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ON LANDS AND DISPOSSESSION.
THE RELEVANCE AND POTENTIAL OF PROPERTY LAW FOR THE CONSTITUTIONAL RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES

Marina Federico

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This paper intends to consider whether and how minorities, especially Indigenous groups, can and should be protected in Constitutions through property law rules, and it investigates the role that constitutional formants can play in the recognition of multiculturalism and pluralism, dealing with the Brazilian legal system as a case study.
To do so, this article seeks to establish whether the constitutional acknowledgment of ancestral land ownership of Indigenous communities can be a way to safeguard both their rights and, more broadly, other collective interests of society, such as multiculturalism and environmental protection. This essay adopts an interdisciplinary methodology, combining comparative private and constitutional law with an historical perspective. The aim is to valorize the right to property as a vehicle to promote the rights of Indigenous groups, and ensure social justice, taking into account the peculiarities of Latin American legal systems.

Keywords: property law – indigenous rights – legal pluralism – Latin America – land rights

I. INTRODUCTION

In critical studies and reflections on modern law and on the principles and development of classical liberalism in western legal culture, private property has often been linked to the colonial invasions and aggressions of the past century.[1] Nowadays, the right to property is also frequently addressed as one of the factors contributing to the rapid shift towards an extractive, individualistic economic and social system, which fosters inequality, oppression and power imbalances.[2] For instance, the contemporary market system has deprived disadvantaged groups from accessing essential resources, such as water, food, electricity or energy, which have been progressively privatized. This process has involved culture, art, drugs, medicine, research, and many other areas.[3] Furthermore, in the digital

[1] For a suggestive reconstruction of modern European state making, which emphasizes power concentration and the consequent "monopoly" of force, see the work of C. Tilly, *War Making and State Making as Organized Crime*, in P. B. Evans, D. Rueschemeyer & T. Skocpol (eds.), *Bringing the State Back In,* Cambridge University Press, 2010, 171-186. The Author proposes an analogy between state making, war making and "organized crime", arguing how forms of coercive exploitation have played a role in the making of Western States and capital accumulation.

[2] See the landmark work of C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, 1 ed., Clarendon press, 1962, and its various successive editions, including *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press, Canada, 2010.

[3] U. Mattei – F. Capra, *Ecologia del diritto. Scienza, politica, beni comuni,* Aboca edizioni, 2017, *passim;* L. Nivarra, *Alcune riflessioni sul rapporto fra pubblico e comune,* in M. R. Marella (ed.), *Oltre il pubblico e privato. Per un diritto dei beni comuni*, Ombre Corte, 2012, 69 - 87. See also G. Resta, *The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspective,* in *Tulane European & Civil Law Forum,* 2011, 33-65; L.

economy, the increasing "commodification" of personality attributes has long assimilated personal data to goods, to be bought and traded, at the expenses of the protection of personhood and human dignity. In fact, in informational and knowledge capitalism, the most powerful economic actors found their business on the exploit and processing of personal and non-personal data.

Should property be radically condemned as evil, then? Or can property law be shaped in a way that promotes social justice, ensures a fairer distribution of resources, and protects and safeguards communities and minorities?

This article explores the possibilities of property in land as a vehicle for guaranteeing the rights of Indigenous communities, such as the right to cultural identity, as well as the general interests of society as a whole, such as environmental preservation, focusing on Central and Southern America, and specifically on the Country of Brazil and its Constitution. The paper upholds that, in multicultural legal systems, constitutional provisions on property can help building a more socially just and inclusive society. Latin American States, in this respect, can offer us a springboard to experiment with the right to property, thanks to their cultural diversity and the influence of Indigenous and Aboriginal traditions, which are traditionally open to collective forms of property.[4]

Particularly, this paper investigates on how the above-mentioned objectives can be achieved through the constitutional recognition of Native communities' titles to their ancestral lands. As Indigenous peoples have long been oppressed by colonization and by a libertarian use of the concept of property, this task is particularly delicate. The Constitution of Brazil is especially worth considering, due to its historic importance in promoting Indigenous rights, and to a recent, interesting ruling of the Supreme Court (*Supremo Tribunal Federal,* hereinafter: STF) which has brought to light the issue of the possession of Aboriginal lands.

This essay proceeds as follows. First, it describes the links between property, colonization and land grabbing in the Majority World, specifically in Latin America. The paper goes on to depict briefly the characteristics of property law in European legal systems, considering the existence of some models of property which are different from the individualistic and "neo-liberal" conception of this right, and which confirm and valorize its collective character. A brief overview of the features of collective property in western legal systems follows. The work takes also into account how property law has been framed in some nineteenth and the twentieth centuries' constitutional charters, as that period of time coincides with the historical process of the national independence of Countries in Central and South America (*Section 2*).

The paper follows by examining the significance of property law in relation to Aboriginal rights to land, specifically in the Constitution of Brazil, as a State marked by a unique

Lessig, *The Creative Commons*, in *Montana law review*, 2004, 1-13; J. Reichman & P. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment,* in *Law and contemporary problems*, 2003.

[4] P. Grossi, *"Un altro modo di possedere". L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffré, 2017 (1977).

history.[5] It focuses on the significance of the terms *property, possession,* and *usufruct* (*dominio*, *posesión, usufruto*) with reference to native territories, and on the role of property law in the Constitution for fulfilling the needs of both Indigenous groups and the rest of the Brazilian citizens, as different populations composing a pluralistic Nation (*Section 3).*[6] Thus, this essay performs a general overview of the legal techniques employed in some Countries for enhancing Natives' cultural rights, after the colonial ruling (*Section 4)*. Afterwards, the paper circles back to the Brazilian legal system, and it investigates the effectiveness of the constitutional provisions on Aboriginal peoples and their lands, noting how the Constitution still fails to fully promote Indigenous rights in practice (*Section 5*).

The partial ineffectiveness of these Brazilian constitutional provisions has led to a recent ruling of the STF over a dispute involving the state of Santa Catarina and the Aboriginal Xokleng tribe about the territory of Ibirama-La Klãnõ, in the proceeding arisen from the extraordinary recourse (hereinafter: RE, *recurso extraordinário)* nr. 1.017.365 (*Santa Caterina Environment Institute v. the National Foundation for Indigenous People,* hereinafter: FUNAI). In the ruling, the Supreme Court has established the illegitimacy of the application of the so-called "time frame limit rule" (the *marco temporal,* which can be roughly translated into English as "temporal landmark") as interpreted in a way that prescribes the Indigenous to show their lands' possession since the time of the enactment of the Constitution for benefitting from the constitutional protection of their territories. This notwithstanding, the Brazilian Parliament has adopted a new statute which affirms the rule of *marco temporal*, precisely in the terms declared illegitimate by the STF, limiting Indigenous rights over their traditional territories. Thus, the article shifts to a normative analysis, formulating some suggestions for a general and more effective implementation of Indigenous rights, which is key to promote a more inclusive, pluralistic and diverse society (*Section 6*).[7] A conclusion follows (*Section 7*).

Overall, this paper formulates a quest for property in land as a vehicle for promoting the interests of communities, collectivities, and society as a whole, such as environmental preservation and diversity, pluralism and multiculturalism. This article adopts a relativist conception of property law, meaning that it tries to conceive property as a concept historically enclosing and carrying different meanings and solutions to the perennial problem of qualifying the relations between humans and nature.[8]

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[5] A. Gambaro & R. Sacco, *Sistemi giuridici comparati,* UTET, 2018, 285; A. dos Santos Cunha, *The Social Function of Property in Brazilian Law*, in *Fordham Law Review*, 2011, 1172.

[6] The most accepted definition of Indigenous people seems to be the one provided for by the UN Special Rapporteur, as peoples having common ancestors and a common history and culture, having suffered from occupation and land appropriation, with a tie with a certain territory, self-identified and accepted as such by the community of reference. This definition is elaborated on by J. B. Henriksen, *Key Principles in Implementing ILO Convention No. 169, Programme to Promote ILO Convention No. 169*, 2008, 5, available at: https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf.

[7] L. Salaymeh & R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in *MPI for Comparative and International Private Law - Research Paper Series*, 2022, 183; F. Englert & J. Schaub-Englert, *A Fruitless Attempt towards Plurinationality and Decolonization? – Perplexities in the Creation of Indigenous Territorial Autonomies in Bolivia*, in *Verfassung und Recht in Übersee*, 2019, 67–89; E. Tuck & K. Wayne Yang, *Decolonization is not a metaphor,* in *Decolonization: Indigeneity, Education and Society,* 2012, 1-40.

[8] P. Grossi, *La proprietà e le proprietà nell'officina dello storico,* Editoriale scientifica, 2006, 26.

In this sense, this research attempts to employ a decolonial approach to the study of foreign legal systems. The term "decolonial" is a conventional expression. By that, it is meant the construction of a reasoning free from hegemonic claims, when approaching non-European legal systems.[9] To this aim, this research acknowledges that, in multicultural and pluralist societies, different legal and cultural values have to coexist with each other. For instance, in the Latin American context, the interrelation of the constitutional text with norms qualified as "social" or "cultural" should always be born in mind, as well as the one between western-derived values and aboriginal ones.[10] The expression "decolonial" should not be confused with "post-colonial", which is conversely used in the paper to describe the result of a historical process of detachment and independence from the colonial domination – not necessarily abrupt and sudden, but even progressive, gradual or peaceful. The Countries which are going to be addressed as "post-colonial societies" are non-western legal systems that have experienced colonialism, and that are now formally independent, where western-derived rules and principles cohabit with aboriginal ones.[11]

This approach is embraced by scholars such as Ralf Michaels and Lena Salaymeh, when writing that: "decolonizing the discipline of comparative law in the Global North requires the involvement of Global North scholars"[12]. The authors seem to mean that it is important to avoid the mistake of linking legal concepts solely to our own cultural understanding when looking at foreign legal traditions.[13] After all, this is the way to build more inclusive societies, where diversity is welcomed as an added value.[14]

[9] Indeed, there is a risk of an even unconscious bias when western comparativists approach legal traditions that seem to be far away from ours. On this respect see, for instance, A. Somma, *Temi e problemi di diritto comparato. IV. Diritto comunitario vs. diritto comune europeo,* Giappichelli, 2003, 10-11.

[10] M. C. Locchi, *Pluralism as a key category in Latin American constitutionalism: some remarks from a comparative perspective*, in *Comparative Law Review*, 2017, 5.

[11] The line between "decolonial" and "post-colonial" is often blurred, as well as the validity of this distinction at all. However, the expressions "decolonial" and "post-colonial" are still widely used in the literature and, notwithstanding all their limits, if they are not interpreted too strictly, they can be helpful in describing certain approaches and historical moments. The terms are employed, for instance, in F. Renucci, *Legal pluralism at the heart of a unitary law. French colonial and post-colonial situations (19th-20th century),* in *Quaderni fiorentini*, L, 2021, 631-650, on legal pluralism and the colonial period in a French perspective; F. Coronil, *Elephants in the Americas? – Latin American Postcolonial Studies and Global Decolonization*, in M. Moraña, E. D. Dussel & C. A. Jáuregui (eds.), *Coloniality at Large: Latin America and the Postcolonial Debate*, 2008, 396-416; F. Englert & J. Schaub-Englert, *supra* note 7. Studies on "colonial law" were conducted also in Italy, at the beginning of 1900, by distinguished scholars such as Santi Romano, focusing on the relationship between property, sovereignty, and territory. On this matter, see L. Nuzzo, *Pluralismo giuridico e ordine coloniale in Santi Romano,* in *Quaderni fiorentini*, L, 2021, 215-249.

[12] L. Salaymeh & R. Michaels, *supra* note 7, 186. The terms "Global North" and "Global South" are not used in a prescriptive way, and they are employed to address the regions of Europe, the United States, and the regions of Asia, Latin America, Africa, Oceania, respectively. However, the use of this terminology is far from being uncontroversial. Indeed, the two areas are historically characterized by mutual contaminations and influences, and it is quite impossible to encase them in the encompassing formulas "Global North and Global South". And yet, even if categories have oftentimes the effect of restrict and embed concepts and entities, they can still be useful, at least for framing certain ideas in general terms.

[13] P. Grossi, *supra* note 8, 30; see also R. Míguez Núñez, *Per una decostruzione del concetto di "proprietà" nella realtà andina*, in *Rivista di Diritto Civile,* 2010, 425-427; I. Ortiz Gala & C. Madorrán Ayerra, *Inappropriate Nature. Natural Resources as Commons*, in *Journal of Interdisciplinary History of Ideas*, 2023, 2-18.

[14] In the words of Boaventura de Sousa Santos, this should be the aim of decolonial theory. Decolonial theory as a methodology, "does not mean discarding the rich Eurocentric critical tradition and throwing it

II. SETTING THE SCENE: PROPERTY IN LAND AND COLONIALISM

During the nineteenth century, Latin American Countries engaged in the process of achieving cultural, political and economic independence from colonial settlers. Although now almost all Latin American Countries are independent, colonialism is part of their story, and still influences the asset of their societies.[15] It has also been argued that, nowadays, we live in an age of neo-colonialism: namely, we still embrace colonialism as a mode of thought, unintentionally adopting a universalized Eurocentric standard in our laws and economies, and when approaching social and political issues.[16]

In Latin America, the European colonization exploded in all its ferocity after the fifteenth century, when the lands of the invaded territories were conquered for acquiring their mines and resources (the so-called *land grabbing*). The concept of sovereignty at the beginning, and the right to property later, served as an effective and "terrible"[17] sword in the hands of the settlers. In fact, the lands of Indigenous populations were regarded as *res nullius,* thus susceptible to be acquired, since the relationship between the Indigenous and their territories did not follow certain rules on properties embraced by the colonizers[18]. Aboriginal groups shared a communal bond to their lands, and Indigenous culture rejected a strong separation between humans and earth; this differed profoundly from the concept of property as an individual, exclusive and absolute right, promoted by the colonizers. The Indigenous deemed themselves and their lands as inseparable, the earth was shared with members of the community and preserved for future generations.[19] Land was intended as something that could be assimilated to a *common good*,[20] or even to a living subject, not as a source of wealth.[21]

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into the dustbin of history, thereby ignoring the historical possibilities of social emancipation in western modernity. It means, rather, including it in a much broader landscape of epistemological and political possibilities. It means exercising a hermeneutics of suspicion regarding its 'foundational truths' by uncovering what lies below their 'face value'." (B. De Sousa Santos, *Epistemologies of the South. Justice Against Epistemicide*, Routledge, 2014, 44).

[15] R. Michaels, *The legal legacy of the colonial era,* 1. Specifically on Latin America, see C. Marés de Souza Filho, *Os direitos invisiveis*, in F. Oliveira & M. C. Paoli (eds.), *Os sentidos de democracia. Políticas do dissenso e hegemonia global*, Vozes/Fapesp, 1999, 307-334.

[16] A. Lehavi, *The Construction of Property. Norms, Institutions, Challenges,* Cambridge Univ. Press, 2013, 243-246.

[17] The right to property has been defined as the "terrible right" by Cesare Beccaria. Later, this expression was used by the Italian legal scholar Stefano Rodotà (S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni,* Il Mulino, 2013).

[18] See G. Resta, *Systems of public ownership,* in M. Graziadei - L. Smith (eds.), *Comparative Property Law. Global Perspectives*, Cheltenham, UK - Northampton, MA, USA, 2017, 244; 246-249. Again, on the links between sovereignty and property, L. Nuzzo, *supra* note 11.

[19] Wub-e-ke-niew, *We Have the Right to Exist. A Translation of Aboriginal Indigenous Thought. The first book ever published from a Ahnishinahbaeójibway Perspective*, Black thistle press, 2013, 212; M. Risse, *A Radical Reckoning with Cultural Devastation and Its Aftermath: Reflections on Wub-e-ke-niew We Have the Right to Exist*, in *Carr Center Discussion Paper*, 2023, 19. On future generations and property law, S. Settis, *In whose name do we act?*, in S. Bailey, G. Farrell & U. Mattei (eds.), *Protecting future generations through commons*, Council of Europe Publishing, 2013.

[20] S. Lanni, *Diritti indigeni e tassonomie del sistema in America Latina*, in *Annuario di diritto comparato e di studi legislativi*, Edizioni Scientifiche Italiane, 2013, 170.

[21] In line with this conception, it has been argued that the most effective way to protect the relationship of the Indigenous with their lands could be to recognize legal subjectivity to the ancestral territories, rather than qualifying them as goods that can be owned and traded. According to the supporters of this approach, this could also help in framing a more eco-centric legal approach. On this topic, see, amongst other, C. Cullinan, *Wild Law: A Manifesto for Earth Justice*, Chelsea Green Pub. Co, II ed., 2011; T. Berry*, The Great Work: Our Way into the Future*, Crown, 2000; T. Berry, *The Origin, Differentiation and Role of Rights,* 01/11/2001,

Moral, religious and philosophical theories later furnished justifications for the Spanish and Portuguese colonial "enterprises" and land grabbing. A rediscovery of scholastic philosophy and the philosophies of natural law affirmed the right to property as a natural and moral entitlement of European citizens.[22] Ownership was intended as the exclusive and absolute right of a person over their goods; and, amongst these goods, land was the main one, as a naturally limited and scarce source of profit. It is not a coincidence that John Locke's theory of labor property developed during colonial times.[23] From Locke's perspective, the right to the appropriation of goods is inherent to natural law, and appropriation happens through labor, especially when it comes to land.[24] From these views a rigid separation between humans and objects follows. Land was conceived as something to be worked, exchanged and traded, a means for wealth.

Therefore, it comes as no surprise that Indigenous relationship towards land (both collective and non-exclusionary) appeared distant from the idea of property carried by the settlers. To justify the colonial enterprises, the Indigenous were presented as peoples without history, living in a perennial state of nature, non-conforming to western standards.[25] They were tragically dehumanized, which helped the process of colonization and justified the violent invasion of their lands.[26] As bitterly observed by Aboriginal writer Wub-e-ke-niew: "«Thou shall not steal» was not meant to apply outside the community of the faithful"[27].

This conception of property as the exclusive, individualistic power to fully dispose of a certain object can be traced back to the Roman law concept of *dominium*[28]. However, it

available at: https://www.ties-edu.org/wp-content/uploads/2018/09/Thomas-Berry-rights.pdf, accessed 13-02-2024; C. D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, in *Southern California Law Review*, 1972, 450-501.

[22] For a synthesis of the philosophical foundations of the right to property, U. Mattei & A. Quarta, *Punto di svolta. Ecologia, tecnologia e diritto privato. Dal capitale ai beni comuni,* Aboca, 2018, 43.

[23] See extensively J. Locke, *Two treatises of Government and a letter concerning toleration*, introduction of I. Shapiro, Yale University Press, 2003. For a complete account, see J. Tully, *A Discourse on Property: John Locke and His Adversaries,* Cambridge University Press, 1980 and L. Underkuffler, *On Property: An Essay*, in *Yale Law Journal*, 1990, 132-139.

[24] J. Locke, *The second treatise of government*, Sections 27, 40. See A. Ryan, *Locke and the Dictatorship of the Bourgeoisie*, in *Political Studies Association*, 1965, 225. Another crucial point of reference is the position of Hegel, who regards property as "the first embodiment of freedom and an independent end" (G. W. F. Hegel, *Philosophy of Right,* transl. S. W. Dyde, Batoche books, 2001, Section 1, § 45).

[25] E. R. Wolff, *Europe and the people without history*, Univ. of California Press, 1990.

[26] Even if with reference to the Sámi Indigenous people in Sweden, see R. Kuokkanen, *From Indigenous private property to full dispossession - the peculiar case of Sámi*, in *Comparative Legal History*, 2023, 24-44. The Spanish school of international law (Francisco Vitoria, Domingo de Soto, Luis de Molina, Bartolomé de Las Casas are the main exponents) recognized the natural rights of Indigenous people (C. Marés de Souza Filho, *The right to exist*, in *Tipití: Journal of the Society for the Anthropology of Lowland South America*, 2022, 158). However, they also justified conquest and subjugation under the idea of the "just war" (on the ambivalence of the Spanish school, see G. Giacomini, *Indigenous people and climate justice. A critical analysis of international human rights law and governance*, Springer, 2022, 151-225). On these matters, see also A. Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah,* Paris:Odile Jacob, 2008.

[27] Wub-e-ke-niew, *supra* note 19, XX. On March 20, 1570, the Portuguese government enacted the "*Ley sobre a liberdade dos gentios*", which granted some protection to the Indigenous, but only conditional to their conversion to the Christian religion.

[28] See the works collected in A. Gambaro, A. Candian & B. Pozzo, *Property, Propriété, Eigentum. Corso di diritto privato comparato,* CEDAM, 1992, specifically B. Pozzo, *La tradizione filosofica in Germania*, 289 and A. Di

only partially represents property in the western world, as ownership is a polysemic concept. Already during the transition from Roman law to *ius commune,* property underwent through radical changes. In the feudal system, the principle of the "closed number" of property rights was questioned; and "ownership" was referred to as the right to enjoy the land, regardless of the formal *dominium* over it.[29] Nonetheless, the individualistic face of the right to property resurfaced in England, with the enclosure movement. The enclosure movement meant the extinction of the previous common rights in land that the peasants had.[30] Property developed as the full power of an individual over a certain good, to be used, improved and labored, an instrument through which acquiring autonomy, self-determination and promoting the economic development of society.

During the enlightenment, property law was also key to affirm freedom and the civil rights of the new bourgeois society, thus allowing the greatest expansion of productive possibilities.[31] This idea of property was codified in the Code Napoléon, where Article 544 lays out the sovereignty of mankind over goods.[32] Such a concept is still present, to a certain extent, in European civil law systems.[33]

However, in European legal systems, property does not neglect public interest, and has never done so.[34] It is remarkable that even Thomas Aquinas, the primary exponent of the scholastic philosophy, upheld that property was to be used for the common good.[35] Alongside with the above-mentioned individualistic and exclusionary traits of the right to property, collective forms of ownership have always existed and survived in Europe. This was the case, for example, of the Italian "*partecipanza*" (which could be roughly translated with the word "participation"). *Partecipanza* is a collective form of property of rural territories, which still endures in Italy, built on the values of solidarity, respect, and

Robilant, *The making of modern property. Reinventing Roman law in Europe and its peripheries*, Cambridge University Press, 2023.

[29] See L. Capogrossi Colognesi, *Le vie del diritto romano*, Bologna, 2023.

[30] J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820*, Cambridge University Press, 1993, 17-18.

[31] This is what has been pointed out by J. Boyle, *The Second Enclosure Movement*, in *Law & Contemporary Problems*, 2003, 35. For a criticism of the neo-liberal conception of the right to property, among many, see P. J. Proudhon, *What is Property? An Inquiry into the Principle of Right and Governance* (1840), ed. and transl. by D. R. Kelley & B. G. Smith, Cambridge University Press, 1994, where the Author famously affirmed that: "property is theft".

[32] Article 544 of the French civil code states that: "*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*." ("The right to property is the right to enjoy and dispose of things in the most absolute way, as long as not they are not used against statutes or regulations").

[33] Conversely, in common law countries, property is often defined as a "bundle of rights" focusing more on the relationships between individuals, rather than between individuals and goods (W. N. Hohfeld, *Fundamental legal conceptions as applied in Judicial Reasoning*, in *The Yale Law Journal*, 1917, 710-770; A. di Robilant, *Property's Building Blocks: Hohfeld in Europe and Beyond,* in *Scholarly Commons at Boston University School of Law*, 2022, 1-29; S. Van Erp & B. Akkermans (eds.), *Cases, materials and texts on national, supranational and international property law*, Hart, 2012, 39).

[34] A. Gambaro, *Il diritto di proprietà,* in *Trattato Cicu-Messineo*, 1995, 185; P. Barcellona, voce *Proprietà (tutela costituzionale)*, in *Digesto delle discipline privatistiche, sezione civile*, Torino, 1997, 461 - 464; E. Resta, *Pubblico, privato, comune,* in *Tra individuo e collettività. La proprietà nel secolo XXI*, Giuffrè, 2012, 114.

[35] G. Portonera, *Diritto privato e interessi generali. Profili storico-sistematici*, in *Jus civile*, 2023, 1004; U. Mattei & A. Quarta, *supra* note 22, 35

equality, founded on the land concessions made by the Church to families and farmers' communities in the Middle Ages.[36]

Another model of collective property is represented by "*civic uses*", which can be roughly described as the right of the inhabitants of a municipality to enjoy a certain territory, privately or publicly owned. In this model, what truly matters is not the formal ownership of the land, but its concrete use, for the needs of a certain community. Nowadays, the importance of civic uses is recognized also for the preservation of the environment, and these territories cannot be sold or employed against public utility. For instance, the new Italian law nr. 168 of 2017, protects civic uses as "the primary legal order of aboriginal communities".[37] Collective ownership is still widely spread among European Countries, mostly in marginal and rural areas, even if it oftentimes lacks recognition in statutory law. Civic uses, *partecipanza,* are just a few examples, but these collective forms of property are impressively heterogeneous.[38] Their existence shows that there are, and there have always been, "other forms of owning".[39] In these models, it does not generally matter who formally owns the land, but how the land is used, by the present and future members of a community, in an "intergenerational" perspective. Currently, the vivid scholarly debate on *commons* focuses on these issues, and explores forms of collective property, focusing especially on the decision-making, the governance and the distribution of land and other resources.[40]

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[36] P. Grossi, *Il mondo delle terre collettive. Itinerari giuridici tra ieri e domani*, Macerata, 2019, *passim.*

[37] On law nr. 168 of 2017, in the Italian scholarship, see L. A. Vitolo, *Gli usi civici e il decreto di esproprio: un'occasione per ripensare ad un antico istituto guardando al futuro*, in *Giur. it.*, 2024, 808; G. Agrifoglio, *Usi civici e proprietà collettive: da* demanium *a* dominium, in *Giur. it.*, 2023, 2335; F. Marinelli - F. Politi (eds.), *Domini collettivi ed usi civici. Riflessioni sulla legge n. 168 del 2017*, Pisa, 2019.

[38] See also C. Camardi, voce *Zucconi Giovanni,* in M. L. Carlino, G. De Giudici, E. Fabbricatore, E. Mura & M. Sammarco (eds.), *Dizionario bibliografico dei giuristi italiani XII-XX secolo,* il Mulino, 2013, pp. 2095-2097, reporting the work of the Italian scholar Giovanni Zucconi, during the XIX century, on collective property and civic uses in the community of Fiuminata. In that chance, the Author highlighted how that particular form of collective property could be traced back to a communitarian idea of ownership which differs, but goes hand in hand, with its individualistic conception. See also P. Grossi, *La cultura giuridica di Giovanni Zucconi*, in *Quaderni Fiorentini*, 1988, pp. 171-196; and, on this matter, G. VENEZIAN, *Reliquie della proprietà collettiva in Italia*, Camerino, 1888, today in *Opere giuridiche di Giacomo Venezian*, II. *Studi sui diritti reali e sulle trascrizioni, le successioni, la famiglia*, Athenaeum, 1920, 3 ff.

[39] P. Grossi, *supra* note 4.

[40] Commons can be approximately defined as shared resources, used by and for the benefit of a community, and for the interest of future generations, too. They are "the opposite of private property" (S. Rodotà, *Il terribile diritto. Studi sulla proprietà private e i beni comuni*, il Mulino, 2013, *passim*). While, in the past, an economy based on commons had been viewed with skepticism (G. Hardin, *The tragedy of the Commons*, in *Science*, 1968, 1243-1248), the benefits and potentials of the theory of commons were later pointed out by many authoritative scholars. One cannot avoid mentioning the landmark works of Elinor Ostrom (E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge Univ. Press, 1990; E. Ostrom & S. Buck, *The Global Commons: An Introduction*, Island Press, 1998) and Daniel Bromley (D. Bromley, *Making the Commons Work: Theory, Practice and Policy,* ICS Press, 1992). See also M. Heller, *The tragedy of anticommons: a concise introduction and lexicon,* in *Modern Law Rev.*, 2013, 6-25. A vivid debate on commons flourished in the Italian legal scholarship at the beginning of the twenty-first century; see A. Gambaro, *La proprietà. Beni, proprietà, possesso*, Giuffrè, 2017; A. Quarta & M. Spanò (eds.), *Beni comuni 2.0. Contro-egemonie e nuove istituzioni*, Mimesis, 2015; U. Mattei, *Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance*, in *South Atlantic Quarterly,* 2013, 366-376; M. R. Marella (ed.), *supra* note 3; U. Mattei, *Beni comuni: un manifesto,* Laterza, 2011; U. Mattei, E. Reviglio & S. Rodotà (eds.), *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Il Mulino, 2007.

In the light of the constant changes characterizing the evolution of the multi-faceted right to property, the affirmation of its social function in modern constitutional charters seems almost a natural and consequential outcome. The so-called *social function of property* is a concept that has evolved over history, which refers to the idea that exclusionary property should be contempered with the interests of society, according to the principle of solidarity.[41] The 1919 Constitution of the Republic of Weimar thus famously affirms that: "property obliges"[42]. The social function of property was also at the core of the debate preceding the enactment of the Italian civil code of 1942. Yet, back then, the apparent contradictions between *duty* (the social function) and *power* (individual property) emphasized by certain scholars, prevailed, and the social function of property did not find express recognition in the civil code. Nevertheless, the code still provided for an articulated regulation of both the internal and public limits to the right to property, where it may be argued that a certain idea of social function is condensed, even if, at that time, connected to the corporativist framework. Some years later, the social function was finally explicitly mentioned in Article 42 of the Italian Constitution, in a radically different context, and with another meaning, linked to the pluralistic society represented in the Italian constitutional charter[43]. The social function was later acknowledged in Article 33 of the Spanish Constitution, too.

As far as supranational Charters are concerned, the European Charter of Fundamental Rights (ECFR) considers property as a fundamental right,[44] in line with other national European Constitutions.[45] However, the Charter's provisions need to be interpreted in a

[41] See S. Foster & D. Bonilla, *The social function of property: a comparative law perspective,* in *Fordham Law Review*, 2011, 101-113. The social function of property has started to be theorized in the French legal system, with the work of Léon Duguit. It is the result of a long process of transformation of society and the role of the law in and for it. See T. Boccon-Gibod, *Duguit, et après? Droit, propriété et rapports sociaux*, in *Revue internationale de droit économique*, 2014, 285-300.

[42] Article 153, Constitution of the republic of Weimar: "Property shall be guaranteed by the constitution. Its nature and limits shall be prescribed by law. Expropriation shall take place only for the general good and only on the basis of law. It shall be accompanied by payment of just compensation unless otherwise provided by national law. In case of dispute over the amount of compensation recourse to the courts shall be permitted, unless otherwise provided by national law. Expropriation by the Reich against the states, municipalities, and associations serving the public welfare may take place only upon compensation. Property obliges. Its use by its owner shall serve the public good."

[43] On the social function of property in the Italian civil code, see U. Natoli, *La proprietà. Appunti delle lezioni, I*, 2 ed., Giuffrè, 1976, pp. 178-180. On Article 42 of the Italian Constitution, see P. Barcellona, *supra* note 34, 457; P. Barcellona, *Diritto privato e processo economico*, Jovene, 1973, pp. 196-208. This relevance placed on the public interest extends to Article 44 of the Italian Constitution, too, where productivity is said to be balanced with public utility. See also, on the matter, A. Candian – U. Mattei – A. Gambaro, *The law of property in Italy,* in A. Pizzorusso (ed.), *Italian Studies in Law*, Vol. 1, Dordrecht, 1992, pp. 119-159; and with specific reference to land law, A. Candian*, Land Law,* pp. 151-157.

[44] On Article 17 ECFR, see P. Grossi, *L'ultima carta dei diritti (lo storico del diritto e la carta di Nizza),* in G. Vettori (ed.), *Carta europea e diritti dei privati*, CEDAM, 2002 and A. Candian, *Riflessioni sull'articolo 17 della Carta di Nizza,* in *Scritti in memoria di Giovanni Cattaneo, vol. 1,* Giuffrè, 2002.

[45] Property is classified as a fundamental right by the Constitutions of Austria (Article 5, Fundamental Law of December 21, 1867, recalled by Article 149), Finland (Section 15), Sweden (Article 18), Denmark (Article 73), Czech Republic (Article 11), Estonia (Article 32), Latvia (Article 105), Slovenia (Articles 33-67-69), Slovakia (Article 20), Malta (Article 37), Cyprus (Article 23), Romania (Article 44), Bulgaria (Article 17), Lithuania (Article 23), Hungary (Article 13), Ireland (Article 43); the United Kingdom (Article 1, First Additional Protocol of the Human Rights Act). On the different constitutional conceptions of the right to property in Europe, see A. Viglianisi Ferraro, *Il diritto di proprietà e la sua "funzione sociale" nell'ordinamento giuridico italiano ed in quello europeo*, in *Rivista italiana di diritto pubblico comunitario*, 2016, 519-540.

coherent and systematic manner, as they do not affirm property as an absolute right. It is indeed generally acknowledged in the interpretation of the Charter that property ought to be limited for the public interest, as attested, for example, by the endorsed disciplines on urban constraints, expropriation, or the rise of new forms of property, such as fiduciary property.[46]

All in all, in European Constitutions and supranational Charters, property law provisions attempt to balance economic, social and personal instances. At the same time, in European legal systems, collective and individualistic forms of property coexist with each other, even though the relevance of the former is not always fully acknowledged by the law. This applies also to non-material forms of property. Nowadays, in the digital economy, we are witnessing the rise of a new "digital mutualism", which calls for establishing new forms of democratic "data governance", where personal and non-personal data are treated not as goods to be owned and traded, but as commons, to be used for the social good.[47] There is also a shared call for a conception of copyright law more attuned to the needs of society, able to ensure equal access to healthcare, food, and essential goods, such as energy, electricity, and even the internet. Today, in European legal systems there is a tension between the need to valorize solidarity through property, and the neoliberal economic model, which tends to privatize resources and prioritize market's needs.

III. Property, lands and multiculturalism in the Brazilian Constitution

As some of the above-mentioned considerations have summarized, colonization involved the dispossession of native communities from their traditional lands.[48] The Indigenous were confined in the hinterland, where most of them are still based today.[49] Even after Latin American States achieved their independence, the cohabitation between Indigenous peoples and those of colonial lineage has been far from easy.[50] Nevertheless, thanks also to the geographical isolation of the territories where part of these populations lives, they have managed to survive, and some of the areas where they live still maintain a certain degree of preservation and biodiversity.[51]

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[46] On fiduciary property, see M. Graziadei, *La proprietà fiduciaria, la proprietà nell'interesse altrui, e i trust. Un itinerario,* in *Trusts e attività fiduciarie,* 2022, 26-47; U. M. Morello, *Tipicità e* numerus clausus *dei diritti reali,* in A. Gambaro & U. M. Morello (eds.), *Trattato dei diritti reali,* Giuffrè, 2008, 67; A. Gambaro, voce *Trust,* in *Digesto discipline privatistiche – Sez. Civ.,* UTET giuridica, 1999, 449-469. Moreover, the Charter has to be interpreted in accordance with the case law of the European Court of Human Rights on Article 1 of the European additional protocol to the European Charter of Human Rights (ECHR) on the peaceful enjoyment of possessions.

[47] The concept of "data governance" is employed by the new legal act of the European Union, Regulation (EU) 2022/868, the so-called *Data Governance Act*, which is founded on the idea of sharing personal and non-personal data for the common good of society, with the appropriate safeguards to fundamental rights of the individuals.

[48] Dispossession is the territorial expropriation of Indigenous peoples from the lands that founded their livelihoods and societies (R. Nichols, *Theft is Property! Dispossession and Critical Theory*, Duke Univ. Press, 2020, 5-9).

[49] C. Marés de Souza Filho, *I popoli indigeni e il diritto brasiliano*, in S. Lanni (ed.), *I diritti dei popoli indigeni in America Latina,* Edizioni Scientifiche Italiane, 2017, 178-179.

[50] E. Allen, *Brazil: Indians and the new constitution*, in *Third World Quarterly,* 1989, 151.

[51] A. Mensi, *I popoli indigeni e le development-based evictions, il diritto alle terre come un diritto culturale*, in *Politica del diritto*, 2016, 191.

In the nineteenth century, when Latin American Countries became independent, there was a rapid escalation of various Indigenous organizations and groups, vindicating their collective rights towards the newly born South and Central American States. At the top of those rights was the right to possess and inhabit their "traditionally occupied lands"[52], essential to the survival of these communities. These fights are still not over, because of the generous mineral and natural resources contained in Indigenous soil, which makes it very attractive to other farmers and corporations. As anticipated above, ancestral lands are central on many levels for the Indigenous. They are essential for their own survival, through hunting and farming, and contribute in defining Aboriginal identities. The conservation of the land ensures the right to life; in the Aboriginal conception, the earth is not just a legal object, but it is an entity, representing the past, the present, and the future of the community. For Indigenous groups, the relationship with the land has cultural significance: it affects their collective identities and it shapes the organization of their groups and the structure of their society. The practices, beliefs, observations, that are transmitted in Indigenous communities from generation to generation, addressed as "traditional knowledge", go hand in hand with the relation between humans and their lands.[53]

As far as Brazil is concerned, an important step in the formal acknowledgment of Indigenous rights was the creation of the Indian Protection Service, in 1910. The Indian Protection Service was the first federal agency devoted to the protection of Indigenous peoples, replaced in 1967 by the FUNAI, the agency that, today, is still in charge of the implementation of Indigenous politics.[54]

After independence, various constitutional texts added specific provisions related to Indigenous peoples,[55] who were addressed as *Indios* in the Brazilian Constitution.[56] However, these documents were more prone to pursue the cultural assimilation of the *Indios* rather than acknowledging their existence as a distinct community, neglecting aspects of their self-determination and autonomy.[57] For a long time, the approach adopted

[52] This expression (in Portuguese, *terras tradicionalmente ocupadas*) is generally employed in International covenants, in the Brazilian Constitution and in the "Statute of *Indio*" (Law nr. 6001/1973). The "traditionally occupied" lands are essential for the customs and traditions of Indigenous populations (S. Barbosa, *Legal regime for a mosaic of differences: 25th anniversary of UNDRIP - experiences in Brazil,* in *Legal history insights*, 27.10.2022, available at: https://legalhistoryinsights.com/legal-regime-for-a-mosaic-of-differences-25th-anniversary-of-undrip-experiences-in-brazil/, accessed 22-12-2023).

[53] See R. C Ryser, *Indigenous People and Traditional Knowledge,* Berkshire Publishing Company, 2011. See also the definition provided for by the UN Permanent Forum of Indigenous Issues, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/04/Traditional-Knowledge-backgrounder-FINAL.pdf, accessed 13-02-2024.

[54] E. Allen, *supra* note 50.

[55] Indigenous rights are generally included in Latin American Constitutions. A different and peculiar case of a Constitution of a State of Indigenous peoples is the Cherokee Constitution, established in 1827 (see B. Aryal, *Constitutional Rethoric: The Genre Performances of the Written Constitution in Transnational, Transcultural Contexts*, in *Graduate Theses, Dissertations, and Problem Reports*, 2018, especially 66, 2015).

[56] For the sake of this paper, the term *indios* is employed only when used in the Constitution and in black letter law. Indeed, the term "Indian" is a legacy of the colonial usurpation. On the use of language to define the Aboriginals and for a critique of the term "Indians" for this scope, see Wub-e-ke-niew, *supra* note 19, especially 34-35.

[57] M. Neves - J. T. Hottinger (eds.), *Federalism, rule of law and multiculturalism in Brazil,* Helbing & Lichtenhahn, 2001, 3; C. Marés de Souza Filho, *supra* note 49, 169-171.

by Latin American States towards Aboriginals was an integrationist one: the Indigenous needed to be "civilized" and integrated in the new State. They were forced to become a part of it, even when against their will, and when that would have meant losing their traditions and identity[58].

It was only with the 1988 Brazilian constitutional document that the Indigenous were no longer portrayed as a minority whose diversity needed to be cancelled, but as an autonomous, distinctive population.[59] In this sense, the Constitution was a turning point.[60] The Charter, still in force today, not only made Brazil a social democracy and federal state, but is considered revolutionary in the whole Latin America, as far as Indigenous rights are concerned.[61]

While the Constitution of 1946 already mentioned the opportunity of using the law of property "for the collective good" (Article 147), and the reform of 1967 introduced the "social function of property" (Article 160)[62], only in 1988 the social function of property was explicitly embraced as a political objective, and one Chapter was exclusively devoted to Indigenous peoples, focusing on their relationship with their "traditionally occupied lands" (Title VIII "The social order", Chapter VIII "Indigenous Peoples", Articles 231-232)[63].

In a nutshell, the Constitution now recognizes the existence of both collective and individual rights (Title II, Chapter I), qualifies property as a fundamental right, entrusted with a social function (Article 5)[64], and assigns a preeminent place to the possession of

58 On colonization as "assimilation" and "integration" of the Aboriginals, see, in general terms, G. Gozzi, *Eredità coloniale e costruzione dell'Europa. Una questione irrisolta: il 'rimosso' della coscienza europea,* il Mulino, 2021 and P. Costa, in *Quaderni fiorentini,* LI, 2022, 398.

59 S. Lanni, *supra* note 20, 159-161.

60 It paved the way to other constitutional documents recognizing Indigenous rights; for example, the Colombian and the Bolivian ones, adopted in 1992 and 2009 respectively (see C. Marés de Souza Filho, *supra* note 49, 173-175).

61 M. Neves & J. T. Hottinger (eds.), *supra* note 57, 6-8.

62 M. G. Losano, *Il controllo della terra, la riforma agraria e i movimenti sociali in Brasile*, in *Fra individuo e collettività. La proprietà nel secolo XXI*, Giuffrè, 2012, 139-141.

63 M. G. Losano, *supra* note 62, 147. For instance, the decision to devote one chapter to Indigenous *peoples* (not populations, groups, or minorities) is meaningful, as it acknowledges the difference between the Indigenous and the rest of the Brazilian society, minorities included (G. Ulfstein, *Indigenous Peoples' Right to Land*, in *Max Planck Yearbook of United Nations Law*, 2004, 12). Moreover, international documents, such as the International Convenant on civil and political rights, relate to *peoples* rights like self-determination and those over lands and resources.

64 G. Marini, *La costruzione delle tradizioni giuridiche ed il diritto latinoamericano*, in *Rivista critica del diritto privato,* 2011, p. 174; A. Somma, *Il diritto latino americano tra svolta a sinistra e persistenza dei modelli neoliberali*, in *Diritto pubblico comparato ed europeo*, 2018, 57-80. See art. 5, Brazilian Constitution: "[…] the right of property is guaranteed; property shall fulfill its social function; the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution; in case of imminent public danger, the competent authority may make use of private property, provided that, in case of damage, subsequent compensation is ensured to the owner; the small rural property, as defined by law, provided that it is exploited by the family, shall not be subject to attachment for the payment of debts incurred by reason of its productive activities, and the law shall establish the means to finance its development […]". Art. 186 of the Brazilian Constitution specifies when property law, specifically rural property, fulfils its social function: "The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements: I. rational and adequate use; II. adequate use of available natural resources and

ancestral lands in the pursuit of Indigenous interests (Article 231). As it will be analyzed further in greater detail, the Constitution qualifies Indigenous ancestral territories as property of the Union, but attributes to the *Indios* the perennial possession of their lands, and powers corresponding to the usufruct of their resources.[65]

Thus, the Brazilian Constitution considers property as a fundamental right, which can be lawfully limited for the public interest (which includes the protection of minorities and communities). At the same time, it employs the property law scheme for valorizing the pluralistic and multi-ethnic nature of Brazilian society, entitling the Indigenous with property-related powers over their lands. The Indigenous community was actively involved in the process of shaping the eighth Chapter of the Constitution. Even if the Constituent assembly was formed within the National Congress, organizations and groups of representatives of Indigenous peoples represented and advocated for their rights.[66] Perhaps, the property law scheme was intended for favoring communication between the Indigenous and the rest of the members of the Brazilian State, as an institution potentially able to embrace both the European and the Indigenous cultural heritages.

Article 20 of the Constitution proclaims that the Federal Union of Brazil is entitled to the property of the rivers, the lakes and the lands "traditionally occupied by *Indios*". Chapter VIII states that the Union should respect and protect them; it follows by establishing that Aboriginal people shall have "the permanent possession and exclusive usufruct of the riches of the soil, the river and the lakes of their traditional lands"[67]. Article 231 further defines as "traditionally occupied" those lands "on which they (*the Indigenous*) live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their wellbeing and for their physical and cultural reproduction, according to their habits, customs and traditions".

The task of individuating which lands are "traditionally occupied" according to the Constitution is attributed to the FUNAI. The demarcation procedure involves an investigation on the nature of the land and its use, and must be carried on consulting Indigenous communities through all its stages.[68] Third parties, including state governments, municipalities and commercial actors, whose interests are impacted by the demarcation procedure, can present their opinions and challenge it, and this has often led to judicial trials.[69]

The regime of the collective model of property entailed in the Brazilian Constitution with respect to Indigenous ancestral territories is the following. Aboriginal lands are owned by the State, as Article 20 of the Constitution clearly affirms, but the rights of Indigenous peoples, in fact, fairly exceed and overcome the attributes and features of the usufruct,

preservation of the environment; III. compliance with the provisions that regulate labor relations; IV. exploitation that favors the well-being of the owners and laborers."

[65] In civil law systems, usufruct is a property right which grants the holder the right to use and enjoy a thing of the owner, and to benefit from its fruits (S. Van Erp & B. Akkermans (eds.), *supra* note 33, 253).

[66] C. Paixão, *Il potere delle rovine: pluralismo politico, dispute sul tempo e futuro della costituzione nel Brasile contemporaneo*, in P. Cappellini & G. Gazzetta (eds.), *Pluralismo giuridico. Itinerari contemporanei, atti dell'incontro di studi, Firenze, 20-21 ottobre 2022,* Giuffrè, 2023, 95.

[67] Article 231, Brazilian Constitution.

[68] As provided for by decree nr. 1775 of 8 January 1996, on the administrative procedure for individuating Indigenous lands (see *Sections 4* and *5* in greater detail).

[69] Article 2, para. 8; art. 9, decree nr. 1775 of 8 January 1996.

laid down in general civil law provisions.[70] The provisions of the Constitution concerning Indigenous ancestral lands derogate from the Civil Code rules on property rights. In fact, on a general level, the Brazilian civil code defines the usufruct (*usofruto*) as the right to the possession, use and administration of movable or immovable assets or estates, and their fruits (Article 1.390; Article 1.394).[71] It sets down that the usufruct can be extinguished by the death of the usufructuary and by change of the economic destination of the asset or the estate, and obliges the usufructuary to transmit to the owner the civil fruits of the administered goods (Articles 1.390-1.411). These limitations do not apply to Indigenous lands.[72] While the civil code does not deal with Indigenous law (*derecho indígena*),[73] the "Statute of *Indio*" (Law nr. 6001/1973) prescribes that "*Indios*" are entitled to all the resources generated by their lands;[74] that their rights cannot be restricted by any legal or governmental act; that they can engage in any agricultural or extractive activity, including activities such as fishing, hunting or harvesting fruits, in their territory.[75] Moreover, Indigenous lands are inalienable, their rights non-transferable, and not subject to the statute of limitations (art. 231, Brazilian Constitution).

Therefore, the Brazilian Constitution, when dealing with property law, seems to create a distinction between Indigenous peoples and the rest of the Brazilians. In fact, the Brazilian State is composed of non-Indigenous, minorities, different ethnical groups, and Indigenous communities. Hence, the general terms and rules about ownership provided for by the Brazilian civil code, such as usufruct or possession, that apply in private transactions, do not have the same meaning when referred to the Indigenous and their lands protected by the Constitution. Different rules apply to different peoples, for preserving their diversity. This happens also, for example, in the Bolivian Constitution, where Bolivia is defined as a Nation composed of all Bolivians, Indigenous peoples included (Article 3, Bolivian Constitution).

Indigenous lands, therefore, on paper, could be compared more to commons, rather to objects of possession or usufruct strictly speaking. As far as commons are concerned, the

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[70] V. M. Lauriola, *Terre indigene, beni comuni, pluralismo giuridico e sostenibilità in Brasile*, in *Rivista critica del diritto privato*, 2011, 425-458.

[71] The Brazilian civil code defines property (*propriedad*) in Article 1.228. The Article describes property as: "the subjective right over a thing, consisting in the possession, use, enjoyment and disposal of corporal or incorporal goods, and the right to claim it against those who unlawfully acquire that thing" ("*El derecho real subjetivo a poseer, usar, disfrutar y hacer uso de bienes corporals o incorpóreos, como reclamar a aquellos que poseen o poseen incorrectamente*") and possession in Article 1.196, as: "the behavior of someone who acts as the owner of a certain good, corresponding to the evident exercise, full or partial, of some of the powers of property" ("*Considera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade*"). The Brazilian civil code bears important resemblance with the German model of the BGB (T. Ascarelli, *Osservazioni di diritto comparato privato italo-brasiliano*, in *Foro italiano,* 1947, 98). Perhaps, the German ascendancy also contributes to keep the Brazilian system more open to the collective dimension of property (G. Marini, *supra* note 64, 178; M. R. Marella, *Introduzione*, in M. R. Marella, *supra* note 3, 13). On the specifics of the Latin American civil law system, see S. Lanni, voce *Sistema giuridico latinoamericano*, in *Digesto delle discipline privatistiche, Sezione Civile,* Aggiornamento, UTET, 2016, 711-755.

[72] G. Marini, *supra* note 64, 173; see A. Llunku & A. Yala, *Constituyencia indigena y código ladino por América*, Madrid, 2000.

[73] S. Lanni, *Sistema giuridico latinoamericano e diritti dei popoli indigeni*, in S. Lanni (ed.), *supra* note 49, 42.

[74] Article 2, L. nr. 6001/1973.

[75] Articles 17-18, L. nr. 6001/1973.

focus is not anymore on who owns a certain object, but rather on the common governance, access and preservation of a given good; hence why the commons have also been considered the opposite of private property. The fact that the Brazilian State formally owns the traditionally occupied land is not relevant *per se* for its use; these lands are, indeed, administered by the Indigenous, which have full access to their resources. At the same time, the Aboriginals preserve their territories, for the community and for its future generations. Thus, the situation of Indigenous traditionally occupied lands can perhaps be described as *collective possession,* a special relationship of the community with their land, ultimately aimed at preserving harmony between humans and nature: the *buen vivir*, which overcomes both the idea of accumulation by dispossession and the merely individualistic and exclusive relationship with the territory.[76]

The fact that the Constitution prescribes that the Federal Union preserves property over Indigenous lands involves that it can take advantage of their mineral and hydric resources, in certain, specific situations. This can be the case only when prescribed by law and when there is a relevant public interest, after having heard the involved communities. At the same time, "Indians" can be removed from their territory only by order of the National Congress, after a referendum, in cases representing a risk to their survival, or that put "the sovereignty of the Union" in danger.[77] More importantly, however, the fact that the State retains the ownership of the lands and that the Indigenous are entitled to their "usufruct and permanent possession" leads to the result that, when a land is demarcated and recognized as ancestral, it then becomes inalienable. This means that the rights of the Indigenous, which are natural and original, prevail over the economic interests of corporations and entrepreneurs, as well as of the non-Indigenous members of the civic society interested in these lands. The State acts a sort of "trustee", for the benefit of the general public and future generations[78].

Nonetheless, the choice to make the lands property of the State shows a protectionist approach toward Indigenous communities.[79] The fact that the Indigenous cannot freely dispose of their ancestral territories might be questionable and regarded paternalistic. Indeed, it could be argued that it should be up to Indigenous populations to change their traditions and their ties to the land freely. This would also include their right to sell those lands to other members of the civil society or corporations. This approach may as well favor Indigenous communities who are composed of hunters and gatherers, rather than those formed mostly by farmers and agrarian groups, who might benefit more from a

[76] See A. Acosta, *Le buen vivir. Pour imaginer d'autres mondes*, transl. by M. Barailles, Les Édition Utopia, 2014, 21-61.

[77] Article 231, para. 3 and 4, Brazilian Constitution. The other acts of disposal undertaken by the Federal Union are void.

[78] G. Resta, *supra* note 18, 250.

[79] In other Latin American States, Indigenous are directly entitled to the ownership of their lands: for example, Article 13 of the Chilean *Ley Indigena* states that communities are the owners of their traditional lands. Other Constitutions recognizing Indigenous' rights to their lands variably are the Constitution of Peru (Article 89), Guatemala (Articles 67-69), Argentina (Article75) and Ecuador (Article 57). In the latter, Chapter VII defines Nature as the holder of "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes".

formal entitlement to their lands.[80] Moreover, attributing full property over their territories might have an empowering effect, even on a symbolic level.

However, if we regard the dignity of these populations as an utmost value, and conceive the Brazilian State as a grantor of pluralism, entitling the State to the property of Indigenous lands ensures that Aboriginals, as a potentially vulnerable group, are protected against the interests of corporations and commercial actors. In certain cases, there might also be a tension between the safeguard of Indigenous traditions and the preservation of nature; it is not always the case that Indigenous communities would actually protect their lands. Assigning to the State a crucial part in protecting Indigenous lands is a way to safeguard the Natives' identities and their cultural attributes. After all, this logic is also employed in other international charters and Constitutions that, for instance, forbid the selling of human body parts, in the name of dignity.[81] It is also remarkable that this result is pursued through a special use of property law.

This interpretation of the constitutional provision on Indigenous lands reflects the concept of "*indigenato*": a theory affirming that Aboriginals' rights over their lands are natural rights, which the Brazilian State has not established, but *recognized* in the Constitution, and safeguarded and guaranteed, since they are inherent to Indigenous populations, ancestral, and precede the creation of the state itself.[82]

Finally, it is interesting to witness a parallel process between the acknowledgment of Indigenous rights and the recognition of peasants' rights in Brazil, including former slaves. While the Indigenous were fighting for recognition of their rights over their lands, at the same time the Country was involved in important agrarian reforms. The *Movimento Sem Terra* (hereinafter: MST) a social and political movement embracing catholic values, was in charge of bringing to light the needs of the peasants and the poorest in society, as opposed to big landowners. This led to the adoption of the so-called *Land law,* L. nr. 601/1850, which today is still in force, though it failed to grasp the real social concerns that these social movements wanted to point out. Furthermore, the fights of peasants also embraced a sacred conception of the land, related to the relationship of Indigenous groups with their territories.[83] The struggles of the Indigenous, and those of the peasants and

[80] These groups have, indeed, a different relation with the lands and the forest. On this distinction, L. L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims,* in *Duke Law Journal,* 2005, 1067.

[81] Specifically on human dignity see, among many, G. Resta, *Human Dignity*, in *McGill Law Journal*, 2020, 85-89; L. R. Barroso, *Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse,* in *Boston College International and Comparative Law Review,* 2012, 331-393; D. Beyleveld & R. Brownsword, *Human Dignity, Human Rights, and Human Genetics,* in *The Modern Law Review*, 1998, 661-680.

[82] The concept of *indigenato* goes back to the colonization period and it was used to address the sources of law that recognized the rights of Indians over their lands (D. Sartori Jr. & C. A. Vestena, *Land, Violence, and Identity in front of the Brazilian Supreme Court*, in *Verfassunblog*, 2023, available at: https://verfassungsblog.de/indigenous-rights-and-the-marco-temporal/, 2). Behind this theory there was originally an integrationist logic, as recalled also by philosophers such as Macaulay and Mill (see J. S. Mill, *Considerations on Representative Government*, Harper & Brothers, 1862, especially 249).

[83] M. G. Losano, *supra* note 62, 145. The agrarian reforms mostly concentrated land ownership to the State, expropriating peasants and farmers from their land without any due process. See also, on this matter, B. P. Reydon, V. B. Fernandes & T. S. Telles, *Land tenure in Brazil: the question of regulation and governance*, in *Land Use Policy*, 2015, 509-516.

other minorities, are not parallel lines that did not meet. In fact, the interests of the peasants and of the Indigenous sometimes converge, and other times are in conflict with each other.

IV. PLURALISM IN POST-COLONIAL SOCIETIES

In Brazil, the constitutional acknowledgment of Indigenous rights over their territories has been possible thanks to important social movements, happening not only at a local,[84] but also at an international level. Indeed, during the twentieth century, many organizations advocating for Indigenous rights gained progressive autonomy and importance,[85] battling for the adoption of significant international documents. Probably, the most important ones are Convention 169 of the International Labour Organization (ILO) on the protection and integration of Indigenous and other tribal and semi-tribal populations in independent countries, the UN Declaration on the Rights of Indigenous peoples (UNDRIP), the American Declaration of the right of Indigenous people, the Vienna Declaration for the elimination of racism and the Convention on biodiversity. Other historical gatherings and meetings happening during that period are worth mentioning. These include the United Nations Conference on Environment and Development (UNCED), in 1992, where the Indigenous were recognized as groups to be consulted for achieving a global sustainable growth.[86]

These movements differently pointed out the importance of the connection of native communities with their lands. Convention 169 mentions the "collective" relationship between the Indigenous and their lands (Articles 13 - 14).[87] As far as the UNDRIP is concerned, Article 10 lays down the right of Indigenous peoples not to be forcibly removed from their traditional lands and territories; Article 26 clarifies their right to use, develop and control these territories; and Article 25 acknowledges their spiritual connection to those lands.[88] Lastly, even though the American Convention of Human Rights does not explicitly acknowledge the rights of Native populations, the Inter-American Court of Human Rights, established within its framework, has embraced a notion of "communal property", as a collective interest that the Indigenous can claim over their traditional territories.[89]

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[84] S. Lanni, *supra* note 73, 42.

[85] R. C. Ryser, *Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power,* Routledge, 2012, 193.

[86] G. Ulfstein, *supra* note 63, 11-32. Moreover, from 1982, the ECOSOC established the Working Group on Indigenous Populations.

[87] This applies not only to traditionally occupied lands, but also to lands "not exclusively occupied, but to which the Indigenous have traditionally had access for their subsistence and traditional activities" (G. Ulfstein, *supra* note 63, 22).

[88] R. C. Ryser, *supra* note 85.

[89] The Inter-American Court of Human Rights elaborated on the notion of common and collective property in the ruling *Mayagna, (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, C Nr. 79. in 2001 and in *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005 C. Nr. 125. The Court referred to Article 21 of the Convention, which establishes that: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. Usury and any other form of exploitation of man by man shall be prohibited by law." Other pivotal rulings are *Saramaka People v. Suriname*, November 28, 2007, C Nr. 172, and *Kichwa Indigenous People of Sarayaku v. Ecuador,* June 27, 2012, C Nr. 245. Both deal with

Some scholars have maintained that these international charters have gradually formed the principles of Indigenous law;[90] thus, they should be taken into account as elements guiding the interpretation of the Constitutions and secondary legal provisions on Indigenous rights, when examining the Brazilian and the Ibero-American legal systems.

Indigenous rights to their ancestral lands are now formally acknowledged in almost all Latin American Constitutions.[91] Almost all of them dedicate some space to the Natives' rights to land, self-determination, autonomy, education, identity, language, which can be summarized in the term "Indigenous cultural rights". Aboriginal lands and territories are explicitly mentioned in the Constitutions of Brazil, Argentina, Bolivia, Colombia, Ecuador, Chile, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

In fact, every Latin American Country has experienced a history of colonization, land grabbing, independence, and the rising of Indigenous claims, thus they share some similarities. For instance, a general trend has been the use of private law (including the rules on property and land tenure) during early times of independence as a tool to strengthen the newly born State. Throughout the first phase of decolonization, this initially led to a rejection of the pluralism in Latin American Countries, adopting an integrationist logic towards Indigenous groups.[92] Later on, during the twentieth century, Ibero-American States started to abandon the integrationist logic, at least on paper, in favor of greater awareness of legal pluralism and plurinationality.[93]

The Constitutions which date back further in time, like the Guatemalan, the Nicaraguan, and even the Brazilian one, do not go as far as explicitly recognizing Indigenous law as an autonomous legal order. Conversely, others, such as the Mexican Constitution, take a clearer stand in stating the pluralistic composition of the Nation (Article 2). For instance, the Constitution of Paraguay highlights the existence of Aboriginal norms, besides national ones (Article 63), and the Bolivian Constitution stresses the autonomy of Indigenous customary law.

The Constitution of Bolivia was actually quite revolutionary in this respect. Revised in 2009, the Constitution takes an explicit stand in favor of plurinationality. To be more precise, it defines Bolivia as a "unitary social state of plurinational communitarian law" (Article 1) and a society built on decolonization (Article 9). It links land, and its collective ownership, with culture; it ensures that the Indigenous are duly represented in the judiciary, the executive and the legislative branches, and on a central and on a municipal level; it advocates for the creation of "Indigenous autonomies" in ancestral territories, to

the relationship between land preservation, Indigenous rights and the protection of the environment. The latter is particularly interesting as the Court dwelled on the definition of "communal property", when holding liable the State of Ecuador for violating the rights of the Sarayaku people. Specifically, they had failed to consult the Sarayaku when allowing an oil company to carry out exploration activities in their territories. On the case law of the Inter-American Court see, amongst many, V. E. Olivares Alanis, *Indigenous peoples' rights and the extractive industry: jurisprudence from the Inter-American System of human rights*, in *Goettingen Journal of international Law*, 2013.

90 S. Lanni, *supra* note 20, 169.

91 C. Mares de Souza Filho, *supra* note 49, 174-175.

92 R. Míguez Núñez, *Indigenous Costumary Law in a Civil Law Context*, in *Journal of the Max Planck Institute for European Legal History*, 2016, 306.

93 See T. Herzog, *Latin American Legal Pluralism: The Old and The New*, in *Quaderni fiorentini,* L, 2021, 705-736.

be administered and geared by the Natives (Article 290). Eventually, it protects the forest and biodiversity, devoting a whole Chapter solely to Amazonia and its relationship with Indigenous rights, while another Chapter is dedicated to legal issues related to land and the integrity of Indigenous territories.[94]

The Ecuadorian Constitution makes use of the principle of good living (*buen vivir*) for promoting coexistence between different peoples and populations. As far as ancestral lands are concerned, it recognizes the right of the Indigenous communities to maintain the "possession" of their lands. Additionally, after the constitutional reform of 2008, Ecuador has established Nature and the ecosystem as subjects of rights. Thus, Ecuador welcomes the Aboriginal concept of land as a living entity, also on a legal point of view.[95] This scheme has been quite effective to protect nature, especially through strategic litigation.[96] In fact, individuals, communities, and even nationalities can take legal action on behalf of *Pachamama,* before public institutions or courts.[97]

The Colombian Supreme Court has stated in favor of the rights of nature as well, specifically with reference to the Atrato river, described as a legal subject having the right to be preserved, conserved, maintained and restored when damaged.[98] At the same time, the Colombian Constitution adopts the property law scheme for guaranteeing Indigenous rights over their territories. It declares Indigenous lands as inalienable property of the communities, assigning directly to the Aboriginals the task to protect their territorial interests.[99]

Finally, the recent Chilean proposal for a constitutional reform, which unfortunately did not secure approval, was aimed at affirming Indigenous cultural rights, which currently lack recognition in the constitutional document of the Pacific Rim Country. Indigenous

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[94] See Chapter VIII, devoted to Amazonia; Chapter IX, entitled to "Land", especially Article 403, Bolivian Constitution. The latter describes the rules governing Indigenous ancestral lands, stating that the State establishes the procedure for the recognition of these territories. The Indigenous have the exclusive exploitation of the resources of the land and the right to enjoy it, to be consulted and informed when natural resources in their territories are administered by the State, according to the law, and to participate from the eventual profits, to apply their own norms, to set their structures of representation, and to live according to their own cultural criteria and principles of harmonious coexistence with nature.

[95] L. Cuocolo, *Dallo Stato liberale allo "Stato ambientale". La protezione dell'ambiente nel diritto costituzionale comparato*, in *DPCE online,* 2022, pp. 1074-1075. See Articles 71-72-73-74, Ecuadorian Constitution. Some important cases raised using the constitutional provisions of the right of nature are, amongst others, Ecuador Constitutional Court, Case no. 1149-19-JP/21, *Bosque Protector Los Cedros* and also Case no. 253/20-JH/22, *Mona Estrellita,* the latter attributing legal subjectivity to wildlife. Another Latin American Constitution mentioning the right to environmental protection as a general interest, but also as a subjective right, and linking it to the right of nature scheme, is the Cuban Constitution (L. Cuocolo, *La Costituzione cubana del 2019, in bilico tra tradizione e innovazione*, in *DPCE Online*, 2020, p. 464).

[96] However, it has been pointed out that attributing rights to the nature, using the human rights scheme, could potentially lead to the opposite outcome, as fundamental rights are naturally anthropocentric and framed for humans. On this matter see C. M. Kauffman, *How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms*, in *Transnational Environmental Law,* Cambridge University Press, 2023, 366-395.

[97] See U. Biemann & P. Tavares, *Forest Law - Foresta Giuridica*, Nottetempo, 2020, 82-83.

[98] Corte Constitucional de Colombia, sentencia T-622/2016 of November 10, 2016; in line with this ruling, and with reference to the Amazon forest, see also Corte Suprema de Colombia, sentencia STC 4360-2018 of April 5, 2018.

[99] Article 329, Colombian Constitution. The Indigenous have "collective property" over their lands, which are inalienable and perpetual. The "Institutional Act of Territorial Planning" lays down the rules for delimiting ancestral territories. The demarcation procedure is geared by the government, together with the representatives of the Indigenous communities, according to the law.

claims are historically noteworthy in Chile; the Country is the motherland of the Mapuche people, one of the biggest Indigenous populations which has resisted to Spanish colonizers. The Mapuche conflict with the Chilean State has exploded also on the issue of land grabbing.[100] The recent Chilean proposals for a constitutional reform of 2022 was meant to shape Chile as a plurinational state, in the footsteps of Ecuador and Bolivia, attributing self-determination and autonomy to peoples like the Mapuche. When the constitutional reform failed, a new, less ambitious proposal was filed in 2023; however, this latter proposal was later withdrawn, leaving Indigenous groups still without clear protection in the Chilean Constitution.[101]

All these Latin American Countries have something in common in the relationship between Indigenous and non-Indigenous peoples, and a key point is the connection with the land. The Indigenous conceive land as center of resources, invested of a spiritual value, to be used for the communal good, and for the benefit of future generations; ownership of the land is envisaged as the open sharing of supplies and the spiritual foundation of a community, of its history and its past, as well as its projection towards the future.[102] This conception is undoubtedly different from the exclusionary and individualistic idea of property law which is present also in the general civil law framework of most post-colonial societies. Dealing with the relationship between Indigenous customary law and the general civil law systems of Latin American States is challenging,[103] but these differences can also be used as a springboard for a change and development of the concept of property in land in collective terms, for the general interest of society as a whole, and for a more eco-centric approach to legal issues.

Of course, there are other ways to deal with the relationship between the Natives' titles to land and the neo-liberal conception of property in land, coexisting in pluralistic societies. For instance, it can also be useful to look at the solutions elaborated in North America, New Zealand and Australia.[104] The United States and Canada, as well as Australia and New Zealand, are Countries of the northern hemisphere where the Natives have been brutally dispossessed of their lands during times of colonization and which have been the site of important confrontations between Indigenous and non-Indigenous populations.[105]

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[100] For an account of the history of the Mapuche people, see R. Míguez Núñez, *supra* note 92, 308-310; extensively, on the implications of the agrarian reforms on the Mapuche people and their rights to their ancestral lands, M. Correa, R. Molina & N. Yáñez, *La reforma agraria y las terras mapuches. Chile 1962-1975*, LOM Historia, 2005; in general, J. Bengoa, *Historia del pueblo mapuche*, Ediciones SUR, 2000.

[101] On this matter, see the two proposals for a constitutional reform in Chile, *Consejo Constitucional de Chile, Propuesta Constitución Política de la República de Chile,* 2023; *Convención Constitucional de Chile, Propuesta Constitución Política de la República de Chile,* 2022.

[102] R. Míguez Núñez, *supra* note 92, 303.

[103] Extensively, see R. Míguez Núñez, *Terra di scontri. Alterazioni e rivendicazioni del diritto alla terra nelle Ande centrali,* in *Biblioteca - vol. 97, Quaderni fiorentini per la storia del pensiero giuridico moderno,* 2013, especially 242-250; 380-400.

[104] For interesting remarks in a comparative perspective about these legal systems, see G. Resta, *Il problema della rinunzia alla proprietà immobiliare nella prospettiva del diritto comparato,* in *Rivista di diritto civile*, 2024, 287-290.

[105] The relevant literature is extremely wide, and it is impossible to be recalled in its integrity it in this paper. See, amongst others, J. Cassidy, *The Stolen Generations – Canada And Australia: The Legacy of Assimilation,* in *Deakin Law Review,* 2006, 132-177; J. R. Saul, *The Roots of Canadian Law in Canada,* in *McGill Law Journal*, 2009, 671-694; S. Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, in *Law & History Review*,

In Canada, the Supreme Court has gone as far as to affirm the existence of an autonomous Indigenous legal system, with its own rules and specifics.[106] Aboriginal rights, recognized in Section 35 of the Constitutional Act, impose precise limitations to the power of the State, and Natives' lands are inalienable.[107]

In New Zealand and Australia, Indigenous rights to their ancestral territories are not mentioned explicitly in the Constitution. In New Zealand, the rights of the Aboriginal are recognized in the legal system primarily through the Treaty of Waitangi, which has been then implemented in secondary law. Furthermore, New Zealand's statutory law treats nature as a legal entity; for instance, the Te Urewera national park, or the Te Awa Tupua river, are both ancestral territories to the Indigenous communities and recognized as legal subjects by written law.[108] In Australia, conversely, the Supreme Court, in the famous *Mabo II case* has rejected the construction according to which Australian lands where *terrae nullius* before the colonization, recognizing the inalienability of Natives' lands and their rights to their own laws and customs, now implemented in statutory norms.[109]

Nowadays, the attention on Indigenous rights and fights happening all over the world has grown bigger with the increasing concern of the international community towards climate change. Indeed, the lifestyle of these populations is naturally respectful towards the environment, and helps to preserve it. Indigenous lifestyle is close to the idea of ecology, intended as the interconnection between diverse living systems.[110] Thus, valorizing the rights of the Indigenous has been a way of protecting the environment, too.[111] Oftentimes, the Indigenous are also the ones suffering the most from the consequences of deforestation and climate change, as these affect their traditional ways of living.

V. THE STATE OF THE ART: THE DEMARCATION OF INDIGENOUS ANCESTRAL TERRITORIES IN BRAZIL

According to the data collected by the *Instituto Brasileiro de Geografia e Estatistica* (IBGE), around 1.693.535 Indigenous peoples lived in Brazil in 2022, and half of them in the

2005, 95-131; E.A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Durham, NC, 2002;

[106] In Canada, Aboriginal rights are deemed to be acknowledged by Section 35 of the Canadian Constitution. In an important, yet extremely controversial ruling, *R. v. Van der Peet*, 1996, 2 SCR, the Court has affirmed the inalienability of Indigenous lands, but that the Indigenous had to show continuity in their lands' possession to enjoy this special safeguarding (similarly to the Brazilian rule of *marco temporal*). The Supreme Court, in *Delgamuukw v. British Columbia*, 1997, 3 scr 1010, with reference to natives' titles to land, has affirmed the coexistence of aboriginal titles to land with general civil law ones, and specified that customary rules of evidence can be used for proving the ancestral status and the continuity in the possession of Indigenous territories. Other important rulings in defining Aboriginal rights have been *Mitchell v. Minister of National Revenue,* 2001, 1 SCR 911, and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 144.

[107] The landmark case where this has been made specific is *R. v. Sparrow*, 1990, 1 SCR 1075.

[108] R. Míguez Núñez, *Soggettivizzare la natura?,* in *The Cardozo Electronic Law Bulletin*, 2019, 4-5. On the same issue, in a different perspective, see M. W. Monterossi, *L'orizzonte intergenerazionale del diritto civile. Tutele, soggettività, azione*, Edizioni ETS, 263-268.

[109] See the case *Mabo v. Queensland, no. II*, 1992 HCA; the case *Wik people v. State of Queensland,* 1996 HCA; and the *Native Title Act* 1993, which officially recognizes Aboriginals' rights over their lands as pre-existing to the Australian State. On this matter, and on the Australian, Canadian, New Zealandese approach towards Natives' cultural rights, see N. McNeil, *Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion*, in *Ottawa Law Review*, 2002, 301-346.

[110] J. Boyle, *supra* note 31, 72.

[111] S. Lanni, *supra* note 20, 183.

Amazonas.[112] The brutal exploitation of the Amazon forest and soil has put the right of the Aboriginal populations to exist, their cultural identity, biodiversity and environmental preservation at risk.[113] In this scenario, the territories which can be qualified as "traditionally occupied by the Indigenous" pursuant to the Constitution are those that are demarcated by the FUNAI, as anticipated above. In theory, demarcation should impair the alienability of ancestral lands and prevent corporations and third parties to acquire them. This practice of demarcation of Indigenous territories was meant to be concluded over seven years after 1988; nevertheless, the demarcation is still ongoing.[114]
Currently, over 1000 territories are claimed as traditional, but only 725 are going under a demarcation process, and many of them are occupied by non-Indigenous.[115] Some of these lands have been transformed into "natural reserves", which means that the Indigenous are guaranteed the sources of living and subsistence, but the Federal State still intervenes in their administration.[116] Furthermore, immediately after the enactment of the Constitution, the State continued to pass decrees and laws aimed at dispossessing the Indigenous of their existing rights over their lands. Another practice employed by the FUNAI, which has had the effect of isolating the Indigenous from one another and impaired their lifestyle, was delimiting Indigenous lands in a series of smaller, discontinuous areas, in order to make the areas in between exploitable by "non-Indians".[117] The "Statute of *Indio*" and the decree of the President of the Republic regulating the demarcation of Indigenous lands, decree nr. 1175/1996, were severely criticized as being insufficient to implement the provisions of the Constitution. In general, the years following the enactment of the Constitution have been characterized by agrarian reforms which have caused the further displacement of communities. The Indigenous still suffer from violent dispossession from their territories by land grabbers, agribusiness, and corporations engaging in mining activities; their relationship with the lands and the forest, where most of them live, is threatened by illegal aggressions and economic activities, including, in certain cases, disruptive tourism.[118]

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[112] The data is available at https://agenciadenoticias.ibge.gov.br/en/agencia-news/2184-news-agency/news/37575-brazil-has-1-7-million-indigenous-persons-and-more-than-half-of-them-live-in-the-legal-amazon, accessed 23-12-2023.
[113] S. Lanni, *supra* note 20, 183-184.
[114] E. Allen, *supra* note 50, 155-156. The procedure is established in decree nr. 1775 of 8 January 1996, and it involves the hearing of stakeholders and Indigenous communities, as well as anthropological investigations to enquire when and if a land can be defined traditional. Currently, the most populated Indigenous land already demarcated by the FUNAI is the Yanamans land. Since the demarcation procedure is complicated and long, many lands are only temporarily protected by the FUNAI; this is the case, for instance, of the Piripkura, an isolated tribe, whose land was put at risk recently because the temporary order of the FUNAI was about to expire.
[115] See D. Sartori & C. A. Vestena, *supra* note 82.
[116] See the policy report by S. Paixao, J.P. Hespanha, T. Ghawana, A. F. T. Carneiro & J. Zevenbergen, *Modelling Brazilian Indigenous Tribes Land Rights with ISO 19152 LADM,* 2013, 143, available at: https://fig.net/resources/proceedings/2013/2013_ladm/11.pdf accessed 15-01-2024. Of course, Indigenous can also acquire, as every Brazilian citizen, full property over a land which is not traditional, with a valid civil law title.
[117] E. Allen, *supra* note 50, 160.
[118] Even if not directly related to Brazil, this is for instance the case in the territory of Machu Picchu, the famous temple which is also UNESCO World Cultural Heritage. The temple corresponds to a territory

Even if the Constitution formally proclaims the inviolability of the rights of Indigenous peoples over their lands, these provisions are, in practice, quite ineffective.[119] At the same time, the contemporary political situation in Brazil does not seem promising for a constitutional reform (one involving, for example, the abandonment of the property construct in favor of an approached based on legal subjectivity of nature or on human rights); recent years have seen an increase of racial discrimination, the rise of populism, a disregard of the Brazilian environmental richness and, lastly, after the elections, even the attempt of a *coup d'état*. Currently, the National Congress' majority is mostly conservative and faithful to the former President Jair Bolsonaro, as opposed to the elected president Luìs Lula da Silva, which does not seem to be promising for a constitutional reform in favor of Indigenous rights.[120]

The Constitution attributes standing to sue whoever fails to respect the provisions on Indigenous rights to the FUNAI, the public prosecutor and each member of the Indigenous communities.[121] Thus, recent years have seen a rise in the use of strategic litigation for asserting Aboriginal rights over their lands.[122] The latest example is the most recent ruling of the Supreme Court on this matter. Nevertheless, the STF's efforts risk being thwarted if legal statutes do not follow accordingly, as it is shown by the new law on the demarcation of Indigenous traditional lands, approved in December.[123]

VI. RETHINKING PROPERTY AND ENHANCING COMMUNITIES: THE IBIRAMA- LA KLÃNÕ CASE AND THE "*MARCO TEMPORAL*" RULE

The FUNAI has recently brought the issue of Indigenous rights over their lands to the Supreme Court, in the case stemming from RE nr. 1.017.365. The agency has opposed the

historically inhabited by the Indigenous, and of great importance for their cultural and personal identities, whose ownership was also object of judicial controversies, touching upon the interrelations between cultural heritage and property (on which, see J. Velásquez Peláez, *Patrimonio cultural: de la propriedad a la metapropriedad. Tres ensayos a propósito del Santurario de Machupicchu,* Quisakuro editores, 2019, 52-58; and, in general, L. Anguita Villanueva, *El derecho de propiedad privada en los bienes de interés cultural,* Dykinson, 2005).

[119] C. Marés de Souza Filho, *supra* note 26, 158. S. Baldin - S. De Vido, S*trumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità*, in *DPCE Online*, 2019, 1307. The consequences of the disregard of Indigenous rights, and the violence perpetrated against them even after the Constitution entered into force, are attested by the Nambiquara case, a tribe who was moved from their traditional territories to one of the poorest regions of the Country; or the Panarà case, a tribe who was dislocated into a national park and forced to coexist with another tribe of traditional enemies. The latter were compensated and then returned to their territories, by the Tribunal Regional Federal da Primera Regiao, AC 1988.01.00.028425-3/DR, *Rel. Juiz Saulo José Casali Bahia (conv) Terceira Turma*, 03/11/2000. Furthermore, a report by the Indigenist Missionary Council attested that violence against Indigenous peoples increased dramatically after 2019 (Conselho Indigenista Misionario - CIMI, Report: Violence against Indigenous Peoples in Brazil, 2020 data, available at: https://cimi.org.br/wp-content/uploads/2022/01/report-violence-against-the-indigenous-peoples-in-brazil_2020-cimi.pdf) and so the invasions of their lands (Conselho Indigenista Misionario - CIMI, Relatorío: Violencia Contra os Povos Indígenas no Brasil, 2021 data, available at: https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf).

[120] On the current Brazilian constitutional order, see C. Paixão, *supra* note 63, 108-111.

[121] Articles 129-232 (prescribing that the Prosecution Office shall also be notified when an action for the rights of Indigenous peoples is started).

[122] A. Pellegrini Grinover*, La difesa degli interessi transindividuali: Brasile e Iberoamerica*, in L. Lanfranchi (ed.), *La tutela giurisdizionale degli interessi collettivi e diffusi*, Giappichelli, 2003, 159-160; Article 234, Brazilian Constitution.

[123] L. nr. 14701/2023.

possessory action started by the Santa Caterina Environmental Agency (*Istituto do Meio Ambiente,* hereinafter: IMA) against the Xokleng population, an Indigenous tribe, for the release of the territory of Ibirama-La Klãnõ. The latter was deemed by the Indigenous group to be part of their traditionally occupied lands[124]. However, the IMA contested the qualification of those lands as traditionally occupied, because the Indigenous had not complied with the *marco temporal* rule.

The rule of the "temporal landmark" was introduced in the case *Raposa Serra do Sol*, decided in 2009 by the STF, through petition R.R. nr. 3388[125]. In the judgment, the STF recognized the legitimacy of the demarcation procedure led by the FUNAI which qualified as traditional the territory of Raposa Serra do Sol, in Roraima. The justices elaborated on nineteen criteria aimed at verifying whether the Indigenous occupation of that territory was ancestral or not. In conducting this enquiry, the Supreme Court highlighted that the presence of the Indigenous in a certain territory at the date when the Constitution entered into force, namely October 5, 1988, shows that the lands they claimed are ancestral (if the other criteria laid down by the constitutional charter are fulfilled, and if the FUNAI so establishes).

This case, however, was not meant to have general repercussions, meaning that it was not meant to become a binding precedent or a general rule. The "nineteen criteria" were valid only for the land in question. Furthermore, the *marco temporal* rule was formulated by the STF to defend the Indigenous' claims. Nevertheless, during the same years when the decision on the case *Raposa Serra do Sol* was pending, the Parliament promoted and presented a bill on the demarcation procedure, encapsulating and generalizing the *marco temporal* rule (bill 290/2007). The proposed law suggested that *only* the territories that on the day of the enactment of the constitution were under material or juridical possession of Indigenous groups could classify as traditional. Occupation or possession of the land needed to be shown by the presence of the Indigenous therein, the existence of a physical conflict, or the proposition of a judicial action in court.[126]

This interpretation of the *marco temporal* was then supported against Indigenous claims; as many Indigenous peoples were actually evicted from their territories in 1988, not all of them could show the possession of their lands on that date. Interestingly, the rule of *marco temporal* from a shield became a sword against the Indigenous, which started to be adopted

[124] The STF declared the proceeding as having "general repercussions": this means that the rules established in this case should be applied in future similar matters and embraced by the law (as provided for by Article 102 of the Brazilian Constitution).

[125] The thesis of *marco temporal* was elaborated in the plenary judgment of the STF in case nr. 3388/2009, *Raposa Serra do Sol*. On this matter, see E. Peluso Neder Meyer & L. de Souza Prates, *The Constitutional Interpretation of the Demarcation of Indigenous Lands in the Brazilian Federal Supreme Court: Time Framework vs. Indigeneity Theory*, in *Questione Giustizia*, 2024, 1-8; L. Massarenti Hosoya, C. Antonio Brighenti & O. de Oliveira, *Território indígena brasileiro e sua relação com as teses do indigenato,* in *TEKOA*, 2023, 1-21; S. Rodrigues Barbosa & M. Carneiro da Cunha, *Direitos dos povos indígenas em disputa*, Unesp, 2018; E. Ferreira de Carvalho, *La colisión entre el derecho colectivo de los pueblos indígenas a las tierras ocupadas tradicionalmente y el derecho a la propiedad privada en el ordenamiento jurídico brasileño: el caso Raposa Serra do Sol*, in *APEA*, 2013, 134-148.

[126] The Indigenous should therefore demonstrate that, if they were not in the possession of the territory, they had suffered from permanent dispossession from it and contrasting it actively; this is also known as "*renitente esbulho*" ("permanent dispossession").

in various demarcation procedures.[127] The 2007 bill was subsequently reshaped into bill 2903/2023, which has recently culminated into a statute, whose approval was accelerated precisely to obstacle the decision in the Ibirama - La Klãnõ case, as it will be analyzed shortly. Moreover, the former President of the Country, Michel Temer, in 2017, approved an opinion of the Attorney General of Brazil establishing guidelines on the demarcation procedure, imposing to the FUNAI to apply the *marco temporal* rule[128].

If understood this way, the *marco temporal* is an undue limit on Indigenous rights. First and foremost, in 1988, the Indigenous did not even have full legal capacity, as they were under the custodianship of the FUNAI. Consequently, legal actions for reclaiming their land rights were still very limited. Moreover, it is quite unrealistic to pretend that the Indigenous would legally demonstrate their entitlement and tenure on a certain territory through general civil law rules, since their forms of relation with the land do not follow those formal entitlements. Even more when uncontacted tribes are involved; in that case, it would be particularly hard, if not impossible, to prove their presence on a certain territory in 1988. Furthermore, many Aboriginal peoples who suffered from land grabbing were also prevented from reacting to it for a very long time. Moreover, in many cases, they never truly abandoned that territory, even though they did not actively engage in a conflict. In the case at stake, the Xokleng people were evicted by the small farmers that had acquired the Ibirama territory from the State of Santa Catarina. However, they had never truly left the land, but continued to wander around it. Even in the case *Raposa Serra do Sol,* recalled by the supporters of the *marco temporal,* there was not a permanent conflict, but Indigenous resistance against the occupiers of their lands. This did not diminish and, in the end, sovereignty was granted over their territory.

Furthermore, and most importantly, the temporal landmark rule, if generalized, contradicts the Constitution, degenerating in considering Indigenous rights valid only from the enactment of the Constitutional Charter onwards. This would go against the spirit of the Constitution itself, which declares that the rights of the Aboriginal peoples over their lands are natural, original and ancestral;[129] and it would also go against the values of a legal system that claims to recognize and protect the inalienable, fundamental rights of individuals.

The STF, in its ruling in the case Ibirama-La Klãnõ, clarified that demarcation has only declarative value, which is to acknowledge pre-existing rights over a certain land. It affirmed that the demarcation made by the FUNAI, following the procedures laid down in statutory law, ascertains if a territory is ancestral, "ancestrality" being a situation of a durable, spiritual and profound tie between the Indigenous and their lands. The STF also established that, if Indigenous peoples did not occupy a certain land in 1988, because they were expelled from that land unjustly, thus dispossessed, but had kept vindicating the area (for instance, wandering, making small incursions, trying to come back), the ancestral nature of the land should not be denied. The Court further clarified that when a certain

[127] For instance in the cases of the lands of Limão Verde, Buritim, Guirarokà (E. Peluso Neder Meyer & L. de Souza Prates, *supra* note 121, 4).

[128] Opinion 001/2017, AGU, available at: https://www.planalto.gov.br/ccivil_03/AGU/PRC-GMF-05-2017.htm accessed 12-02-2024.

[129] C. Marés de Souza Filho, *supra* note 26, 180-181; 184.

state legitimately transferred to third parties a land later claimed as Indigenous, when the third party was in good faith and possesses a valid civil law title, they have the right to receive compensation when expelled from the land, or at least to reach a compromise with the Aboriginal communities. Contrarily, Indigenous interests always and fully prevail over those of land grabbers.[130] Therefore, the outcome of the ruling valorizes both the social function of property, qualifying Aboriginal rights as public interest, and the peculiar nature of Indigenous possession, which is ancestral, inalienable and imprescriptible.

Nevertheless, on the day the ruling of the STF was released, the Parliament approved a new statute on the demarcation of Indigenous lands, l. nr. 14701/2023, precisely with the aim to oppose the decision undertaken by the judiciary.[131] Despite the veto expressed by the Brazilian Prime Minister over the statute, this statute not only codifies the rule of *marco temporal* in the most restrictive way, but it provides for greater limitations of the powers of the Indigenous over their lands. It also prohibits the extension of already demarcated lands, unduly limiting the FUNAI's action. Since it also applies to the ongoing demarcation procedures, the statute could even lead to a loss of the lands which are about to be recognized.[132]

The new statute is likely to be regarded as unconstitutional by the STF, if brought to its attention, as some Indigenous organizations have already anticipated that they intend to do.[133] Additionally, according to supranational charters, such as the above-mentioned American Convention on Human Rights, the Brazilian State has an obligation to refrain from adopting statutes that contradict the rights and principles laid down in the Convention, such as the ancestral and original nature of the rights of the Indigenous over their lands.[134]

Overall, this whole matter is emblematic of how property in land is an extremely sensitive and political issue; the *marco temporal* has become the occasion for the Congress, namely the legislative branch, to challenge the judiciary and the President, and the playground has

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130 Thus, confuting the argument of the justices who voted in favor of *marco temporal* for legal certainty. In fact, individuals who have a legitimate title are entitled to compensation. However, the rights of the Indigenous are still superior over the private property titles that other Brazilians might have, as also affirmed by the STF, in the case M.S. 21575, *Mato Grosso do Sul,* 3 February 1994. On the conflicts between the titles of third parties in good faith and Indigenous peoples, see M. Marciante, *Tutela dei diritti dei popoli indigeni nel sistema CADU: note a margine della sentenza Pueblo indígena Xucuru*, in *DPCE on line*, 2018, 3, with reference to the case *Xucuru Indigenous People and its members v. Brazil,* 5 February 2018, C. nr. 346, decided by the Inter-American Court, where the prevalence of Indigenous rights in ancestral lands over those of the general society in Brazil was remarked.

131 The law stems from bill nr. 490/2007, then bill nr. 2903/2023.

132 See Articles 4, 9, 13, 22-23, l. nr. 14701/2023. Moreover, the statute justifies the installation of military bases, units, and posts, as well as other military interventions, the expansion of the road network, the implementation of strategic energy centrals, and the protection of strategic assets in Indigenous territories without the need of consulting the involved Indigenous communities, nor the FUNAI; the superiority of national security and defense interests over Indigenous needs; and the possibility for the public authorities to interfere with the administration of Indigenous territories for the sake of building roads, transportation routes, and the constructions and the equipment necessary for implementing public services, related to the health and education sector.

133 The Articulation of Indigenous People in Brazil (APIB) has already announced that it will appeal the new statute. See https://apiboficial.org/marco-temporal/?lang=en, accessed 14-02-2024.

134 M. Marciante, *supra* note 130, 4-5.

been the recognition of Indigenous rights. The above-described facts show that, even if Indigenous rights over their lands are constitutionally acknowledged on paper, Indigenous claims still struggle to be effectively implemented in practice. The property law scheme can be a winning one, but constitutional provisions are not enough if they are not accompanied by proper rules regarding demarcation and land registration.

Probably, the most rewarding technique to ensure the respect of the constitutional norms could be to lay down a comprehensive legal framework for Indigenous law, with all its peculiarities and special features. An harmonization of Indigenous law, aimed at, amongst other things, protecting their traditional knowledge, openly establishing the superiority of Indigenous interests over those of third parties, including corporations and land grabbers, clarifying the relationship of the constitutional provisions regarding Indigenous rights on their lands with the general private law rules on property, possession, usufruct and transactions, would probably be a stronger safeguard of the rights of these communities, and could help interpreting the Constitution, which is, by nature, an open and general text. Constitutional principles, such as the originality of Indigenous rights, can and should be applied directly, but technical and procedural matters, such as the demarcation procedure, or land registration, need statutory implementation.

There is still an "implementation gap"[135] between constitutional norms and practice, which should be filled with secondary law and regulation. Cultural recognition of Indigenous groups is essential for stability and peace; and this necessarily implies a more stable protection of Aboriginal lands. While the role of the judiciary in strategic litigation has been fundamental, judicial activism should be followed by the other State powers, especially the legislative branch.

VII. CONCLUDING REMARKS

The case against *marco temporal* is only one of the many fights that Indigenous communities have led during the current and the past centuries.[136] In fact, the values proclaimed by the Brazilian Constitution (human dignity, social justice, equality and solidarity, the expression of "Indian and Afro-Brazilian cultures, as well as those of other groups", ethnic and regional diversity)[137], and the empowerment of Indigenous communities, still strive for effectiveness.

What is certain though, is that the Constitution identifies Brazil as a multiethnic and diverse State. Recognizing full usufruct and possession to the Indigenous over their lands, while leaving the property to the State, can work if Indigenous groups are favored as vulnerable subjects, whose dignity is ensured, without indulging in a paternalist approach. It is commendable, though, when interpreted as leaving Indigenous communities without full protection against State laws, such as l. nr. 14701/2023.

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[135] As pointed out by the UN General Rapporteur Stavenhagen in 2007, available at https://www.ohchr.org/en/statements/2009/10/special-rapporteur-human-rights-indigenous-people-presents-annual-report-human, accessed 14-02-2024.

[136] See the case *Marques, Mallmann and Cia. Ltda v. Irena Mello da Silva, José Claudemir Andrade, and others,* decided in 1988 by the Court of Appeal of Porto Alegre (cited by A. Ciervo, *Ya basta! Il concetto di comune nelle costituzioni latinoamericane*, in M. R. Marella (ed.), *supra* note 3, 134).

[137] Articles 1, 3, 215, 231, Brazilian Constitution.

Nowadays, South American Constitutions acknowledge the rights of Indigenous peoples and their connection to "Mother Earth" (*Pachamama*). However, constitutional texts alone are not sufficient. The principles laid down in the Constitution must be acted on, through legal acts; hence the argument for the necessity to lay down a comprehensive *derecho indígena*, suitable to the native Latin American communities.[138]

What emerged from the analysis of the relationship of Indigenous peoples with their lands is a conception of land ownership as a common bond between members of a certain community, and as a vehicle for the promotion and protection of human and fundamental rights. Indigenous peoples' struggles for their land are global challenges, as they impact on the preservation of territories, such as the Amazon forest, that are crucial for the survival of the environment. In a State, like Brazil, where very different cultural heritages coexist, legal norms should be framed to reflect this multicultural richness. The apparent contradictory stratification of European legal institutions and Indigenous traditions should not baffle lawyers. On the contrary, the ambivalences and internal frictions should be respected and valorized, and overarching interests, such as the one in preserving minorities and safeguarding the environment, be emphasized.[139]

In this framework, the right to property, if conceived in an inclusive and collective way, can act as a means of communication between the different social groups and populations composing the state and, most importantly, a driving force for empowering Indigenous communities and safeguarding their rights.[140]

To conclude, this paper has tried to unravel, with many simplifications, how the institution of property, if conceived as an inclusive, pluralistic, multi-ethnic right promoting the interests of future generations and the respect of all the living entities (in a word, shaped by dignity), can empower communities at a crossroads of different cultures. Bringing effectiveness to the relationship between the Indigenous and their lands is a matter of preserving a certain tradition and ensuring the survival of a population. Since Constitutions are pivotal in "constituting" a society, thus offering the foundations for social relations in a polity,[141] they should be framed to recognize this need. Implementing legal acts and policies should follow accordingly. Since under the proclaimed neutrality of the law there are conflicting interests, inequalities, and social contradictions,[142] it is up to lawyers to unveil them, and then act on them, with the instruments we have.

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[138] S. Lanni, *supra* note 73, 87.

[139] L. Salaymeh & R. Michaels, *supra* note 7, 172.

[140] As observed by Audra Simpson: "if Indigenous peoples ironically are to protect their lands and their people from further encroachment and expropriation (a protective measure) they might have recourse to the very instrument that has been used to take their lands and authorize their disenfranchisement and misery: law. Law is to protect them in the present; yet their sovereignty, granted by law, threatens the very exercise of that sovereignty." (A. Simpson, *Under the Sign of Sovereignty: Certainty, Ambivalence, and Law in Native North America and Indigenous Australia*, in *Wicazo Sa Review*, 2010, 108).

[141] G. J. Jacobsohn, *Constitutional Identity*, Harvard Univ. Press, 2010, 8, referring to Book III of Aristotle's *Politcs*.

[142] C. Camardi, *L'uso alternativo del diritto fra teoria e prassi,* in *Jus civile*, 2023, 975.