potentiality-for-Being*. However, at each moment, we are called to make a choice, and this choice imposes a sacrifice on us to renounce the possibilities that are excluded from our choice. Before our choices result in a determinate horizon, there is the moment in which we project ourselves into them. These projections come from existence, a thrownness that we have not chosen, which is the condition of possibility. We are called to take on the responsibility for our thrown character, which opens countless possibilities and from which we constantly must choose. But, we cannot choose our thrownness.

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[30] *Understanding* (Verstehen), which is discussed in MARTIN HEIDEGGER, BEING AND TIME § 31 (John Macquarrie & Edward Robinson trans., Harper & Row, Publishers, Inc. 1962) (1953), does not refer to some conscious, rational and theoretical notion. Instead, it refers to the sense that beings take on, considering their pragmatic and pre-reflexive experience. It is clear that the notions and concepts produced by theoretical endeavors and by science at large enriches this pre-reflective sphere, producing meanings that are adopted but that do not originate in scientific and theoretical reflection. The starting point is, therefore, some comprehension that is responsible for the inauguration of meaning.

[31] *Mood* (Befindlichkeit), along with *understanding*, are aspects of *being-there* (Dasein). *Mood*, which is discussed in § 29 of BEING AND TIME, indicates that each being is perceived not only through a sense that he assumes in relation to the pragmatic experience of purposes that guide our actions and thoughts, but also in relation to mood (Stimmung), which always accompanies this sense and affects the interpretation of the being in a specific situation. The term, *being-there*, indicates a state of familiarity with the world. *Being-there* indicates the manner of our *being-in-the-world*, how we are always already in the world. In addition to *understanding* and *mood*, *being-there* is structured by *discourse* (Rede) and *decline* (Verfallen). *Id.* § 29.

[32] John Richardson briefly and precisely explains this idea of *being-thrown*: "[T]hat more general predicament of Dasein which Heidegger refers to as "thrownness" [Geworfenheit]: we have always already been thrown into our world, and are indeed always 'in the throw', which we can never get back behind. Not only our moods, but even our understanding, is something we find ourselves already in, with no possibility of originally producing it." JOHN RICHARDSON, EXISTENTIAL EPISTEMOLOGY: A HEIDEGGERIAN CRITIQUE OF THE CARTESIAN PROJECT 34 (1986) (boldface type omitted).

[33] Heidegger's *Dasein* is a substitute for the category of "subject" in philosophy, since it always points to a human being from the perspective of her existential dimension. More details about the concept of *Dasein* and other Heideggerian terms can be found in JOSÉ CARLOS MOREIRA DA SILVA FILHO, HERMENÊUTICA FILOSÓFICA E DIREITO: O EXEMPLO PRIVILEGIADO DA BOA-FÉ OBJETIVA NO DIREITO CONTRATUAL [PHILOSOPHICAL HERMENEUTICS AND LAW: THE PRIVILEGED EXAMPLE OF OBJECTIVE GOOD FAITH IN CONTRACT LAW] (2d ed. 2006).

As this existential aspect of human subjectivity is reinforced, it is possible to realize that the projects chosen by us (from the horizon that we have not chosen) can be interrupted at any moment without any explanation or before being accomplished. The fundamental interruption is mortality. The last possibility is the possibility that there will not be any other possibilities available. This character of *being-towards-death* makes the existential human aspect even more intense, broadening the responsibility over the choices made, since there is insufficient time to explore all of the possibilities available.

Another important point regarding the structure of *being-in-the-world* is the fact that the *world* is always shared with others (*being-with-others*), that the inaugural meaning for each person emerges through the world shared with other human persons. It is through this fact that it is possible to illuminate for others aspects of a common world, and vice-versa. This illumination of what is common from the *Being-with* (Mitsein) is called discourse.[34]

To live with authenticity is to be conscious of this finite and temporal dimension. Because it is not easy or comfortable to confront our finitude, Heidegger uses the term *fallingness*[35] to capture this experience. According to this image, we allow ourselves to be absorbed in determinations and meanings that the anonymous opinion of a certain common sense has established as the truth. The *falling* reveals itself as an escape from the confrontation with our existential[36] limits, preventing us from perceiving them as an original instance and condition of possibility. A clear example of *falling* is the insistence on a solely rational definition of the human person, as an abstract conception *a priori*, developed by modernity as an abstraction of the subject from her own existence. It is much more comfortable to have the assumption that we can explain reality based on theories that are secure and immune to the flux of time. However, an authentic conception of human person cannot ignore existential limits because theory itself emerges from these limits and, therefore, cannot supersede them.[37]

Consequently, as discourse assumes an authentic format, it urges human persons to acknowledge in themselves and in others the existential limits from which they are constituted, enabling the construction of an authentic community.

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[34] *See* HEIDEGGER, *supra* note 30, § 34.

[35] *See id.* § 38.

[36] This escape is evident in the general tendency of getting dispersed with immediate, small and superficial matters, rather than focusing, experiencing and discussing broader issues and projects of life. When we amplify our focus to this broader level, we are closer to facing our existential limits.

[37] John Richardson makes this same point. It is as if we should use *logos* to identify and denounce its own limit, thereby opening ourselves to what is below and beyond, and the importance of phenomenology. Richardson states:

> The truth of phenomenology, then, will then consist in its capacity to 'light up' for its student those aspects of his Being that falling has inclined him to avoid. The reader must be helped to turn himself towards, to confront directly, those features of his Being that he has previously fled; in particular and most crucially, he must confront the nullities fundamental to that Being, which are the original motives for flight from it. . . . Phenomenology finds its point in directing its student towards authenticity, and it is the latter, and not any theoretical system, that constitutes the existential understanding at which the former ultimately aims.

RICHARDSON, *supra* note 32, at 194. The *nullities* are the existential limits mentioned above.

It is necessary, still, to emphasize the issue of otherness within these existential limits, even though this aspect cannot receive the in-depth attention it deserves in this Article. For the time being, it is enough to say that, just as it happens with our *thrownness*, our projecting character and our *being-towards-death*, the other also reveals to herself something that cannot be imprisoned by theory or totally described by *logos*. The other is also a condition of possibility for the human person and, at the same time, she denounces her finitude. Any concept that attempts to explain otherness or to delimit others is unfaithful to the incommensurability of the *face*[38] of the other. In view of so many limits, how can we satisfy ourselves with a conceptual and standardizing apprehension of subjects? Among the logical and precise categories of doctrinal legal theories, is it not necessary for there to be a dimension of uncertainty regarding the subject that does not suffocate her otherness and her existential character?

VII. For an Existential Subject of Rights: The Subject of Rights in the Context of the Indigenous Peoples of Brazil

Within private law, the movement of "repersonalization" refers to the necessity that the person regarded as having rights, duties and obligations, cannot only be considered as a rational universal, but also must be considered as a concrete particular. There are numerous aspects of real life that are related and that are not included in the functional or abstract extracts of legal theory.[39] These aspects can only be perceived in the context of the CONCRETE dimension of EXISTENCE.

A juridical analysis that justifies the notion of human dignity, understood in the temporal and finite levels profiled here, cannot be satisfied with a func-

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[38] The *face* (Visage) is an important notion by Levinas that delimits the presence of the other without being the face subsumed in some kind of representation. The face indicates a totally different and mysterious reality that can only be *found* and not represented.

> The face is present in its refusal to be contained. In this sense it cannot be comprehended, that is, encompassed. It is neither seen nor touched–for in visual or tactile sensation the identity of the I envelops the alterity of the object, which becomes precisely a content.
>
> . . . .
>
> . . . The relation between the Other and me, which dawns forth in his expression, issues neither in number nor in concept. The Other remains infinitely transcendent, infinitely foreign; his face in which his epiphany is produced and which appeals to me breaks with the world that can be common to us, whose virtualities are inscribed in our *nature* and developed by our existence.

EMMANUEL LEVINAS, TOTALITY AND INFINITY 194 (Alphonso Lingis trans., Duquesne Univ. Press 1969) (1961).

[39] This selective, exclusive and abstract characteristic of legal theory is highlighted by Luiz Edson Fachin in relation to private law, as one of the central arguments of his work, CRITICAL THEORY OF PRIVATE LAW. Here is an illustrative passage:

> The artful system, in such a competent way, attributed to itself the power to dictate the law, and by doing so, delimited with a thin but effective blade, the law of non-law, thereby excluding from the system that which does not interest it, like the indigenous relations on the land, the mode of non-exclusive ownership of property, and life in communion that is not of the given model.

LUIZ EDSON FACHIN, TEORIA CRÍTICA DO DIREITO CIVIL: Á LUZ DO NOVO CÓDIGO CIVIL BRASILEIRO [CRITICAL THEORY OF PRIVATE LAW] 213 (2000) (translated for this Article by Moreira da Silva Filho).

tional concept of the subject in jural relations.[40] In an instigative article, Aguiar emphasizes the theme of alterity in Law, leading the reader beyond the narrow confines of the modern subject of rights:

> The criticism of the depersonalization that scientific discourse raises can also be extended to legal discourse, which is AN OBLIGATION, a knowledge of control, which is likely to depersonalize the other as a strategy of rationalizing her existence. So, law abstracts the other, turns her into an element in the syntax of jural relations, removing the possibility of establishing an effective alterity, an opening of oneself to the other, or the formation of values in the confrontation with the other's face
>
> . . . .
>
> Today, the increasing disembodiment of the human being makes a greater fluidity of social controls possible, because, besides abstracting the human from existence, it renders her more apt to quantitative considerations, by alleging objectivity and the status of truth. The subject of rights of our Civil Code is the CULMINATING EXPRESSION of that view. The citizen and her dramas and demands exists no more; the society is no longer cleaved by asymmetries of all genres, but is composed of detached individuals, each of whom is anonymous and is reduced to legal entities, despite the separation. Thus, the official norm expresses itself in contradiction to the concrete individual, belonging to the given social world.[41]

The Indian question in Brazil provides an excellent example of the limits of rational and abstract conceptions of the subject of rights. The difficulty and violence in seeking to understand indigenous peoples and their specificities based on the notion of the modern rationalist subject is patent. Today, Brazilian law, especially since the 1988 Constitution, has faced the challenge of accepting the consequences of ethnic plurality and has urged its interpreters and actors to escape the standardized view of the traditional subject of rights. It is necessary to cultivate a space in which the concrete and existential peculiarities of the different subjects who comprise the social whole are able to express themselves and be recognized by themselves.[42] This aim is particularly evident in the issues relating to indigenous peoples' rights in Brazil.

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[40] From this standpoint, the subject is seen as one element of the jural relation. As Hattenhauer notes, the notion of jural relation, developed by German PANDECTISTICS, no longer considers the philosophical discussion on the concept of person and her legal projection for the idea of the subject of right. The subject is now perceived in her schematic functionality, for which the specific and peculiar characterizations are irrelevant. *See* HANS HATTENHAUER, CONCEPTOS FUNDAMENTALES DEL DERECHO CIVIL: INTRODUCCIÓN HISTÓRICO—DOGMÁTICA [FUNDAMENTAL CONCEPTS OF CIVIL LAW—HISTORICAL-DOGMATIC INTRODUCTION] 19-20 (1987); Filho, *supra* note 1 (an article written by us in which this aspect is reviewed and further developed).

[41] Roberto A.R. de Aguiar, *Alteridade e Rede no Direito* [*Alterity and Net in Law]*, 3 VEREDAS DO DIREITO, July-Dec. 2006, at 11, 25-26, 32 (Braz.).

[42] Discussing multiculturalism, Charles Taylor draws attention to the fact that, in contemporary society, recognition has become a problem because identity is no longer settled by reference to a cosmic or divine order. Recognition must be negotiated with the other members of society. Non-recognition or misrecognition threatens an identity seeking to assert itself, as it induces self-deprecation. *See* CHARLES TAYLOR ET AL., MULTICULTURALISM, EXAMINING THE POLITICS OF RECOGNITION 25-74 (1994).

VIII. The Paradigmatic Change of the 1988 Constitution: The Recognition of the Brazilian Ethnic Plurality

The decisive action to dramatically change Indian policy in Brazil, especially their legal and constitutional status, started with the Brazilian indigenous people, supported by organizations like the *Conselho Indigenista Missionário* [Indigenous Missionary Council] (CIMI). This new scenario resulted in the creation of the União das Nações Indígenas [Union of Indigenous Nations] (UNI) in 1980, which thereafter began to take numerous actions to articulate and exert pressure on public agencies responsible for indigenous affairs, including efforts to recover land, occupations of administrative offices of Fundação Nacional do Índio [National Indian Foundation] (FUNAI), and conducting assemblies and demonstrations.

It was with this spirit and commitment that UNI kept close watch throughout the constitutional process that culminated in the enactment of the constitutional text on October 5, 1988. UNI engaged in many activities, including: submitting and discussing proposals; seeking indigenous representation in the National Constituent Assembly (which, unfortunately, was unsuccessful); being present in Brasilia to follow the votes and discussions; lobbying and talking personally with Constituent Deputies, covering almost all offices; performing *pajelanças*, dances, rituals, and body painting; and making forceful speeches (like those of Chief Raoni Mentuktire).[43] "For the first time in the history of the country and the Brazilian constitutional process indigenous participation in a normative elaboration took place successfully."[44]

As a result of these activities, the new constitutional text ended the assimilationist paradigm[45] and adopted the recognition of ethnic plurality in Brazil. The caption of Article 231 of the Federal Constitution reads, "Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property."[46]

The text makes it clear that the specific existence of indigenous people is not an inferiority to be corrected by imposing legal guardianship with the ultimate goal of cultural assimilation. Rather, it recognizes the importance of acknowledging the Brazilian indigenous peoples in their own cultural identities

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[43] In her study, Rosane Lacerda Freire provides a rich and detailed account of this process, showing that the conquest of the indigenous peoples of Brazil, consolidated in the unprecedented juridical treatment propitiated by the new Constitution, was not without cost. She shows that they had to face the opposition of FUNAI for their participation. Furthermore, the indigenous peoples were subject to the prejudice of constituents and part of the press that perceived in the argument for recognition of ethnic diversity as well as indigenous specificity a sort of submission of national sovereignty to hidden multinational forces. Lacerda, *supra* note 15, at 98-148.

[44] *Id.* at 145.

[45] The former Constitution, in article 8, subsection XVIII, established that it was for the Union to legislate on "the incorporation of the forester [indigenous persons] to the national communion."

[46] Constitution of the Federative Republic of Brazil art. 231 (2d ed.) (Braz.), *available at* http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_2ed.pdf?sequence=3.

and alterity, which implies not only conferring a right, but also recognizing it as pre-existent to the Brazilian state itself.

Additionally, the following provision, Article 232, establishes that "[t]he Indians, their communities and organizations have standing under the law to sue to defend their rights and interests, the Public Prosecutor intervening in all the procedural acts."[47] It is clear that the indigenous people are no longer perceived as children who require protection through the representation of agencies such as FUNAI, but that indigenous peoples are subjects of their own history who have full legal capacity. At the same time, due to their cultural specificities, and the historical oppression, marginalization and decimation that Indians have suffered in the process of the formation of the Brazilian constitutional state, it is clear that they do require protection, counseling, and special rules in order to prevent their fundamental rights and dignity from being disrespected and despised. These measures represent a significant shift away from the pejorative and prejudiced view that the Indians' incapacity, immaturity, and inferiority needed to be "remedied" through assimilation to a "civilized" way of life."

The Brazilian Constitution, therefore, opens the door to alterity. There is a true act of recognition and respect regarding the values and senses of others not contained within the western omnipotence of prior legal articulations. However, despite this, most legal actors remain insensitive to this change of perspective. Although the 2002 Civil Code does not reproduce the text of the 1916 Civil Code about the relative inability of the "foresters" to perform certain acts and practices, it refers the matter to a special legislation. However, in many cases, the Indian Statute of 1973 is still regarded as this "special legislation," completely ignoring the subsequent constitutional text.[48] In spite of this tendency at the national level, it is possible to find examples that go in the

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[47] *Id.* at art. 232.

[48] This can be seen, for example, in Maria Helena Diniz's comments on the new Civil Code. By commenting on the sole paragraph of article 4 of the Code of 2002 ("the Indians' capacity will be governed by special legislation"), and on an item entitled, "Indígenas e sua *submissão* a regime tutelar" [Indigenous and *submission* tutelary system](emphasis added), the author says: "Since the education of indigenous peoples is slow and difficult, they are placed under the protection of a special law that will govern the issue of their capacity by the new Civil Code. The Civil Code, subject them to the guardianship regime, established in special laws and regulations." MARIA HELENA DINIZ, CODIGO CIVIL ANOTADO: DE ACORDO COM O NOVO CODIGO CIVIL [CIVIL CODE ANNOTATED] 16 (10th. ed. 2004). What is most regrettable is that after the passage reproduced above, the author cites not only the Indian Statute, but also article 231 of the Constitution, not realizing, apparently, any contradiction between them. A similar mistake is made by Gustavo Tepedino, Heloísa Helena Barbosa, and Maria Celina Bodin de Moraes. In their comments on Article 4, these authors state: "As for the indigenous peoples, their capacity is regulated by a special legislation, in the current framework, the Indian Statute, Law n.6.001/73. Among the main provisions of this law, it stands out that . . . the Indians and the indigenous communities that *are not integrated into the national communion* are placed under a system of guardianship established by that law (Article 7)." GUSTAVO TEPEDINO, HELOISA HELENA BARBOZA, MARIA CELINA BODIN DE MORAES, CÓDIGO CIVIL INTERPRETADO: CONFORME A CONSTITUIÇÃO DA REPÚBLICA [CIVIL CODE INTERPRETED ACCORDING TO THE CONSTITUTION OF THE REPUBLIC] 15 (2004) (emphasis added). Unfortunately, the conquest of indigenous peoples in the Brazilian Constitution is largely unnoticed by most Brazilian jurists.

opposite direction at more local levels. Here we will give closer attention to one of these examples: the case of *Morro do Osso* (Bone Hill) in Porto Alegre.

IX. *MORRO DO OSSO*: HISTORY OF A CONQUEST

On April 9, 2004, a small group of Kaingang families occupied a region of the South Zone of Porto Alegre called *Morro do Osso* (Bone Hill). This is a place of great natural beauty and rich biodiversity, from which one can view the Guaíba river and part of the city. In 1998, the site had been expropriated and transformed by the municipality into an ecological park: the Natural Park of Morro do Osso. The park is ringed by several homes and luxury condominiums, indicating the interest of local land developers in this area. One month after the occupation, the Indians filed SUIT,[49] seeking recognition of the traditional occupation of the area by the Kaingang, and an order in favor of the community's rights pursuant to article 231, paragraph 1 of the 1988 Brazilian Constitution.

On December 07, 2005, the Municipality of Porto Alegre filed a possessory action[50] against the Kaingang Community of Morro do Osso, seeking their removal from the site. At first, the preliminary order was partially granted. The judge ordered the wooden houses built within the park to be removed. The Indians, therefore, opted to leave, but they established camp near the access road to the park, since their presence at the site was the only effective instrument of pressure they had on behalf of their claim.

After hearing both parties, the Federal Judge Candido Silva Alfredo Leal Junior issued a preliminary order for the reintegration of possession by the municipality and the withdrawal of the community from the park and its surroundings within thirty days. The Department of Justice promptly filed an interlocutory appeal against that decision and obtained a stay due to an imminent judicial recess.[51] Finally, on September 07, 2006, the appeal was granted and the writ of entry required by the municipality was dismissed in an eloquent opinion by Judge Márcio Antônio Rocha, of Tribunal Regional Federal [REGIONAL FEDERAL COURT OF APPEALS]-(TRF) of the 4th Region.[52]

What is to be emphasized here, however, is the contrast in the manner in which the facts and events surrounding this case are perceived. There are two very different ways of dealing with and understanding the indigenous issue. It is important to highlight this aspect of the case in light of the need to achieve the constitutional spirit of respect for the ethnic and cultural diversity of Brazilian society, mainly through its public institutions.

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[49] Juízo Federal da Vara Ambiental, Agrária e Residual [J.F.] [Federal judge of agrarian and environmental and Residual jurisdiction] of Porto Alegre No. 2004.71.00.021504-0 (Brazil).
[50] Juízo Federal da Vara Ambiental, Agrária e Residual [J.F.] [Federal judge of agrarian and environmental and Residual jurisdiction] of Porto Alegre No. 2005.71.00.023683-6 (Brazil).
[51] R.T.R.F.4 [Regional Federal Court of Appeals of the 4th Region], No. 2005.04.01.052760-4 (Brazil).
[52] Despite the dismissal of the preliminary order, the action for reintegration is still in progress before the Federal Judiciary. On June 29, 2007 an unfavorable ruling was handed down to the Indian community, leading to an appeal to the REGIONAL FEDERAL COURT OF APPEALS of the 4TH REGION ON AUGUST 3, 2009.

Thus, on the one hand, there is the position of City Hall, part of the Federal Judiciary, the residents of the South Zone, and some newspapers that, by reporting the fact, emphasized a biased point of view. Here is the summary of the main elements: the presence of Indians in the Park is a threat to the preservation of the environment; the coexistence with the Indians is dangerous and undesirable, and brings misery and filth to the neighborhood; the existing evidence about the former Indian occupation, which would underlie the tradition, is better associated to Guaranis rather than to Kaingangs; and this Kaingang community can perfectly settle in another region already designated for Indian occupation by the State Government.[53]

On the other hand, there is the position of the Kaingang community, led by: the articulate and engaged *Cacique* (Chief) Jaime; the Department of Justice; federal organs responsible for indigenous interests, like FUNASA and the nucleus of Indigenous Health of the Public Health School of RS; the portion of the federal judiciary and other sectors that have supported the struggle of this community, such as the Núcleo de Antropologia das Sociedades Indígenas e Tradicionais da Universidade Federal do Rio Grande do Sul–[Anthropology Center of Traditional and Indigenous Societies of the Federal University of Rio Grande do Sul] - NIT/UFRGS.[54]

Based on what we can gather from the judicial records, as well as the conversations held with the Chief and some members of the tribe, the case is justified by the combination of very special factors that take into account, fundamentally, the traditions and the spirituality of the Kaingang ethnicity. However, from the "white man's" point of view, it is very difficult to understand the fundamental link that Indians have with the land, since this view is based on the western legal concept of abstract ownership of property that corresponds to an abstract understanding of the subject of rights.

The Kaingang ethnicity attributes a priceless value to the land where their ancestors were buried. Living in the land where the dead were buried is a key element to their way of life. Guided by shamanism, they receive spiritual and practical guidance from dreams and the Shaman's contact with their ancestors. Thus, it is not merely a problem of having or not having land to live and produce, but of being able to live in a specific land that holds fundamental meaning for them. For the Community of Morro do Osso, the land in question has a sacred sense, confirmed by the Shaman. Moreover, the place is an important element of tradition that is transmitted orally in the Community. There is no point, therefore, in proposing that they move to other lands that do not have such meaning for them; moreover, those lands are already occupied by the Guarani, whose tradition is very different from that of the Kaingang.

By associating the notion of the subject of rights to the context of the implementation of indigenous rights, which in this case is related to property rights, we can perceive the crucial role of hermeneutics. First, this approach takes into account the pre-understanding and existential character that sustains the claims of this indigenous group. Second, such an attitude requires a will-

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[53] The judicial records of this suit clearly show that South Zone residents, some newspapers, City Hall and the Federal Court Judge present this point of view.

[54] The judicial records show these opinions as well.

ingness on the part of legal officials interpreting the law to "open their horizons."[55] Third, the legal dispute is mediated by the problematic interpretation of the legal text, and, more specifically, the constitutional text.

When CF/88 in Article 231 grants to the Indians "original rights to the lands they traditionally occupy," one must ask what criteria will be used to define these traditional lands. The white man (i.e., Western society) has historically been the one who has always determined such original rights, but why not look to the indigenous peoples? For them, their oral tradition and the guidance of their spiritual leaders are much more important than archaeological and historiographic evidence produced by Western scientists.

It should be noted that the constitutional text makes clear the need of using the criteria given by traditions and indigenous cultures when defining the lands they "traditionally" occupy. The first paragraph of Article 231, with emphasis added, establishes that "the lands traditionally occupied by the Indians are those in which they live on a permanent basis, they use for their productive activities that are essential for the conservation of environmental resources necessary for their well-being and for their physical and cultural reproduction, *according to their uses, customs and traditions*."

Even without these considerations, in light of western scientific criteria there are elements that reinforce the appeal of the Kaingang Indigenous Community in this case. Antique tools tailored in the bamboo tradition associated with Kaingangs were found by a team of archeologists from UFRGS at the site. Additionally, accounts of their oral history indicating the existence of ancestors on the site have been confirmed by independent means.

Furthermore, it is now evident that, as the judge of the REGIONAL FEDERAL COURT OF APPEALS rightly pointed out two years after the occupation, the alleged damage that will be caused to the environment has not in fact occurred. After all, if there is any culture that threatens the integrity of the environment, it is the Western culture, not the culture of Indians-Brazilian native people, whose relationship with the land is sacred. The Indians do not need rules to protect the environment; a zeal for respecting nature is an inherent element of their culture.[56] Unfortunately, we can not say the same about the "civilized white man."

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[55] Here, one should recall that Gadamer states that those who are willing to engage in genuine interpretation must be prepared for the possibility that they might change their opinions. HANS-GEORG GADAMER, VERDADE E MÉTODO: TRAÇOS FUNDAMENTAIS DE UMA HERMENÊUTICA FILOSÓFICA [TRUTH AND METHOD] 405 (Flávio Paulo Meurer trans., 1997).

[56] Chief Jaime Këntháhn Alves, leader of the Kaingang community of Morro do Osso, in the Relatório Azul [Blue Report] of the Assembléia Legislativa do Rio Grande do Sul [Legislative Assembly of Rio Grande do Sul], adds the following: "regarding the environment, FUNAI has set up projects within indigenous lands over the years in accordance with their interests, and ended up leaving these lands exhausted and degraded. The fish, animals, trees, water and the land are sick. These projects, were conceived without regard to Article 231, which refers to the indigenous right to the environment and preserved natural resources, as to which the Indians have the exclusive right of use. Today, in Rio Grande do Sul, it is difficult for indigenous peoples to maintain their traditional systems of healing, shamanism, education, and traditional food due to the environmental degradation of our territory. Therefore, we are shocked when they say they fear that the Kaingang will harm the environment in Morro do Osso. This argument is false, because we are the most interested in the preservation of the fields and forests, for it is from this nature that we live, we are this nature! In

X. Final Considerations

The reflections in this Article were intended to develop, even if briefly, the four important aspects reinforced by the idea of repersonalization of Civil Law: to transform the comprehension of modern Civil Law by debating two of its fundamental notions: the notion of subject of rights and subjective right; to rescue a philosophical-moral dimension of the notion of person projected in the law; carrying this out, however, without losing sight of the concrete, relational and existential dimension of human life, which comes before any abstract representation of the person; and, finally, to perceive that such focus is the most vital result of a new constitutionalism, which looks forward to the construction of a democratic state of law in which the word "democratic" refers to opening our legal representations. The law must be open to that which is always changeable, existential and different, confident that democracy is a communal relation that allows for contact with different peoples without considering them inferior or irrelevant, or, even worse, as something that goes unnoticed because it is suffocated.

The example of indigenous people in Brazil points out, in a privileged way, the issues mentioned above, because it has a strong exteriority and, at the same time, a closeness relation with Brazilian roots. Decisions such as the one in the aforementioned interlocutory appeal show how it is possible for Brazilian legal actors to give up on a narrow and intolerant view of the legal system and open themselves to an understanding of law that is able to deal with multiple communities that constitute Brazil, noting that difference does not mean weakness or inferiority. Instead, difference is a sign of an alterity to be respected in its inapprehensible mystery. More than understanding, it requires recognition and respect. This is the ultimate lesson of hermeneutics.

Porto Alegre we see luxury condominiums being built on forests that are cleared daily. And society does not say anything against that." Relatório Azul: Garantias e Violações dos Direitos Humanos (2006), Rio Grande Do Sul, Assembléia Legislativa, Comissão de Cidadania e Direitos Humanos [Blue Report: Guarantee and Violations of Human Rights (2006), Rio Grande do Sul, The Commission of Human Rights and Citizenship of the State Legislature] 107 (translated for this Article by Moreira da Silva Filho).